

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 17 May 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

16th Meeting 2005, 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

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 17 May 2005

[THE CONVENER *opened the meeting at 10:38*]

Items in Private

The Convener (Dr Sylvia Jackson): I welcome members to the Subordinate Legislation Committee's 16th meeting of 2005. I have received no apologies, so I expect Gordon Jackson to arrive at some point.

Christine May (Central Fife) (Lab): Adam Ingram is also expected.

The Convener: I thank Christine May for adding that.

Agenda item 1 is consideration of whether the committee agrees to take items 8 and 9 in private. Both items relate to the draft report on our inquiry into the regulatory framework. Item 8 concerns a paper on the Canberra conference and item 9 involves considering themes for the draft report and making the first stage of the report ready. Quite a lot of papers must be examined and we are at a draft stage, so in keeping with normal committee work, I ask the committee to take the items in private. Is that agreed?

Members indicated agreement.

Murray Tosh (West of Scotland) (Con): The Canberra paper will be part of the inquiry report—it is not a separate report.

The Convener: It is not.

Murray Tosh: In that case, the decision is all right.

Delegated Powers Scrutiny

Housing (Scotland) Bill: Stage 1

10:39

The Convener: The Housing (Scotland) Bill runs to 169 sections and is divided into eight parts. Its aim is to improve the condition and quality of private sector housing. Members will see from the legal advice that we need to consider many sections to check the information that we have been given about possible changes. I will go through all the relevant sections to be sure of those to which we agree.

Section 1 will confer on local authorities the power to designate housing renewal areas by order. This delegated power is not referred to in the memorandum supplied by the Executive; as we go through the meeting, members will notice that a number of powers are not referred to in that memorandum. Our legal advice on section 1 is that it seems to be entirely appropriate and that we should agree with what the Executive proposes. Is that agreed?

Members indicated agreement.

The Convener: Section 6(1) would give ministers the power to direct local authorities in the identification of areas that are to be designated as HRAs. Again, our legal advisers are satisfied that that is an appropriate matter for the use of directions that are not subject to parliamentary scrutiny. Is that agreed?

Members indicated agreement.

The Convener: Section 11(3) will amend section 86 of the Housing (Scotland) Act 1987 and will provide ministers with a power to issue guidance on how references to the tolerable standard shall be construed. Again, this delegated power is not referred to in the accompanying memorandum.

It is suggested that we ask the Executive why it considers that the matter is suitable for guidance and whether it considered amending the 1987 act instead. I am looking for members' views.

Murray Tosh: I have a question. I was not clear from the briefing paper how the below-tolerable-standard definition will be made. Will it be made on the face of the 1987 act or will it be defined in regulations that derive their authority from the 1987 act?

The Convener: I am reliably informed that it will be on the face of the 1987 act.

Murray Tosh: Is that a sensible way to do it, given that the Executive is suggesting two significant changes that require primary

legislation? Might it not be more appropriate to make the definition by subordinate legislation subject to the affirmative procedure so that, although there would be a reference to the below tolerable standard on the face of the act, it could then be left to subordinate legislation to amend that in the light of changing circumstance? It seems peculiar that that is not how it is done.

Presumably our acts are more skeletal today than acts were in 1987 and so I presume that the Executive would do it that way if it was starting now. Should it not consider that in the context of the fresh bill? Is it worth raising that question?

Christine May: It is a reasonable question.

The Convener: It is a perfectly good question.

As there are no other points we will write to the Executive with the points that our legal advisers have raised, plus Murray Tosh's point. Is that agreed?

Members indicated agreement.

The Convener: Section 11(4) will amend section 86 of the Housing (Scotland) Act 1987 to provide for the exercise of an order-making power to be subject to the affirmative procedure. Our legal advisers are satisfied that that is the right way to go. Is that agreed?

Members indicated agreement.

The Convener: Section 20(2) will give ministers the power to issue guidance on the written information that a landlord must provide to a tenant at the start of a tenancy. This delegated power is not referred to in the Executive's memorandum. Legal advice is that before we reach a view—and we have time—the committee might wish to invite the Executive to comment on why it feels that such a power should be exercised by guidance rather than by regulations. Is that agreed?

Members indicated agreement.

Murray Tosh: Paragraph 11 of our legal brief also raises an interesting point by suggesting that landlords are under a legal duty to provide information and then observing that there is no enforcement mechanism when landlords fail to provide that information. I do not quite understand why that is the case. If landlords have to give the information, surely there ought to be some sort of procedure to make sure that they do so. Again, that is something about which it might be worth asking the Executive.

The Convener: Absolutely. We will include that in the letter.

Section 21(5) will enable the president of the private rented housing panel to issue directions and guidance. Again, this delegated power is not

referred to in the Executive's memorandum. Our legal advisers are satisfied with the approach. Are we agreed?

Members indicated agreement.

The Convener: Section 50(8) will give ministers the power to issue guidance to local authorities on their exercise of a new power to contribute to the maintenance costs of private owners. Again, that is not referred to in the Executive's memorandum, but our legal advice is that it is an appropriate matter for guidance rather than subordinate legislation and that parliamentary scrutiny does not seem to be necessary.

Murray Tosh: I have a question about that. I am not sure whether section 50(8) will allow ministers to make mandatory the discretionary payments that are due by local authorities. That would be a very substantial power. Section 50(8) says that a local authority must have regard to guidance. Under section 50(8), could the Executive change the guidance and say that certain payments will be mandatory? If it could, that would require some form of parliamentary scrutiny.

10:45

The Convener: We should ask that question.

Members indicated agreement.

The Convener: Part 2 of the bill is about the scheme of assistance for housing purposes.

Murray Tosh: Have we jumped past section 51? There was nothing in the legal brief, but I have a question about that section. Perhaps our legal advisers could apply themselves to it. I am sorry about the lack of notice. Section 51(3) says

"a tenant is not entitled to exercise the right set out in subsection (2) without the consent of the landlord, which must not be unreasonably withheld."

How is that assessed and challenged? If consent is withheld, how does a tenant challenge whether the refusal is reasonable or not? Is there any Executive guidance to clarify what would be reasonable or unreasonable? If so, there would presumably be, if not subordinate legislation, some relevant form of ministerial guidance, direction or advice. Does the situation rest entirely on case law or is there in effect no legal redress at all?

The Convener: We should ask the Executive. At the moment I cannot get a quick answer out of our legal advisers so we should ask the question. Well done, Murray, you have been working well. You deserve a gold star.

Murray Tosh: Just do not call me Stewart Stevenson.

The Convener: Part 2 is on the scheme of assistance for housing purposes. Section 68(4) will give ministers the power to make regulations on non-financial assistance that local authorities may provide for housing purposes. Our legal advisers are satisfied that the negative procedure is appropriate. Are we agreed?

Members indicated agreement.

The Convener: Section 70(5) will give ministers the power to alter by order the list of standard amenities that might influence a local authority's decision to provide assistance. That is a Henry VIII power, but it is very narrow in scope so our legal advisers are happy that the negative procedure would be appropriate. Is that agreed?

Members indicated agreement.

The Convener: Section 73(4) would give ministers the power to set a maximum approved expense limit for housing works that are funded by local authority grants or loans. The negative procedure is considered to provide a sufficient level of scrutiny for an order that will set a financial limit on a local authority's exercise of functions under the bill. Is that agreed?

Members indicated agreement.

The Convener: I welcome Adam Ingram to the committee. We are now talking about section 74(1) of the Housing (Scotland) Bill, which will confer on ministers the power to make regulations for the assessment of applications for housing grants or loans. Again, it is thought to be appropriate that Parliament should scrutinise the regulations under the affirmative procedure as is proposed. Are we agreed?

Members indicated agreement.

The Convener: Section 76(6) will give ministers the power to set a minimum percentage of grant or loan to be available for certain works. Our legal advisers are satisfied that the affirmative procedure will provide the appropriate level of scrutiny. Is that agreed?

Members indicated agreement.

The Convener: Section 88(4) will confer on ministers the power to make regulations to amend a definition and set terms for loans. Our legal advisers consider that the affirmative procedure might be a more appropriate form of scrutiny. It is suggested that, before we take a view, we should write to the Executive to ask why it considers that the negative procedure would be sufficient and whether the affirmative procedure was ever considered.

Murray Tosh: Might we not be a wee bit stronger than that and suggest that the affirmative procedure should be used?

The Convener: We can be.

Murray Tosh: The argument that is advanced in paragraph 29 of the legal brief is clear that because of the way in which the committee approaches such matters, the affirmative procedure ought to be used in this case.

The Convener: Yes, and we can include in the letter the essence of what is in paragraph 29 of the legal brief. Is that agreed?

Members indicated agreement.

The Convener: Section 91(1) is on the power to issue directions to local authorities in relation to the provision of assistance under part 2. The power of direction that is taken here is very wide, and paragraph 34 of the legal advice suggests three "More acceptable alternatives" that could have been used instead. Do members wish to comment on those three options? Should we simply write to the Executive, as suggested?

Christine May: It is reasonable for us to write to the Executive and ask them about the matter. It is also reasonable to set out to the Executive the alternatives before us in our legal brief, rather than leaving it to guess and seeing what it might come up with. If we have got some suggestions, let us say what we have thought of and find out whether the Executive agrees.

The Convener: Absolutely. The first suggestion is:

"To exercise the power by issuing guidance."

The second suggestion is:

"To limit the direction-making power to specified matters so that the Committee is in a position to judge whether these matters are appropriate for an instrument not subject to parliamentary scrutiny."

The third option is:

"To exercise the power by making regulations or orders subject to parliamentary scrutiny."

Murray Tosh: There is a strong sense that the last option is the one that we would expect to be chosen. I suspect that the first and second suggestions would not meet the Executive's requirements, as it wants to put a more robust provision in place. We should set out a possible procedure and invite the Executive to follow the logic of that.

Members indicated agreement.

The Convener: Section 91(4) will give ministers a power to issue guidance regarding the exercise of functions by local authorities under part 2. The legal advisers suggest that that is a suitable matter for guidance that is not subject to parliamentary scrutiny.

Members indicated agreement.

The Convener: Part 3 of the bill is entitled

“Provision of Information on Sale of House”.

Section 96(2) provides ministers with a power to make regulations setting the period within which documents must be provided to potential buyers of houses. The legal advisers consider it perfectly reasonable for the Executive to take such a power, and the negative procedure would appear to afford an appropriate level of scrutiny.

Members indicated agreement.

The Convener: Section 101(1) contains a power for ministers to make regulations about documents to be provided to potential buyers of a house. Section 101 gives a fair indication of the matters that would be dealt with under such regulations, and they appear to be appropriate matters for subordinate legislation scrutinised under the negative procedure.

Members indicated agreement.

The Convener: Section 102 is to do with the single survey. The legal advice states:

“The brevity of the Executive’s note on this power suggests that policy in this area”

could be a little more developed. It is suggested that

“the Committee may wish to write to the Executive asking for examples of how the power may be used, why it considers negative procedure to be appropriate, and whether affirmative procedure was considered.”

Mr Stewart Maxwell (West of Scotland) (SNP): The question is what the policy intention is behind the power. The power would allow certain types of premises or property transaction to be exempt or excluded, but that is not clear from the memorandum supplied by the Executive. We should ask why some premises have been excluded from the power. Perhaps the Executive could develop the thinking behind the policy a bit.

The Convener: That is agreed.

Murray Tosh: There are some obvious areas where the Executive might not think the provisions are appropriate, for example in cases where a house is being sold in a non-competitive situation, such as a right-to-buy sale or the sale of a house as an ancillary part of a complex of buildings—perhaps a farm or another business containing a residence. If the power is not appropriate in such circumstances, I would have thought that there should be a clear indication of the approach to be taken for that category of property. If other categories might be affected, and if the powers could be more widely extended beyond what is a fairly clearly definable exemption, there is a case for the Executive giving us more information and considering the procedure in some detail.

The Convener: Absolutely.

Mr Maxwell: Given the lack of information on the matter, the power could be either very narrow or very wide. We simply do not know.

The Convener: Yes, that is the problem. We are agreed: we will write to the Executive on those matters.

Section 108(4) contains a power for ministers to make regulations about penalty charge notices. Regulations made under the power will deal with a level of detail that cannot be expected to be included in the bill. The legal advisers are satisfied that the negative procedure offers an appropriate level of scrutiny.

Members indicated agreement.

The Convener: Section 110(3) amends the Housing (Scotland) Act 1987 to insert a power to make regulations concerning information to be supplied by local authorities to persons buying their council house. The legal advisers are satisfied that the negative procedure is appropriate.

Members indicated agreement.

The Convener: We turn now to part 4, which concerns the licensing of houses in multiple occupation, or HMOs, starting with section 119(2), which provides a power for ministers to amend the list of HMOs that are exempt from licensing under part 4. The legal advisers accept the need for such a power. As it is a power to amend primary legislation, it is appropriate that the bill has provided for parliamentary scrutiny under the affirmative procedure.

Members indicated agreement.

The Convener: Section 120(1) contains a power for ministers to order that local authorities may exempt certain types of HMO from the requirement to be licensed. There would be an order listing possible exemptions, and discretion would lie with the local authority.

Mr Maxwell: I understand the Executive’s argument that private landlords might have gone through many, if not all the hoops that are imposed by the Antisocial Behaviour etc (Scotland) Act 2004 and that it might therefore not be necessary for landlords to register under the HMO regulations.

I do not know whether this is already the case, but it struck me that fire authorities are very much involved and in the loop regarding HMO regulations, for obvious reasons. If a private landlord is not required to observe the HMO regulations, but may instead use the antisocial behaviour legislation, will fire authorities still be involved? That was one of the major concerns when HMOs were being discussed, and fire-related issues gave rise to many of the antisocial

behaviour regulations in the first place. We should ask the Executive about the effects of using antisocial behaviour provisions rather than HMO provisions. Are fire authorities still involved? What are the differences between the two sets of provisions, if any?

Mike Pringle (Edinburgh South) (LD): I entirely agree with that point. We must be absolutely certain about everything that people have to do when applying for a licence for an HMO if they use the antisocial behaviour legislation. The different sets of legislation must be absolutely complementary. If there is anything missing from either of the two areas, I suggest that landlords should still have to apply for a licence for an HMO. That is a big issue in my constituency. The HMO regulations, in my view, need to be examined and tightened up. If the provisions before us represent any sort of relaxation, we need to know about it. I would be against any such relaxation.

The Convener: That is agreed. The legal advisers point out that section 119(2) contains a similar power. It amends primary legislation and is subject to the affirmative procedure. We should therefore be asking why the Executive considered the negative procedure to be appropriate in the case of section 120(1). We can put all those points in a letter.

Christine May: We might be able to use both the Antisocial Behaviour etc (Scotland) Act 2004 and the Housing (Scotland) Bill, when it is enacted, together with the regulations under them, in our report on better regulation, as an example of how requirements under two different pieces of legislation could be combined so as to produce a single registration document, allowing people to fulfil all the provisions that are not common. The registration form could take into account those issues that were particular to one or the other act.

The Convener: Yes. That would provide much more clarity to the issue.

We welcome Gordon Jackson, who has just joined the meeting.

Gordon Jackson (Glasgow Govan) (Lab): I am sorry I am late. For once, I have a very good excuse—but I am not about to share it in public.

The Convener: On that, we will quickly move on.

Mike Pringle: We look forward to Gordon Jackson sharing his excuse in private afterwards.

The Convener: Section 126(2) contains a power for ministers to order local authorities to include certain conditions in HMO licences. Ministers set the standard conditions here. Generally, this power seems okay, but it is considered appropriate for us to write to the Executive to ask about including a requirement to

consult bodies representing local authorities and landlords. Do members have further points?

11:00

Christine May: No.

The Convener: Do members agree to the suggestion?

Members indicated agreement.

The Convener: Section 145(2) provides ministers with the power to make provision about HMO licence fees. The legal advice is that the power is sensible and that scrutiny under the negative procedure is okay. Is that agreed?

Members indicated agreement.

The Convener: Section 147(1) gives ministers the power to issue guidance about the exercise of functions under part 4. The legal advice is that the power is perfectly reasonable. Parliamentary scrutiny of such guidance appears unnecessary. Members have no further thoughts. Are we happy with the provision?

Members indicated agreement.

The Convener: Part 5 concerns mobile homes. Section 150 will amend the Mobile Homes Act 1983 to provide a power to make regulations about information that site owners are to give to proposed occupiers. The legal advice is that the amendment will improve the existing level of scrutiny and that the negative procedure is appropriate, given the subject of the regulations. Is that agreed?

Members indicated agreement.

The Convener: Section 153(1) will amend the 1983 act to add a power to amend the implied terms for site agreements that are set out in that act. Members will have seen the letter from the Minister for Communities that explains in detail the reasons for taking that power.

The power is significant. Its exercise will amend primary legislation and it will have retrospective effect. It will affect the rights of mobile home site owners and occupiers. However, given the consultation requirement, the use of the affirmative procedure and the precedent that is cited in the minister's letter, the legal advice is that the power is acceptable. Do members have further points?

Christine May: No.

The Convener: Do members agree to the power?

Members indicated agreement.

The Convener: Part 6 covers criteria that are used to assess suitability to act as a landlord. Section 155(3) will amend the Antisocial

Behaviour etc (Scotland) Act 2004 to provide for a code of practice for landlords. The legal advice is that, as the code will not be legislative, parliamentary scrutiny is unnecessary. Do we agree? Murray Tosh is unsure.

Murray Tosh: I am just a wee bit unclear about the meaning. The advice in our briefing is that

“the Code is intended to assist local authorities to judge the fitness of landlords”

and that it will be

“a statement of good practice and will not be binding”.

What happens if a local authority rules a landlord unfit? Can the landlord continue in business or will he no longer trade because he was ruled not to be a fit person? Whether some form of scrutiny is necessary depends on that and whether the rules will change materially. If the code has absolutely no implications for anybody, it needs no scrutiny, but if it has no implications, why is it here?

The Convener: That is a good point about which we can ask.

Christine May: We are dealing with more provisions in the 2004 act that apply to landlords and how they behave. The answer to Murray Tosh’s question may be that regulation is in that act, but it is worth asking the question, because this is another time when we need to ensure that the 2004 act and this bill complement and support rather than act against each other.

Murray Tosh: The substantive debate is about policy—whether the ability to allow or disallow landlords ought to exist. The question that I am asking is just whether that ability exists. If it does, some way to monitor what rules are set should be available. That requires some form of procedure.

The Convener: That is a fair point about which to ask. Do we agree?

Members indicated agreement.

The Convener: We will take on board Christine May’s general point, too.

Part 8 concerns general and supplementary provisions. Section 162(1) will give ministers the power to provide for forms that are to be used for formal communications under the bill. The power seems reasonable to the legal advisers. Do we agree that it should be left to subordinate legislation?

Members indicated agreement.

The Convener: Section 164(1) will give ministers the power to make ancillary provision in consequence of the bill. The legal advice observes that the power is standard and is appropriately divided between the affirmative and negative procedures. Is that agreed?

Members indicated agreement.

The Convener: Section 169(3) will give ministers the power to commence the bill by order. That is a standard commencement power. Orders that are made under it will not be subject to parliamentary procedure, but the committee will scrutinise them. Is that agreeable?

Members indicated agreement.

The Convener: Paragraph 7(1) of schedule 2 provides ministers with the power to make further provision about applications to private rented housing committees. Do we agree with the legal advice that the power is reasonable, because the subject of the regulations is appropriate for scrutiny under the negative procedure?

Members indicated agreement.

The Convener: Paragraph 2 of schedule 3 deals with the power to prescribe the amount of a penalty charge. The legal advisers are satisfied that the power is necessary. The £500 maximum places a financial limit on the exercise of the power, so scrutiny under the negative procedure is okay. Is that agreed?

Members indicated agreement.

The Convener: Paragraph 1(2)(d) of schedule 4 gives ministers the power to order further information to be provided in an application for an HMO licence. That is a suitable matter for subordinate legislation, so do we agree that we are content with the proposed level of scrutiny?

Members indicated agreement.

The Convener: Paragraph 3(5) of schedule 4 creates a power for ministers to direct local authorities about the requirement to display HMO applications on premises. The legal advice says:

“The Executive’s explanation lacks examples to support its reason for taking this power, however notices of HMO applications may contain such information as the name and home address of individuals, and it is possible that the public display of such information could put people at risk. This direction-making power is very specific and therefore limited. Legal advisers are satisfied that this is appropriate matter for directions not subject to parliamentary scrutiny.”

Mr Maxwell: I do not disagree with the legal advisers’ conclusion but, as we have the time, should we ask for an example of what is intended? That would do no harm. The legal advisers are probably right, but they have guessed rather than described the Executive’s intention.

Christine May: The matter may relate more to policy than to regulation, but it is sometimes difficult for tenants to find out who their landlord is. We want to achieve the proper balance of interest in whatever regulations we have.

The Convener: Do we agree to raise those points?

Members indicated agreement.

Licensing (Scotland) Bill: Stage 1

The Convener: Item 3 is scrutiny of the delegated powers in the Licensing (Scotland) Bill, which is another substantial bill—it has 140 sections and five schedules. I know the bill well, as I am a member of the Local Government and Transport Committee.

The bill contains 41 enabling powers that will be used to make orders and regulations that deal with many technical, procedural and administrative matters that are not suitable for inclusion in the bill, in the Executive's view. Members have from the legal advisers a list of matters that we should take up with the Executive. They also have a briefing about delegated powers and the Nicholson committee's recommendation that flexibility and the ability to react quickly are needed, which makes subordinate legislation appropriate for some aspects.

Christine May: A general point is that the bill should provide a shining example for the work that we have done on better regulation, because it pulls together in one regime a wide range of licensing regulation that involved seven systems. While we examine the bill, we must keep it in mind that the measure is welcome then consider whether it lives up to good regulatory practice.

The Convener: In essence, the bill concerns on-sales premises licensing rather than off-sales.

The first delegated power is in section 6(7)(a), which provides the power to appoint a day as the start of a three-year period for the purposes of a licensing policy statement. The legal advice is that the negative procedure is appropriate. Do members agree?

Members indicated agreement.

The Convener: Section 9(2) gives the power to prescribe some matters that relate to licensing registers. The legal advice is that it is normal to deal with such matters by subordinate legislation and that the negative procedure offers an appropriate level of scrutiny. Is that agreed?

Members indicated agreement.

The Convener: Section 13(4) concerns the qualifications and experience of licensing standards officers. We are advised that, as the provision concerns a detailed matter and the required qualifications and experience will need to be amended at short notice in the light of circumstances, it is appropriate for such matters to be dealt with in subordinate legislation. The legal advice is that the negative procedure is suitable for the exercise of such a power. Do we agree?

Members indicated agreement.

The Convener: Section 19 will give Scottish ministers the power to prescribe matters relating to

an application for a premises licence. Again, it is considered normal for such detailed procedural information, which might be subject to frequent change, to be prescribed in subordinate legislation and subject to the negative procedure. Are there any further points?

Members: No.

The Convener: The points under section 20(6) are about the meaning of the terms "neighbouring land" and "notifiable interest". The legal advisers think that the delegation of power is appropriate and that the choice of negative procedure will provide sufficient scrutiny. Is that agreed?

Members indicated agreement.

The Convener: Section 21(2)(a) is on objections and representations. According to our legal advisers, those are routine practical and administrative matters that need not be set out expressly in the bill but which may be properly dealt with by way of subordinate legislation subject to the negative procedure. Is that agreed?

Members indicated agreement.

The Convener: Section 24 will give ministers the powers to prescribe the form of premises licence, summary of licence and the information that is to be contained in the licence. We are advised that it is reasonable for such matters to be delegated to secondary legislation and that the negative procedure would be appropriate. Is that agreed?

Members indicated agreement.

The Convener: Sections 25(2) and 25(3) are about the conditions of premises licences. The point that is raised by our legal advisers concerns section 25(2). The power that is contained in that section would allow Scottish ministers to add to and extend the application of schedule 3 conditions. The Executive notes that:

"It is very likely, as new practices develop within the trade or as new public order issues arise, that we may need to add additional licence conditions."

What I am going to say about section 25(2) is very similar to what will be said about section 57(2). Schedule 3 is very important and the power in question will be a Henry VIII power that could alter schedule 3. Is the choice of the negative procedure appropriate?

Mr Maxwell: Like most members of the committee, I would usually say that the affirmative procedure should be used for Henry VIII powers, but the Executive has a point in relation to section 25(2). There is clearly an issue around flexibility. There might well be licence holders who will try to get around the rules or bend them a bit. It is only appropriate that the bill should enable ministers to act speedily and flexibly, particularly when we are

dealing with staff training and happy hours or irresponsible promotions. The more flexibility that there is in the bill, the better. I know that it is unusual and that I would normally argue the other way, but it seems to me that the negative procedure is reasonable for this power.

The Convener: Are there any other views? Murray, are you quite happy?

Murray Tosh: It has been a good day for Henry VIII so far. Stewart Maxwell's point is fair enough.

The Convener: Are we agreed?

Members indicated agreement.

The Convener: Section 27(6)(d) concerns applications to vary premises licences; our legal advisers think that that is a suitable matter for delegation and that the negative procedure is sufficient. Is that agreed?

Members indicated agreement.

The Convener: Section 32(1) is on transfer on the application of a person other than the licence holder. Our legal advice is that the delegation of power is appropriate and that the negative procedure is appropriate. Is that agreed?

Members indicated agreement.

The Convener: Section 52(c) is on certified copies. Again, it is normal for such matters to be delegated to subordinate legislation and the legal advisers' view is that the negative procedure would be appropriate. Is that agreed?

Members indicated agreement.

The Convener: Sections 53(7)(a) and 53(8)(h) are concerned with occasional licences. It is normal legislative practice to delegate the power to prescribe forms. The power to prescribe the additional information that will be contained in an occasional licence is also fairly standard. Both matters are suitable for subordinate legislation under the negative procedure, as suggested. Is that agreed?

Members indicated agreement.

11:15

The Convener: Section 55(2)(a) concerns occasional licences and objections and representations. The legal advisers consider the provisions that have been suggested to be appropriate and a reasonable delegation of power.

Members indicated agreement.

The Convener: Sections 57(1) and 57(3) are about conditions of occasional licence. The legal advisers point out that section 57(3) gives the Scottish ministers the power to prescribe by regulations subject to the negative procedure

further discretionary conditions that may be imposed by licensing boards. As with the power at section 25(3), the legal advice considers that this is an appropriate matter for subordinate legislation subject to the negative procedure.

Members indicated agreement.

The Convener: Section 57(2) is related to section 25(2), which we have discussed. Section 57(2) refers to schedule 4. Are we satisfied with the Henry VIII power and the negative procedure for the same reasons that we discussed in relation to section 25(2)?

Members indicated agreement.

The Convener: Section 67 is entitled "Issue of licence". Once again, it is suggested that delegated legislation is fine, rather than having the power in the bill itself, and that the negative procedure is appropriate.

Members indicated agreement.

The Convener: Section 78(1) concerns the licence holder's duty to undertake training. The committee will recognise that, in order to remain current, requirements in relation to the training that is to be undertaken by personal licence holders will need to be amended and updated on a regular basis. For that reason, it is preferable to make detailed provision in regulations rather than to do so in the bill. The negative procedure is judged to be appropriate.

Members indicated agreement.

The Convener: Section 80(7) concerns licensing boards' duty to update licences. Section 80 places certain requirements on licensing boards to update personal licences. The power prescribes the level of detail that is required for refresher training. As is the case with the powers at section 78(1), it is normal for provisions of this type to be made by subordinate legislation subject to the negative procedure.

Members indicated agreement.

The Convener: Section 81(1) concerns the power to specify which licensing board is to exercise functions under part 6. Our legal advice comments on subsection (2) and the Henry VIII power. The legal brief states:

"It is not clear, however, why it would be necessary for the Executive to take a power to modify any part of the Act to achieve this aim."

It is suggested that we seek further explanation from the Executive with regard to the need for the power, why the power is not subject to draft affirmative procedure and whether the policy aim could instead be achieved by an order under section 135, which would require the affirmative procedure.

Members indicated agreement.

The Convener: Section 82 gives a power to prescribe licensing qualifications. The training of persons who are involved in the licensed trade is key to the Executive's policy. The specific detail of the qualifications that are to be held by such persons seems to be a suitable matter for delegation with negative scrutiny.

Members indicated agreement.

The Convener: Section 91 covers regulations on closure orders. There appears to be some ambiguity in the drafting of section 91(a), and there is a feeling that the provisions might go far wider than closure orders. A further issue arises with respect to section 91(c), which allows regulations to make provision for the holding of hearings by licensing boards. It is suggested that the holding of such hearings amounts, in effect, to a right of appeal for the licence holder against a closure order. There is a feeling that much more clarity is required about how such hearings will take place.

Mr Maxwell: I agree with what the convener has said. It is also not clear whether such hearings should or should not take place. It might be the case that a hearing simply does not take place, but surely that would not be the intention. We must seek further clarity on the matter.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: At this point, I will hand over to Gordon Jackson for a few minutes.

The Deputy Convener (Gordon Jackson): The regulations under section 93(4)(c) are subject to the negative procedure. Are we content with that?

Members indicated agreement.

The Deputy Convener: Section 101 concerns the duty to display a notice. Are we content with the legal advice that the matter is suitable for delegation and for the negative procedure?

Members indicated agreement.

The Deputy Convener: Section 115(3)(b) is unusual, as it extends a power in other legislation without amending it. It could be argued that the power is not really necessary, as the power at section 115(5) allows for amendment of the definition of excluded premises. Do members have views on that? Do we need to ask the Executive for further information?

Christine May: It would be reasonable to ask the question.

The Deputy Convener: Okay. We will ask the Executive to explain its difficulty.

Section 115(5) provides the power to amend the definition of excluded premises in section 115(2). Our old pal Henry reappears. The power to amend the definition of excluded premises is, in effect, a power to widen or narrow the practical application of the bill. Nothing in the power restricts its application to premises that are connected with roads or the motor trade. Is the negative procedure adequate or should we ask the Executive for further explanation?

Mr Maxwell: On the face of it, the situation is much clearer than some that we dealt with earlier. We return to our standard position that the affirmative rather than the negative procedure should be used. The power appears to be fairly wide. It could change the bill's application dramatically and it is not restricted to premises that are connected with roads and the motor trade, so it should probably be subject to the affirmative procedure. At the least, we should ask the Executive to explain further why it chose the negative procedure.

The Deputy Convener: Okay. I will go for that.

For subsections (1) and (2) of section 116, there is nothing wrong with having the negative procedure. Do we agree?

Members indicated agreement.

The Deputy Convener: Do we agree that the same applies to section 117?

Members indicated agreement.

The Deputy Convener: Section 120(1) deals with relevant offences and foreign offences. I have no problem with that, either. Do members agree?

Members indicated agreement.

The Deputy Convener: We are rattling through the provisions. Section 123(8) adopts what is pretty much standard practice. Is that agreed?

Members indicated agreement.

The Deputy Convener: Section 124 follows standard practice for hearings. Do we agree that the regulations should be subject to the negative procedure?

Members indicated agreement.

The Deputy Convener: Section 125 is the same—boy, we have a lot of standard practice. Is that agreed?

Members indicated agreement.

The Deputy Convener: Section 127 is about fees. It is normal practice to prescribe fees in subordinate legislation. Does anyone have difficulty with that?

Members indicated disagreement.

The Deputy Convener: Section 130 relates to remote sales of alcohol—I am not sure what they are.

Christine May: That refers to sales over the internet.

The Deputy Convener: Right. I see that the provision is more technical—I thought that it meant a man over there buying a round.

Murray Tosh: In your case, that would be standard practice.

The Deputy Convener: Absolutely. We will move on. The matter is very serious.

Remote sales of alcohol—what is this about? Remote sales from overseas companies are exempt from licensing regulation, so the Executive is taking the power in section 130 to ensure that that sector can be appropriately regulated in the future if the need arises.

The difficulty is genuine, but the power at subsection (3) is very wide. The power is to make such provision as the Scottish ministers consider necessary, so they could do almost anything with it. That takes us back to old Henry. Do we want further clarification of why regulations that are made under the power should be subject only to the negative procedure?

Members indicated agreement.

Mr Maxwell: It is appropriate for the ministers to take the power, but it should be subject to the affirmative procedure.

The Deputy Convener: Section 135 is an ancillary provision. The power is standard. Is that okay?

Members indicated agreement.

The Deputy Convener: Is section 136 fine?

Members indicated agreement.

The Deputy Convener: Section 140 enables commencement orders to be made. Are we content with that?

Members indicated agreement.

The Deputy Convener: Do we have any difficulty with paragraph 11(1) of schedule 1, which is on training?

Members indicated disagreement.

The Deputy Convener: Schedule 1, paragraph 12(4) is a standard power concerning the detail of the proceedings of licensing boards. Are members content with the proposed procedure?

Members indicated agreement.

The Deputy Convener: Schedule 1, paragraph 12(5) is on licensing board rules. There is no

difficulty there, nor is there any difficulty with schedule 3, paragraph 6(1), which covers the training of staff.

Here is a funny one: schedule 3, paragraph 8(4), on irresponsible drinks promotions. This is another Henry VIII power, but it is a very narrow one. We might consider the negative procedure to be adequate here. We will not cry wolf over this power. The negative procedure might be good enough. However, members may feel that we ought to go back to the Executive on this matter.

Mr Maxwell: Could we ask about it?

The Deputy Convener: We will do so. That is no problem. Schedule 4, paragraph 7(4) contains a further Henry VIII power. Let us ask about it, too.

So, that is the Licensing (Scotland) Bill—we probably need a drink after that.

Christine May: Have a bottle of water.

The Deputy Convener: I am sorry—I should have mentioned one more thing. The committee may wish to consider whether the Executive's undertaking to consult is adequate or whether a general consultation requirement should appear in the bill. Members are aware of my view, which is that the Executive should always consult. It does that: one thing that the Executive *disnae* no do is consult.

Murray Tosh: The Executive has done so much consultation that we might sometimes feel it is not necessary. On the other hand, if the Executive has done so much consultation and intends to continue doing so, why not place a consultation requirement in the bill?

Mike Pringle: Absolutely. I quite agree with that.

The Deputy Convener: Let us ask the Executive about that.

Executive Responses

Materials and Articles in Contact with Food (Scotland) Regulations 2005 (SSI 2005/243)

11:26

The Deputy Convener: Agenda item 4 is Executive responses. We asked the Executive why article 3(3) of the Food Safety Act 1990 (Consequential Modifications) (No 2) (Great Britain) Order 1990 (SI 1990/2487) had not been expressly revoked. The Executive has said that that was an oversight. I would have thought that we will report the instrument on that basis—the Executive has told us that it got it wrong.

Members *indicated agreement.*

Fireworks (Scotland) Amendment Regulations 2005 (SSI 2005/245)

The Deputy Convener: We asked the Executive to explain why the requirement under section 2(4) of the Fireworks (Scotland) Act 2003 to issue a full regulatory impact assessment was not narrated anywhere in the instrument.

Christine May: We should report the matter.

The Deputy Convener: Once again, we will simply report the Executive's answer.

Members *indicated agreement.*

Consultation Requirements (Citation of Article 9 of Regulation (EC) No 178/2002)

The Deputy Convener: Agenda item 5 is a further Executive response. Following its meeting of 26 April, the committee wrote to the Executive to inform it that it considered that a failure to include a reference to compliance with the consultation requirements of article 9 of regulation 178/2002 of the European Parliament and the Council of the European Union in the preamble to relevant Scottish statutory instruments amounts to defective drafting. We said that we would report in those terms in future.

The Executive has noted our continued concern and has undertaken to review its practice on this point. The Executive will conduct a wide review across the range of its functions over the coming weeks and will write to the committee with its conclusions. As part of that review, the Executive will consider the form of footnotes relative to the consultation requirements that are laid down by Community law. Does that mean we simply have to wait and see what the Executive does?

Murray Tosh: There is some movement in the response.

Christine May: Yes, and we should welcome that.

The Deputy Convener: Do we just thank the Executive and wait for more?

Christine May: Yes.

The Deputy Convener: We will welcome the Executive's positive—

Christine May: And gradual measures.

The Deputy Convener: We will await the outcome of the review with interest.

Christine May: We should welcome the Executive's acceptance of our position.

The Deputy Convener: Okay.

Instruments Subject to Annulment

Confirmation to Small Estates (Scotland) Order 2005 (SSI 2005/251)

Prior Rights of Surviving Spouse (Scotland) Order 2005 (SSI 2005/252)

11:28

The Deputy Convener: No substantive points arise on the orders.

Instrument Not Subject to Parliamentary Procedure

Supporting Children's Learning: Draft Code of Practice (SE/2005/90)

11:29

The Deputy Convener: No points arise on the draft code of practice.

We now move into private session, as agreed.

11:29

Meeting continued in private until 13:07.

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