

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 June 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

21st 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

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 June 2005

[THE CONVENER *opened the meeting at 10:35*]

Items in Private

The Convener (Dr Sylvia Jackson): I welcome members to the 21st meeting in 2005 of the Subordinate Legislation Committee. I have not received any apologies, so I assume that Adam Ingram will arrive shortly. We have a full agenda so we will try to move through it as rapidly as we can.

I recommend that we take in private item 7, on our draft report on phase 1 of our regulatory framework inquiry, which we have already considered, and item 8, on the approach paper for phase 2 of the inquiry, which will include discussion of potential witnesses. Is that agreed?

Members *indicated agreement.*

Delegated Powers Scrutiny

Smoking, Health and Social Care (Scotland) Bill: as amended at Stage 2

10:36

The Convener: Members will note that the stage 3 debate on the Smoking, Health and Social Care (Scotland) Bill will take place on Thursday 30 June. The committee will report to Parliament in advance of the debate.

We have several sections to consider, the first of which is section 3, which makes provision for the display of notices in or outside no-smoking premises. Section 3(3) will empower ministers to make regulations regarding the manner of display, form and content of the notices in question. The section has been amended to clarify where the notices should be displayed. A consultation requirement has also been added and it has been made clearer that it will be an offence to fail to comply with the regulations. Is the committee content with the amendments that have been made to section 3?

Members *indicated agreement.*

The Convener: The issue that arises with section 4 is a little bit more complicated. Section 4 defines what is meant by “smoke” and “no-smoking premises”. The term “no-smoking premises” is to be defined in regulations made by ministers under the section. In line with the concerns that the committee expressed to the Minister for Health and Community Care, the bill has been amended to require that any changes to regulations that are made under section 4(2) or section 4(7) will be subject to consultation in draft form. That is what we asked for. As amended, section 4 will allow the Parliament to scrutinise draft regulations. Are we content with the amendments that have been made to section 4?

Mr Stewart Maxwell (West of Scotland) (SNP): I should think that we are more than content given that we have had quite a debate about this contentious subject. I welcome the Executive’s agreement to publish draft regulations for consultation when there are changes in future. That will help all those who were involved with the bill or those who might be affected by any future regulations.

The Convener: Absolutely. However, it is not clear whether regulations made under section 4(8), which relate to section 3(1)(b), will be covered by the prohibitions under section 1. I suggest that we ask the Executive about that before the stage 3 debate. Obviously that is a very tight timescale.

Mr Maxwell: Are we talking about the possible technical problem with vehicles, vessels, and aircraft and the interrelationship between sections 1, 3(1)(b) and 4?

The Convener: Yes.

Mr Maxwell: As I understand it, that is all fairly technical and there might be a problem with whether such vehicles will be caught by these offences. I am not sure that I fully understand the technical legal point, but if there is any doubt as to whether those vehicles—obviously we cannot call them premises—would be caught by the provisions in the bill, it is imperative that we flag that up to the Executive. We should publish the concern in our report because we are running out of time and we might require to lodge an amendment if we do not get a clear indication from the Executive that it is convinced that the provision is okay. As we are running out of time, any amendment might even have to be a manuscript amendment. It is extremely important that that is in our report.

The Convener: There is not usually a big problem with technical amendments. However, according to our legal briefing, there could be quite an important problem with this amendment. I therefore suggest that we do as Stewart Maxwell proposes and that we raise our concerns about the issue in our report to the lead committee and to the Executive, and I hope that the Executive will be able to take our concerns on board. Is that agreed?

Members indicated agreement.

The Convener: Section 7A concerns the sale of tobacco to underage persons and the variation of age limits. It enables ministers to modify section 18 of the Children and Young Persons (Scotland) Act 1937 to change the minimum legal age at which people may smoke. Although an order that is made under this section is currently subject to the negative procedure, the Executive has undertaken to change that to the affirmative procedure at stage 3. Are members content with that now?

Mr Maxwell: I do not think that I would have been content if we had not had an undertaking from the minister that the Executive will introduce an amendment at stage 3 to make the procedure affirmative. This is a completely new power that has been added to the bill and there is obviously wide interest in this area. It is a policy matter, but personally I welcome the inclusion of the power. However, it would have been a fairly wide power if the Executive had not agreed to make it subject to the affirmative procedure, so that the Parliament can consider the matter properly. As we discussed in relation to other sections, section 7A is tightened by the fact that regulations made under

it will be introduced first in draft form for consultation. I have already lodged a stage 3 amendment to tighten section 7A further, so that the variation in age could be only up, not up or down. I hope that that amendment will be accepted at stage 3.

Putting aside the question whether people agree or disagree on the policy, I think that the power itself is not unreasonable. Given the commitments to using the affirmative procedure and to consulting on draft regulations in future, I think that there should be no problem as far as the committee is concerned.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: Amendments to section 15, which concerns the list of persons undertaking to provide, or approved to assist in the provision of, general dental services, and to section 17, which concerns the provision of ophthalmic services, have been made to subdivide further the list of relevant health care professionals. Are members content with those changes?

Members indicated agreement.

The Convener: Section 19A concerns the drug tariff. The section gives ministers power to prescribe the information relating to pharmaceutical care services that must be included in the drug tariff. Are members content with the section?

Members indicated agreement.

The Convener: Section 26A concerns the frequency of inspection of care services under the Regulation of Care (Scotland) Act 2001. It inserts new subsections into that act. The proposed power would allow Scottish ministers to amend the minimum frequency at which care services must be inspected by the Scottish Commission for the Regulation of Care. That would be done by order following consultation with the care commission. That seems okay, but it has been suggested that there might be a slight difficulty and that we should consider asking the Executive for further enlightenment on the purpose and effect of the words “and thereafter”, as detailed in paragraph 34 of the briefing paper. Do members agree that we should ask for further information and that we should put it in our report?

Members indicated agreement.

The Convener: Section 30 amends the Adults with Incapacity (Scotland) Act 2000 and concerns the authorisation of medical treatment. As amended at stage 2, section 30(2)(b) enables Scottish ministers to prescribe, by regulations, the requirements that health professionals must meet

to be entitled to certify for incapacity. Are members content with the section as amended?

Members indicated agreement.

The Convener: Paragraphs 40 and 41 of the briefing paper concern the short title and commencement. Section 37(3) was amended to enable an order appointing a day for the commencement of sections 1 to 8, or schedule 1, to specify the time in the day for their commencement, so that they do not need to come into force at the beginning of that day. It has been suggested that we might want to ask about that.

10:45

Mr Maxwell: I do not think that there is a problem with it. I accept that it is rather unusual to specify a time, but there are important policy reasons for not wanting the standard situation, where an order would come into force at the first minute of a day, at midnight. A lot of premises, such as pubs and clubs, would be open at that time, and trying to enforce a regulation that came into effect at midnight would be rather onerous and could cause problems, so it seems perfectly reasonable that a specific time should be chosen. Although that is unusual, I think that it is perfectly reasonable.

The Convener: Thank you for that clarification. Are members happy with the amendment to the commencement power?

Members indicated agreement.

Transport (Scotland) Bill: as amended at Stage 2

The Convener: Members will note that there is a stage 3 debate on the Transport (Scotland) Bill next week, on Wednesday 29 June. I therefore recommend that we do as we did with the Smoking, Health and Social Care (Scotland) Bill and put the points that we raise into a report. Is that agreed?

Members indicated agreement.

The Convener: Section 1 provides for the establishment of regional transport partnerships. Are members content with the largely technical amendments that have been made to section 1?

Members indicated agreement.

The Convener: Section 2 deals with the dissolution of the RTPs. It provides ministers with the power to dissolve partnerships, places a duty on them to consult prior to making an order, and provides for the order to modify any enactment. New subsection (2A) includes a provision that empowers ministers, on the dissolution of an RTP, to transfer functions back to the original person

who carried out the functions before they were transferred to the RTP. That reflects a comment made by the committee at stage 1. Are members happy with that change?

Members indicated agreement.

The Convener: Section 10 concerns other transport functions of RTPs and allows ministers to transfer statutory functions to an RTP by order. The committee raised concerns at stage 1 about the width of the power and the lack of detail in the bill as to how it would be exercised. As a result of our concerns and those of the lead committee, section 10 has been subject to considerable amendment. The Executive intends to remove subsection (7) at stage 3, following amendment to section 12(2). It does not intend to transfer any of the relevant functions to an RTP by order under section 10.

An illustrative list of the type of function that may be included in an order has been included at subsection (2A). There are technical difficulties with the drafting of that subsection, and the Executive proposes to revisit the amendment at stage 3. Are members happy with that position?

Members indicated agreement.

The Convener: A new subsection has also been added to section 10. Subsection (1A) obliges ministers, when making an order, to have regard to the transport strategy of an RTP, if that strategy has been published before the making of the order. That amendment was also welcomed by the lead committee. Are we content with that amendment?

Members indicated agreement.

The Convener: Section 10A concerns alteration of an RTP's functions. The new section reflects a point that the Subordinate Legislation Committee made at stage 1, which was that section 10, as originally drafted, provided only for a one-way transfer to an RTP. Section 10A now allows for the making of an order to transfer the functions back to the original holder, or for those functions to be exercised jointly with that person. A similar amendment was made to section 2, as discussed earlier.

Does Mike Pringle have a point about this section?

Mike Pringle (Edinburgh South) (LD): No.

The Convener: Okay. I just saw you chattering there and thought that you must have a point to make.

Are members quite happy with section 10A?

Members indicated agreement.

The Convener: Section 12 concerns the transport functions of Scottish ministers. Section 12(1) provides ministers with powers to make an order to enable them to carry out the rail transport function of the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive. At stage 1, the Executive indicated that the drafting of the section was provisional and subject to the making of an order under section 30(2) of the Scotland Act 1998 to transfer the necessary legislative powers to the Scottish Parliament. The order has been approved and section 12(1) refined accordingly. Are members content to note that amendment?

Members indicated agreement.

The Convener: Section 13 concerns the transfer of staff, property and liabilities. Section 13(4) provides for the transfer of property and other matters from one body to another. A small technical amendment has been made to include the word "rights" as well as "property" and "liabilities". Are members content with the section as amended?

Members indicated agreement.

The Convener: Section 17 inserts new section 112A into the New Roads and Street Works Act 1991 and provides for the setting up of the Scottish road works register. New section 112A(3A), which provides ministers with a power to make regulations regarding the payment of fees as a condition of access to the register, reflects an observation made by the committee at stage 1. The regulations will be made by statutory instrument and subject to the negative procedure. Are members happy with that amendment?

Members indicated agreement.

The Convener: Section 18 concerns directions on the timing of road works. Section 18(3A), which inserts section 115(2A) into the 1991 act, again reflects a comment made by the committee at stage 1 and provides ministers with the power to make provision for appeals against the direction of road works authorities regarding the timing of works. Members will note that ministers are not placed under a duty to make regulations; they have been given only a power to allow them to do that. A regulation-making power is only rarely expressed as a mandatory duty.

However, an amendment to section 19, which also relates to this section, changed a "may" to a "shall". As paragraph 76 of the legal briefing makes clear, section 115(2A) of the 1991 act, which is inserted by section 18 of the bill, should therefore be tidied up by changing the word "may" to "shall". I suggest that we put that into our report. Are members agreed?

Members indicated agreement.

The Convener: Section 19(1), which inserts new section 115A(4) into the 1991 act, provides ministers with the power to prescribe the procedure for the giving of directions by the road works authority to the undertaker on the placing of apparatus. However, new section 115A(5), which confers powers on ministers by regulations to make provision for appeals against such directions and is similar to the new power in section 18 that we have just discussed, has been amended to alter the power to oblige ministers to make the appropriate regulations. Are members content with the amendment?

Christine May (Central Fife) (Lab): Given that this amendment and the previous amendment relate to each other, both provisions should be consistently worded to ensure that the policy is consistently applied.

The Convener: Are members agreed?

Members indicated agreement.

The Convener: Section 23 concerns enforcement of section 119 of the 1991 act. Section 23(2) extends section 119 to ensure that penalties are applied both to road works authorities and to undertakers. That was a big issue for the Local Government and Transport Committee. Are members content to note that amendment?

Members indicated agreement.

The Convener: Section 29, which concerns regulations and guidance on resurfacing, inserts new section 132D into the 1991 act and provides ministers with a power to make regulations in relation to obligations on an undertaker to resurface roads. The provisions were amended at stage 2 to include new section 132D(3A), under which ministers, before they make regulations, will be obliged to consult any relevant association of undertakers and other such bodies as they consider appropriate. Do members agree with that amendment?

Members indicated agreement.

Gordon Jackson (Glasgow Govan) (Lab): Bearing in mind that we always want the Executive to consult on everything, we should perhaps say in our report that we are rather pleased to find that, on this occasion, it is doing so.

The Convener: Absolutely. We can put that in.

Section 32(1), which inserts new section 154A into the 1991 act, empowers ministers to modify schedule 6A of the act to provide for certain offences to be fixed-penalty offences. In response to the committee's comments at stage 1, the provision has been amended to ensure that any order made under this section will be made by a statutory instrument that will be subject to the

affirmative procedure. I take it that the committee welcomes such an amendment.

Christine May: We are delighted with it.

Mr Maxwell: I would not go that far.

Christine May: I am trying to follow Margaret Curran's example and find different ways of saying the same thing.

The Convener: Section 33, which concerns civil penalties for certain offences under the 1991 act, inserts new section 154B into the 1991 act to enable ministers to make regulations in relation to the imposition and payment of charges for certain offences that will be subject to civil penalties. In response to the committee's suggestion, the procedure for regulations under this section has been changed from negative to affirmative. I am sure that members are happy with that.

Members indicated agreement.

Christine May: It is a significant victory.

The Convener: Section 35, which concerns fixed-penalty offences under the Roads (Scotland) Act 1984, has been amended to remove the requirement for such offences in effect to be selected from the list in schedule 8A by regulations and now provides for all offences that are listed to be fixed-penalty offences. However, the section confers a power on ministers by order to modify the schedule to provide that an offence will cease to be a fixed-penalty offence. That is more restrictive as no power is conferred on ministers to add to the list or to restore removed offences.

The committee had suggested that the regulation-making power should be subject to the affirmative procedure. However, that has been superseded by the redrafted provision, which is more restrictive than the earlier version and is subject to the negative procedure. Are we happy with the provision?

Mr Maxwell: It seems slightly odd that although we can remove offences from the list, we cannot add any. Perhaps that is the Executive's policy intention but, on the face of it, it seems more logical to have the power to remove, to add and to put back offences that have already been removed. Otherwise, the provision seems slightly strange.

I take it that we have to report on this matter.

The Convener: Yes.

Mr Maxwell: I wonder whether it is worth making the point that we do not know why this provision has been drafted in this way. It might be helpful if the Executive made it clear before the stage 3 debate whether that was the policy intention or whether it was just a small error.

The Convener: The suggestion is that we should ask the Executive to make it clear whether it has purposely drafted the provision in this way or whether it has made an error. Are members agreed?

Gordon Jackson: Presumably, if the Executive decides that it wants the power to subtract but not the power to add, that is a policy decision. We are interested only in how—*[Interruption.]*

Mike Pringle: Sorry for sneezing, Gordon.

Gordon Jackson: I am very rarely thrown, Mike, but you managed that on this occasion.

My theory is that if the Executive is going to add offences for citizens, it should do so by affirmative instrument. Perhaps it is the lawyer in me, but I do not really mind it using negative procedure to remove offences.

Mr Maxwell: That might well be, but I simply seek clarification as to whether that is the Executive's policy intention. If that is the case, I am fine with it.

Gordon Jackson: Sure.

The Convener: We will say that we are a little bit concerned about whether that is the Executive's policy intention.

I welcome Adam Ingram to the committee.

Mr Adam Ingram (South of Scotland) (SNP): I am sorry that I am late.

The Convener: We are now discussing amendments to section 36 of the Transport (Scotland) Bill, which concerns civil penalties for certain offences under the Roads (Scotland) Act 1984. The section, which inserts section 130B(1) into the 1984 act, confers powers on ministers to make regulations in relation to the imposition and payment of charges for offences that will be subject to civil penalties. Are we content to note the amendment?

Members indicated agreement.

The Convener: Section 43 concerns minor amendments to the Transport (Scotland) Act 2001. Section 43(4) amends section 64 of the 2001 Act to provide ministers with regulation-making powers for the appointment of persons to determine disputes and appeals against determinations under charging schemes. New subsection (1C) has been added to section 64 to allow ministers to confer such determining powers on those who currently carry out a similar function. Are members content with the amendment?

Members indicated agreement.

The Convener: Schedule 5 inserts new schedule 6B into the New Roads and Street Works Act 1991. Paragraph 11(2) of the schedule

provides ministers with the power to make regulations to specify the amount of receipts from fixed penalties that road works authorities may retain to meet the administrative costs associated with managing fixed-penalty notices. That will prevent authorities from using the receipts as a revenue stream. Such regulations will be subject to the negative procedure. Are members content to note the amendment?

Members indicated agreement.

The Convener: I wish that there was another way of doing this.

Christine May: I tried.

The Convener: As schedule 7, which inserts new schedule 8B into the Roads (Scotland) Act 1984, makes similar provision to schedule 5, the issues that arise are the same as those that have been set out for schedule 5. Are members content to note the amendment?

Members indicated agreement.

The Convener: That brings us to the end of item 3.

Murray Tosh (West of Scotland) (Con): I should point out that an alternative way of proceeding would be to publish the legal briefing paper. If you could refer to it, you could substantially truncate the proceedings.

The Convener: Perhaps only marginally.

Executive Responses

Nitrate (Public Participation etc) (Scotland) Regulations 2005 (SSI 2005/305)

10:59

The Convener: The Committee asked the Executive to explain the reference in regulation 2(2)(a) to the wording

“published in 1997 by the Scottish Office”

given that that wording appears to have been replaced by regulation 6(2)(a) of SSI 2002/27. The Executive has now acknowledged that the purported amendment can have no effect, and it will rectify that at the earliest opportunity.

Christine May: We should draw that to the attention of the lead committee and the Parliament on the basis of defective drafting.

Charities (Designated Religious Bodies) (Scotland) Order 2005 (SSI 2005/306)

11:00

The Convener: The Committee asked the Executive to clarify why it chose not to narrate in the preamble to the order the statutory conditions to the exercise of the enabling power, as set out in section 3(1)(a) to (c) and section 3(2) of the parent act—the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

The Executive does not consider that the matters set out in those sections are preconditions that, as a matter of drafting practice, require to be narrated in the preamble. It considers that in exercise of the enabling power ministers have satisfied themselves in relation to the conditions. It adds that because it is clear from the explanatory note that ministers are satisfied that the conditions have been met, the validity of the order is not in question. The Executive also points to a previous instrument where the conditions were not narrated in the preamble.

What do members feel about this one?

Christine May: The briefing on the order was interesting. On the basis of the view that the Executive took, the order has been made in a valid way and therefore the vires is not in question. However, if the order is for bodies of 3,000 members or more it is intra vires, but if the body had fewer than 3,000 members, the order would not be intra vires. That is where there is a query.

The other point is whether the criteria in the parent act are subjective. Our legal advice is that that is not necessarily relevant because there is precedent for ministers using their opinion to make

instruments. They do that all the time with the instruments on amnesic shellfish poisoning, for example. Ministers are of the opinion that there is a danger; it is not that they are convinced of it.

There are valid arguments about both points and we should at least draw them to the attention of the lead committee and Parliament.

Murray Tosh: Is it not even more worrying than that? Paragraph 70 of the draft copy of the legal brief—paragraph 116 in the copy that the committee is using today—makes the valid point that the Executive argues that

“it is ‘implicit’ in the exercise of the power that Ministers were satisfied”.

However, if the exercise of the power requires the fulfilment of conditions, how do we assess whether those conditions were met unless we refer to them? It is quite a significant abuse of power to say that because the Executive has exercised this power, we must assume that it is implicit that it has exercised it properly. It is standard to see whether the correct conditions are cited. The legal brief argues that very strongly and we should take a strong position on the order.

Mr Maxwell: I was going to raise the same point that Murray has covered. The point is that there are five specific conditions. Where do we draw the line? If there were 10 or 100 specific conditions and the Executive said, “It is implicit that we have done this correctly”, should we just accept that? Once we go down that road, there is no obvious point at which we should say, “Stop”. Murray has made the point well that we should be quite strong and say that it is not acceptable.

The Convener: We might therefore want to pass on quite a lot of what is in the legal brief when we report to the lead committee and Parliament on the improper drafting.

Members indicated agreement.

Christine May: This order gives credence to the discussion in our draft report about the need for proper explanatory notes and supporting documentation. That is true not just for this committee; members of the lead committee or other committees that might be peripherally affected also get sight of instruments. We cannot know what is in other people’s minds and if they do not give us the background information on which they have based their judgments, how are we to make a judgment?

The Convener: We shall put all those points in our letter.

Wildlife and Countryside Act 1981 (Variation of Schedule) (Scotland) Order 2005 (SSI 2005/308)

The Convener: The committee asked the Executive to explain why no Executive note was provided, and the Executive stated that the content and effect of the order were considered to be self-evident, that the text of the order was self-explanatory and that, accordingly, no Executive note was required.

I think that we have heard that before. Do members wish to draw that to the attention of the lead committee and the Parliament?

Christine May: I wonder whether we should tell the Executive that we feel absolutely humbled by the fact that we were so stupid as not to recognise what was self-evident. Perhaps not. The Executive’s reply is just a little patronising, but we have been through it before so I do not think that there is any need to say it all over again.

Murray Tosh: When the Executive requires us to look at 30-odd statutory instruments a week, there is an issue about judging anything to be self-evident. There is clearly a workload issue here. It would not surprise me if the Executive did not provide a note because it did not have time, given the pressure that it has put itself under. It is certainly putting us under pressure to do a vast amount of business at very short notice. Perhaps we should make the additional point that the Executive should not assume that anything is self-evident, particularly not when the clear briefing from our legal advisers—in paragraphs 76 and 77 of the original briefing and 46 paragraphs further on in the updated one—is that we should not regard it as self-evident. Even if it were, the understanding is that the Executive will produce a note unless it is clearly superfluous. In this case, a note is not clearly superfluous.

The Convener: Exactly. In fact, paragraph 123 of the legal briefing states:

“Neither the instrument itself nor the Explanatory Note (which is one sentence long) mentions the fact that the instrument is connected with criminal offences and penalties.”

Christine May: Indeed.

Mr Maxwell: The order is a bit like the previous one that we considered. It is not self-evident, self-explanatory or even implicit. The use of that sort of language in response to our concerns is clearly incorrect and is not helpful at all, either to the lead committee’s deliberations or to Parliament’s deliberations on the regulations.

The Convener: We shall try to encompass all those points in our letter.

Mental Health (Content and amendment of care plans) (Scotland) Regulations 2005 (SSI 2005/309)

Mental Health (Content and amendment of Part 9 care plans) (Scotland) Regulations 2005 (SSI 2005/312)

The Convener: The committee asked the Executive to explain why, in regulation 3 of each of those instruments, there is a reference to paragraph 1 but no reference to subsequent paragraph numbers. The Executive has acknowledged those drafting errors. Shall we report that to the lead committee?

Members *indicated agreement.*

Student Loans (Information Requests, Maximum Threshold, Maximum Repayment Levels and Hardship Loans) (Scotland) Regulations 2005 (SSI 2005/314)

The Convener: The committee asked the Executive why new regulations 11A to 11F were inserted into part III of the Repayment of Student Loans (Scotland) Regulations 2000 (SSI 2000/110), when they appear to apply to all borrowers, not only those who are resident overseas. The Executive responded that the new provisions, which appear to apply to all borrowers, will apply only to overseas borrowers, because of a determination granted by ministers that collections should be made by the Inland Revenue through taxation by self-assessment and pay as you earn. The position is not at all clear from the regulations, without the detailed explanation given by the Executive. What are members' views?

Christine May: I think that we should report the regulations.

The Convener: Is it agreed that we report that defective drafting?

Members *indicated agreement.*

Murray Tosh: This is a good example of a case where something that might be self-evident to the drafter requires explanation to those who read it, because they do not have the privilege of being party to all the information that the drafter had at his or her disposal.

The Convener: Good words, Murray.

On new regulation 11F, we asked the Executive whether the time of serving a document is the time of posting or the time of delivery—we have asked about that before—and whether the provision is intended to have a different effect from section 7 of the Interpretation Act 1978. The Executive has responded that the reference must be to the time of delivery rather than to the time of posting,

because documents will not always be sent by post. However, our advice suggests that the intended meaning of “delivered” could have been set out in the regulations.

Christine May: I agree. This matter engendered a lot of debate and discussion last week.

The Convener: I can imagine.

Christine May: Given that the documents might have legal consequences, the regulations should make clear the meaning of the term “delivered”. That could be done quite easily. As a result, I think that we should mention the matter in our report.

The Convener: I think that our report will say that and make it clear that we have met this matter before.

Mr Maxwell: By the end of last week's extensive debate, we had not reached a conclusion about what was meant. Given that we could not do so, I am not sure that the matter will be—to use a phrase that has been well-worn this morning—self-evident to everyone else. The Executive should be clear about these things. After all, we have dealt with this point before. Perhaps discussing whether these matters should be explicit or implicit should form part of the deliberations in our inquiry and in the work that might possibly lead to a bill.

Murray Tosh: When documents are served, are they sent by some form of recorded delivery?

Mr Maxwell: We do not know.

Murray Tosh: That might be pertinent to the question of deciding whether delivery is the appropriate standard to adopt. Delivery based on the assumption that someone will get the document is entirely different from delivery based on the knowledge that someone will get it. Given that we will discuss the matter again as it evolves, it might be useful to know what the practice is and, indeed, to find out whether practice is consistent and whether there is a standard definition of serving a document. Is issuing a piece of information to someone serving a document? At what point does sending someone stuff through the post constitute serving a document? Is the practice consistent?

The Convener: There are two issues to address. First, we will report to Parliament and the lead committee that the meaning of the provision could be made clearer. Secondly, we will write back to the Executive and find out what the general procedure is.

Mike Pringle: In legal terms, serving a warrant means that it is handed to a person at their door.

Christine May: But we are talking about delivering something, rather than serving it.

The Convener: We will clarify the exact procedural definition of the term and take into account Murray Tosh's points.

I see that members asked a few questions about these regulations last week.

The Executive was also asked to explain the discrepancy whereby new regulation 11C(3) provides for a penalty of £100, but the explanatory note refers to a penalty of £108. The Executive has acknowledged the error and says that it will seek to correct the version of the explanatory note on Her Majesty's Stationery Office website. Do members agree to report to Parliament and the lead committee that the Executive has acknowledged defective drafting in this matter?

Members indicated agreement.

The Convener: The committee also asked the Executive to explain whether the references to "paragraph 9(4)", "sub-paragraph 13(4)(a)" and "paragraph 13(1)" in regulations 4 and 5 should in fact be references to regulations. The Executive has acknowledged that those references are drafting errors and that they indeed refer to regulations. I suggest that we report that to Parliament and the lead committee as defective drafting. Are members agreed?

Members indicated agreement.

Local Government Pension Scheme (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/315)

The Convener: The committee asked the Executive whether, in regulation 2(a) and (b), the references to paragraphs 132(1) and 132(3) should instead be to regulations 132(1) and 132(3). The Executive has acknowledged that those are drafting errors and that the references to paragraphs should be to regulations instead. Are members agreed to report to Parliament and the lead committee that the Executive has accepted this defective drafting?

Members indicated agreement.

Genetically Modified Organisms (Transboundary Movements) (Scotland) Regulations 2005 (SSI 2005/316)

The Convener: The committee asked the Executive to comment on whether the provisions in paragraph 6 of schedule 2 to the regulations might breach the right of a person not to incriminate him or her self as guaranteed under article 6 of the European convention on human rights.

The Executive has indicated that the inspectors who enforce the regulations will be bound by the terms of the Human Rights Act 1998, and cannot

lawfully exercise their powers in a way that might breach that legislation. It also adds that there was no intention that the power conferred be used in a way that was incompatible with the ECHR. That said, our advice suggests that persons who are affected by the regulations will not necessarily be aware that the requirement to answer an inspector's questions is subject to the general right, as guaranteed by article 6, not to be compelled to incriminate themselves.

Do members agree to report to Parliament and the lead committee that the regulations fail to include an appropriate protection?

11:15

Mr Maxwell: The Executive is correct to say that there is protection under the ECHR. However, it would have been helpful if the issue with regard to self-incrimination had been made absolutely clear in the regulations. It might not be strictly wrong for the Executive not to do so, but it is not helpful. After all, everyone should know exactly where they stand. As a result, we should include that comment in our report.

The Convener: Are members agreed?

Members indicated agreement.

Gaming Act (Variation of Fees) (Scotland) Order 2005 (SSI 2005/319)

The Convener: The committee asked the Executive to clarify why, in uprating the fees amounts set out in section 48 of the Gaming Act 1968, it did not amend all the figures in section 48(4) of the act to reflect the amended amounts in section 48(3).

The Executive has indicated that previous orders under the 1968 act were confusing and that, in an attempt to make this order as user-friendly as possible, it did not uprate certain figures that are consequential and "superfluous". However, our advice suggests the failure to uprate all the figures in section 48(4) means that the primary legislation is now inaccurate.

Christine May: I think that we should report the order to Parliament and the lead committee on the ground of defective drafting.

The Convener: Are members agreed?

Members indicated agreement.

Prevention and Monitoring of Cetacean Bycatch (Scotland) Order 2005 (SSI 2005/330)

The Convener: We are nearly at the end.

The committee asked the Executive to comment on the delay in implementing Council regulation

(EC) No 812/2004, which came into force in July last year, and the timing that has been chosen for making provision for its enforcement. From the Executive's response, it appears that any delay has in practice been minimal. Is the committee content to draw the attention of the Parliament and the lead committee to the fact that we are happy with the further information that we have received on this order?

Members indicated agreement.

Eggs (Marketing Standards) (Enforcement) (Scotland) Regulations 2005 (SSI 2005/332)

The Convener: The Committee asked the Executive to comment on why, given that the principal regulations were amended by The Food Standards Act 1999 (Transitional and Consequential Provisions and Savings) (Scotland) Regulations 2000 (SSI 2000/62), the relevant parts of those regulations are not included in schedule 2 to the regulations, which lists the regulations that these regulations revoke and replace. The Executive has explained that the omission is unintentional, but that there is no practical effect, and has said that it will endeavour to rectify the point at the next available legislative opportunity. Do members agree to draw the attention of the Parliament and the lead committee to these regulations on the ground of failure to follow proper legislative practice?

Members indicated agreement.

Instruments Subject to Annulment

Edinburgh College of Art (Scotland) Order of Council 1995 (Amendment) Order of Council 2005 (SSI 2005/313)

11:18

The Convener: No substantive points arise on this order of council, but we might want to raise a couple of minor drafting points with the Executive in an informal letter. Are members agreed?

Members indicated agreement.

Products of Animal Origin (Third Country Imports) (Scotland) Amendment Regulations 2005 (SSI 2005/323)

The Convener: The regulations provide for the administration and enforcement of Council regulation (EC) No 1774/2002, which lays down health rules concerning animal by-products that are not intended for human consumption. Do members agree to seek an explanation for the delay between the European regulation becoming applicable and these regulations coming into force?

Christine May: Oh yes. Technically, cruise ships could beetle up to Scotland to dispose of their unused supplies in a way that might not comply with the regulations. After all, the Department for Environment, Food and Rural Affairs introduced regulations to implement this European legislation in England in 2004.

The Convener: The question is a good one.

Cereal Seed (Scotland) Regulations 2005 (SSI 2005/328)

The Convener: The regulations consolidate for Scotland, with amendments, a series of Great Britain regulations that implement European legislation on the marketing of cereal seeds. First, do members agree to ask the Executive to explain why section 17 of the Plant Varieties and Seeds Act 1964 has not been cited as an enabling power?

Members indicated agreement.

The Convener: Do members agree to ask the Executive whether the reference to regulation 21(5) in paragraph 12 of part VI of schedule 6 to the regulations is correct?

Members indicated agreement.

The Convener: Should the committee also ask the executive to clarify why paragraph 16 of part

VI of schedule 6 imposes both an objective test at subparagraph (a) and a subjective test at subparagraph (b) in relation to the same subject matter?

Members *indicated agreement.*

Fodder Plant Seed (Scotland) Regulations 2005 (SSI 2005/329)

The Convener: These regulations consolidate for Scotland, with amendments, a large series of regulations that implement European Communities legislation relating to the marketing of fodder plant seed. There are five questions to ask the Executive.

The first is to ask the Executive why section 17 of the Plant Varieties and Seeds Act 1964 has not been cited as an enabling power. Is that agreed?

Members *indicated agreement.*

The Convener: Secondly, we should ask for clarification on whether the reference to regulation 21(5) in paragraph 12 of part VI of schedule 6 to the regulations is correct.

Christine May: I think that you must mean paragraph 13.

The Convener: There might be an error on my brief. You could well be right. Well spotted; take a gold star.

Are we agreed on that?

Members *indicated agreement.*

The Convener: We should also ask the Executive to clarify why paragraph 17 of part VI of schedule 6 imposes an objective test at subparagraph (a) and a subjective test at subparagraph (b) in relation to the same subject matter. The issues are similar to those raised on the previous regulations.

In the definition of “basic seed” in regulation 3, the drafting of the reference in paragraph (c)(i) needs clarification, given that the requirements in paragraphs (a) and (b) appear to be cumulative, not alternatives.

Do we agree to ask the Executive for clarification?

Members *indicated agreement.*

The Convener: Finally, we will ask the Executive for an explanation of the reference in regulation 9(1)(b)(ii) to articles 6(1)(a) and 6(1)(b) of the fodder plant seed directive, given that no such articles appear to exist in that directive. That was well spotted by our legal advisers. Is that agreed?

Members *indicated agreement.*

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2005 (SSI 2005/336)

National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2005 (SSI 2005/337)

The Convener: No substantive points arise on the regulations but we will raise minor drafting points by informal letter if that is agreeable to members.

Members *indicated agreement.*

Local Authorities' Traffic Orders (Procedure) (Scotland) Amendment Regulations 2005 (SSI 2005/338)

The Convener: Regulation 16 of the principal regulations—the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 (SI 1999/614)—requires local authorities to make a traffic order within two years of the date of publication of the proposal to make the order. The regulations permit a local authority to apply to ministers for extensions of that period.

It is suggested that we ask the Executive for clarification of regulation 2(3), particularly whether there is any limit on extensions following the six-month period allowed for the first extension of the two-year time limit.

Members *indicated agreement.*

The Convener: It is also suggested that we should ask the Executive to clarify whether an application for an extension must be made before the expiry of the two-year limit or whether it could be made after that date.

Members *indicated agreement.*

Advice and Assistance (Scotland) Amendment (No 3) Regulations 2005 (SSI 2005/339)

The Convener: No substantive points arise on the regulations, but there are some minor drafting points that we could raise in an informal letter.

Mr Maxwell: Convener, you did not mention that there were also some minor points on the previous regulations. I assume that they will be included in an informal letter. Is that implicit?

Murray Tosh: It is implicit.

Mr Maxwell: I apologise, but that is what happens. Someone thinks that something is implicit and someone else does not.

The Convener: Stewart cannot read my mind at the moment; that is the problem.

Murray Tosh: Just as well.

Pollution Prevention and Control (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/340)

The Convener: The amendment regulations make several miscellaneous amendments to the Pollution Prevention and Control (Scotland) Regulations (SSI 2000/323). There are two questions to ask the Executive. First, we should ask the Executive to explain why regulation 5 states that new paragraph (1) is “subject to paragraph (4) and (5)”

as paragraph (5) appears to be a separate condition in its own right. Secondly, it is suggested that we ask the Executive to clarify why several amendments add the words “mobile plant” after the word “installation” but that a similar amendment has not been made to regulation 17(8). Is that agreed?

Christine May: I had a vision of “The Day of the Triffids”.

Mike Pringle: What, attached to your ear?

The Convener: Is that agreed?

Members indicated agreement.

Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment Regulations 2005 (SSI 2005/341)

The Convener: The regulations amend several sets of principal regulations to create a new category of student eligibility in relation to certain maintenance or graduate support and the graduate endowment. The definition of

“national of a member state of the European Community”

in regulation 2(2)(c) is used only once. Additionally, the definition includes the United Kingdom within its scope, but when it is used in new paragraph 9(a) of schedule 1 to the principal regulations, it excludes the UK from its scope. We will seek clarification from the Executive, if that is agreed.

Members indicated agreement.

Murray Tosh: Some of my colleagues will be very pleased to hear that definition.

The Convener: The second question will be about the purpose of the amendment intended in regulation 2(2)(c) because it appears to have already been achieved by regulation 2(2)(b) of the Education (Student Fees and Support) Temporary Protection (Scotland) Amendment Regulations

2005 (SSI 2005/217). We will ask the Executive for clarification.

Members indicated agreement.

The Convener: It is also suggested that we seek clarification of the wording inserted by regulations 4(2) and 4(3) into schedules 1 and 2 to the Education (Fees and Awards) (Scotland) Regulations 1997 (SI 1997/93), given that, unlike other paragraphs of those schedules, the words “excepted student” and “excepted candidate” are not specified. Is that agreed?

Members indicated agreement.

Fire (Additional Function) (Scotland) Order 2005 (SSI 2005/342)

The Convener: Regulation 8 consists of one numbered paragraph and it is not clear whether there should be further paragraphs.

Christine May: That has come up before.

The Convener: Yes, it has. Do we want to seek clarification from the Executive?

Members indicated agreement.

Fire (Charging) (Scotland) Order 2005 (SSI 2005/343)

Fire (Scotland) Act 2005 (Consequential Modifications and Amendments) (No 2) Order 2005 (SSI 2005/344)

The Convener: No substantive points arise on the orders, but we can raise minor drafting points by informal letter. Is that agreed?

Members indicated agreement.

Education (Student Loans) Amendment (Scotland) Regulations 2005 (SSI 2005/345)

Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2005 (SSI 2005/346)

Scottish Administration (Offices) Order 2005 (SI 2005/1467)

The Convener: No points arise on the instruments.

Instruments Not Laid Before the Parliament

Water Services etc (Scotland) Act 2005 (Commencement No 1 and Savings) Order 2005 (SSI 2005/351)

11:27

The Convener: No points were raised on the order.

Christine May: I like the reference to the office of the water commissioner being dissolved.

The Convener: That brings back my chemistry.

Education (Listed Bodies) (Scotland) Amendment Order 2005 (SSI 2005/354)

The Convener: There are no substantive points on the order, although there are minor drafting points that we will put into an informal letter. Is that agreed?

Members *indicated agreement.*

The Convener: The committee will now move into private session for the next two items.

11:28

Meeting continued in private until 12:34.

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