

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 29 November 2005

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2005.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Tuesday 29 November 2005

Col.

DELEGATED POWERS SCRUTINY	1397
Council Tax Abolition and Service Tax Introduction (Scotland) Bill: Stage 1	1397
Police, Public Order and Criminal Justice (Scotland) Bill: Stage 1	1411
EXECUTIVE RESPONSES	1421
Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005 (SSI 2005/558)	1421
Firefighters' Pension Scheme Amendment (Scotland) Order 2005 (SSI 2005/566)	1422
Registration of Independent Schools (Scotland) Regulations 2005 (SSI 2005/571)	1422
Civil Partnership Act 2004 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572)	1423
Antisocial Behaviour etc (Scotland) (Commencement and Savings) Amendment Order 2005 (SSI 2005/553)	1425
INSTRUMENT SUBJECT TO APPROVAL	1426
Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 17) (Scotland) Order 2005 (SSI 2005/585)	1426
INSTRUMENTS SUBJECT TO ANNULMENT	1426
Act of Sederunt (Fees of Sheriff Officers) 2005 (SSI 2005/583)	1426
Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005 (SSI 2005/584)	1426
Bovine Products (Restriction on Placing on the Market) (Scotland) (No 2) Regulations 2005 (SSI 2005/586)	1427
Mobility and Access Committee for Scotland Amendment Regulations 2005 (SSI 2005/589)	1427
Protection of Water Against Agricultural Nitrate Pollution (Scotland) Amendment Regulations 2005 (SSI 2005/593)	1427
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT	1428
Act of Sederunt (Fees of Messengers-at-Arms) 2005 (SSI 2005/582)	1428
Diseases of Animals (Approved Disinfectants) Amendment (No 2) (Scotland) Order 2005 (SSI 2005/587)	1428
Vulnerable Witnesses (Scotland) Act 2004 (Commencement No 2, Saving and Transitional Provisions) Order 2005 (SSI 2005/590)	1428
Education (Recognised Bodies) Amendment (Scotland) Order 2005 (SSI 2005/591)	1428
Education (Listed Bodies) (Scotland) Amendment (No 2) Order 2005 (SSI 2005/592)	1428

SUBORDINATE LEGISLATION COMMITTEE

33rd 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 Kenneth Macintosh (Eastwood) (Lab)

Mr Stewart Maxwell (West of Scotland) (SNP)

Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Tommy Sheridan (Glasgow) (SSP)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 29 November 2005

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

Delegated Powers Scrutiny

Council Tax Abolition and Service Tax Introduction (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): Welcome to the 33rd meeting in 2005 of the Subordinate Legislation Committee. I welcome Stewart Stevenson, who is the substitute for Stewart Maxwell. I have received apologies from Murray Tosh and Adam Ingram.

Tommy Sheridan is with us to discuss the subordinate legislation arising from the Council Tax Abolition and Service Tax Introduction (Scotland) Bill. Like me, Tommy Sheridan is on the Local Government and Transport Committee, which is dealing with the bill. I apologise for keeping you waiting, Tommy, but First ScotRail has caused us some problems this morning.

You will know that one of our major concerns about subordinate legislation is that the right balance is achieved between the provisions in the bill and those that will be introduced by subordinate legislation. Could you say a little bit about why you think that the balance is correct?

Tommy Sheridan (Glasgow) (SSP): I appreciate that, like other members and me, you were delayed in getting here this morning. There is no problem about my being kept waiting.

The bill is designed to deliver a quite radical policy change in relation to local government finance with a specific policy memorandum commitment to tackling poverty. I appreciate that the Subordinate Legislation Committee is not here to examine the policy outcome, but I think that it is important to emphasise that that is the underlying and most important aspect of the bill.

In drafting the bill, we wanted to establish the principle of the abolition of council tax. When I approached the Parliament's non-Executive bills unit almost two years ago, my intention was to introduce a bill that would abolish council tax and call for an income-based alternative. I was told that that proposal was far too wide and that I had to make it more specific. I would have preferred us to debate at stage 2 what should replace the

council tax, once we had established a consensus to abolish it. However, the Scottish service tax proposal, which I think is the best alternative, was inserted in the bill.

Much of section 5 instructs Scottish ministers in various areas. I think that the balance that you mention is reasonable, given that this is a member's bill rather than an Executive bill. In section 5, there are a number of aspects relating to arrears, penalties and other aspects of tax levying that I think that it is advisable to call on Scottish ministers to introduce.

I hope that section 10 covers the issue of accountability for the various statutory instruments. Section 10 ensures that any orders that are made under the eventual act must be scrutinised by the Parliament and approved by resolution. We are not leaving it completely to Scottish ministers to do as they wish. We are trying to ensure that, when it comes to aspects of finite detail, although the Scottish ministers would be given powers to introduce various instruments, those instruments would have to be scrutinised. Obviously, if those provisions were to be scrutinised as part of a bill, they would receive greater scrutiny. However, they will receive an element of scrutiny. Some of you will have sat in committees and dealt with Executive bills that contain provisions for statutory instruments that are not designed to be scrutinised in that way. I think that section 10 addresses accountability.

Hopefully, that is a reasonable introduction. There are provisions that are open to statutory instruments. The committee will have to take a view on the issue of balance but, given the complexity of the bill and the fact that it is a member's bill, I think that the balance is reasonable.

The Convener: The first section that we want to deal with is section 2(3), which is about the meaning of "qualifying individual".

Stewart Stevenson (Banff and Buchan) (SNP): Section 2(3) appears to apply to anyone of any age, since infants can have an income that makes them subject to income tax and, indeed, wealthy parents can use their children as a mechanism to avoid tax. Would you envisage that the general categories of individuals who are specifically excluded might be something that the orders might cover? If you envisage that, why is that not in the bill?

Tommy Sheridan: Section 2(3) was introduced in relation to the powers of Scottish ministers to decide that, perhaps, students, disabled citizens and so on should be exempt. Under the council tax, students are exempt. As few students will have an income that is above £10,000 a year, they will be excluded because of the income

qualification that the service tax introduces. However, if the bill comes into operation, or as a result of further scrutiny, we might wish to include other classes of individuals.

I should say in response to Stewart Stevenson's point that we had hoped that qualification under income tax generally would have excluded children. I gather from what you say that you think that the bill should specifically mention adults, and that may be reasonable.

The thinking behind section 3 was to give an opportunity for further consideration of whether there were classes of individuals, such as students and disabled citizens, who should be automatically exempted.

Stewart Stevenson: Is the appropriate way to deal with that through secondary legislation, rather than by providing in the bill that children should be excluded?

Tommy Sheridan: I did not think when drafting the bill that such a provision was necessary, given the definitions of "qualifying individual" and "relevant income". A qualifying individual would have to be working and paying income tax, and most citizens fall into that category. I am sure that you will accept that only a very small minority of children in Scotland pay income tax.

It may be fair to say that the bill should contain provisions to deal with that very small minority. However, in drafting the bill we did not think that that was required.

Mr Kenneth Macintosh (Eastwood) (Lab): Section 4(6) gives ministers a wide power to change the bands of income. Is that deliberate? The provision is subject to the affirmative procedure, but would it not be in order for it to be subject to the super-affirmative procedure? Would it not be better to consult the Parliament and others before, rather than just during the process?

Tommy Sheridan: I hope that you will accept my introductory remarks about the genesis of the bill. We tried to leave as much scope as possible for introducing other forms of income-based tax. The convener of the Local Government and Transport Committee provided a clear statement that the general principle of the bill is to establish an income-based alternative—not necessarily the service tax. If, for instance, someone wanted to amend the bill to introduce a local income tax that was set and collected locally, that would be acceptable. We felt that section 4(6) should contain scope for flexibility.

You make the reasonable suggestion that section 4(6) should be subject to the super-affirmative procedure so that there would be consultation first. However, there is a requirement in the bill for the Parliament to approve a draft of

any instrument that ministers might propose. Nevertheless, there is a bottom line—those who earn less than £10,000 per annum would be exempt. You will notice that there is no flexibility on that provision. There should, however, be flexibility on the other provisions.

I feel, as you might expect from the member in charge of the bill, that the rates of tax are reasonable and would provide the required surplus that we seek. However, having that flexibility allows some playing around with the bands if people think that they are not punitive enough, or are perhaps too punitive.

11:00

Mr Macintosh: I just want to clarify this. The ministers could change the bands. The bands would start out as national bands, but there could be local bands in each local authority, which could be changed by ministerial order.

Tommy Sheridan: I do not envisage ministerial orders instructing a change to the national band system. I envisage other individuals or parties seeking to amend the bill at stage 2 to change the national banding to local setting. As I said earlier, the convener of the Local Government and Transport Committee has established that, should such an amendment be submitted, it would be competent. However, if the bill were passed in its current form, with national bandings, I do not envisage the Executive having the power to instruct one local authority to have a different band from another. They could instruct that there was to be a different band, but that would be across all local authorities.

Stewart Stevenson: I want to ask about the provisions of section 4(6)(a), which specifically excludes from the power the ability to reduce band A below £10,000. For example, say a person has an income in excess of £90,000—they would fall into band E. Without any tax implications, they could transfer £0.25 million of HBOS shares to their spouse. Those shares would generate an income from dividends of about £9,000 at current rates.

The Convener: We must be careful not to stray into policy issues, Stewart.

Stewart Stevenson: I am not going to. I just want to be clear whether, in specifically excluding taxation on income below £10,000, it is the intention to prevent secondary legislation from being applied to cover situations where a transfer of significant assets to the spouse would have the effect of reducing by £2,000 the taxation on someone earning more than £90,000. Tommy Sheridan's provision would specifically prevent ministers from addressing that in secondary legislation. I suspect that you, like me, would see

that as a circumvention that you would not want to permit, Mr Sheridan. Did you have it in your mind deliberately to allow that?

Tommy Sheridan: You will not be surprised to hear that the intention behind section 4(6)(a) is to tackle poverty and remove from tax liability those whom we, the Scottish Low Pay Unit and the Scottish Executive consider to be living on a below-poverty level of income. On your example, I hope that under section 5(4), on the various aspects of pursuit of those liable to pay, we would be able to deal with as many loopholes as possible. I accept that there is no perfect tax system. We have huge levels of tax evasion here and now. I hope that there are provisions in the bill to try to prevent some tax evasion, but there is no doubt that some people will try to evade some taxes, including this one—and they might succeed. However, I do not think that tax policy should be predicated on the activities of a minority.

The Convener: Section 4(6) is important. Sensitive issues will arise, particularly if additional bands are put into the system. Are you saying that you would like a super-affirmative procedure to be used to allow discussion on that? Would you consider that? It would mean that there would be more parliamentary debate about that.

Tommy Sheridan: I always support more opportunities for parliamentary debate and scrutiny. If the super-affirmative procedure facilitated such opportunities, I, as the member in charge of the bill, would support its use. At the moment, according to various anti-poverty and Government organisations, people living on less than £10,000 a year are said to be living in poverty. However, three or four years down the line, that level might be £12,000. Moreover, the 15 per cent tax rate for band C could be split. Before we decided on the current proposal, which moves from a 4.5 per cent tax rate in band B to the 15 per cent rate in band C, we initially considered an 8 per cent tax band for certain incomes. Such ideas would benefit from more consultation and debate, and I have no problem with that.

The Convener: That is fine.

We move to section 5(4)(e), on the levying and remitting of the Scottish service tax.

Gordon Jackson (Glasgow Govan) (Lab): Section 5(4) contains many provisions and I accept that the detail has to be dealt with in subordinate legislation. However, section 5(4)(e) permits an order to be made to create penalties for people who fail to pay the tax. As a result, that becomes a criminal sanction. In general, the committee has always argued that any provisions on criminal penalties should be set out in the bill and that the Executive should not have the power to create such offences and penalties by order.

That simply protects the role of Parliament quoad the citizen. I completely understand that penalties cannot always be detailed in the primary legislation—after all, they change all the time—but I feel that, if any criminal offence is created, it should be set out in the bill, perhaps with some indication of the maximum penalty that would be imposed. Has that crossed your mind?

Tommy Sheridan: That is a fair point. I hope that the committee accepts that the intention behind section 5(4)(e) is to establish a penalty to discourage any attempts either to evade or to circumvent the tax. We did not prescribe the penalty in the bill because we hoped that ministers would, by way of an order that would be subject to parliamentary debate, consider penalties that were commensurate with the antisocial behaviour of avoiding reasonable and fair taxes. One wider problem in society is that those at the very top think that taxes are for the little people. I felt that it might not be in my best interests to set out in the bill the level of penalty that I wanted to be introduced for the minority at the top of the tree who avoid taxes, as it might discourage some faint hearts from supporting it. However, I hope that ministers would come up with a balanced proposal that would allow Parliament to examine whether the measures were hard enough or not.

Gordon Jackson: I am not particularly concerned about the level of penalty. I might not have understood it right, but I do not think that the bill says that a penalty will be created in that respect. It simply gives the power to create a penalty under subordinate legislation. For quite good libertarian reasons, the committee likes the creation of criminal offences to be set out in the primary legislation.

Tommy Sheridan: Your point is reasonable, but I must point out that, as far as the bill is concerned, one of the major advantages of having an income-based tax is the ability to collect at source for the overwhelming majority of taxpayers and, for the rest, through self-assessment. The level of evasion of income-based taxes is much lower than that of other taxes, therefore the use of penalties will be a minority sport, which is why they are not spelled out in detail. The current figure for the collection of income-based taxes, including national income tax, is around 98 per cent, whereas council tax collection runs at 90 to 91 per cent. In Glasgow, the figure is 85 per cent. You can see that there is a requirement for recovery measures to be spelled out more.

The Convener: Gordon, do you want to pursue any points about the limit being in the bill?

Gordon Jackson: If you do not create a penalty in the bill, you cannot put a limit on it. Our general view is that with criminal sanctions the Parliament should state—and historically has stated—what

the limit is, whether it is two years in jail or a £1 million fine or whatever. However, I can see why, from your self-interest point of view, as you put it, you might not want to put that in the bill. There is a civil liberty argument against executive power to create criminal offences.

Tommy Sheridan: I may be over-egging this part of the pudding, but the executive power is not without the check and balance of having to come to the Parliament. Every order that we are talking about would have to be presented to the Parliament. I am sure that if a sanction went beyond our civil liberty limit, such a hue and cry would be created that a problem would be caused.

Gordon Jackson: I accept that but, at the risk of wearying the committee, we deal with subordinate legislation, and while we accept that there is parliamentary scrutiny we are also a little cynical about it. How often is subordinate legislation knocked back because it cannot be amended or touched? We always feel safer when details are included in the bill. I hope that that is not a cynical view of subordinate legislation, but it is based on our experience.

The Convener: Before we conclude on this matter, Stewart Stevenson has a quick point, as does Ken Macintosh.

Stewart Stevenson: I seek clarification. Do penalties include civil penalties as well as criminal ones?

Tommy Sheridan: I envisage that the penalties will be civil. I do not envisage imprisonment for non-payment of the Scottish service tax, but neither do I envisage a non-payment fine of £2,000 for someone who earns £2 million. In other words, I want the balance to be punitive for avoidance. The only way that America was able to get hold of Al Capone was by imprisoning him for non-payment of his taxes. Maybe that is the only way that we will get hold of our Al Capone equivalents who are rich and avoid taxes. However, given my civil libertarian background, I do not support the sending of people to prison for non-payment of taxes, although people with considerable means should face considerable penalties.

Gordon Jackson: On that basis, one could put in the bill that the penalty rate has to be considered by the Scottish Executive, but that it cannot include imprisonment. That way, our libertarian fears would be allayed. That is only a suggestion.

Tommy Sheridan: It is a helpful suggestion, which I endorse and accept as good advice from the committee.

Mr Macintosh: I bow to Tommy Sheridan's experience in dealing with imprisonment for avoiding local taxes.

Under the bill, instruments made by ministers under the delegated powers are to be subject to the affirmative procedure, so they will be scrutinised and approved by the Parliament. However, do you not envisage that parliamentarians might wish to make their views known through a super-affirmative procedure? Many members would wish to express their views on the level of penalties.

11:15

Tommy Sheridan: It is worth pointing out that I have never been imprisoned for non-payment of taxes—we do not have that facility here in Scotland. I was imprisoned for breach of a court order in relation to the poll tax. I also underline the fact that I have been talking about the avoidance of fair and reasonable taxes, which I do not consider the poll tax to have been.

I suppose that you guys on the Subordinate Legislation Committee need to strike a balance. You need to consider the parliamentary process for the passage of bills, and you have to consider whether we get to an end point sooner or later. Some super-affirmative procedures will be necessary to ensure that, even after the Parliament has expressed its will, there is further detailed scrutiny of certain sections before the bill receives royal assent or comes into force. However, there will be other aspects of legislation for which that would be viewed as an unnecessary drag on the parliamentary process.

As far as this aspect of the bill is concerned, I find it difficult to envisage that the Scottish Executive would come forward with extraordinary penalties that would be completely out of sync with the wishes of the Parliament. I would probably be in a minority, arguing that the penalties should be a lot tougher, but I am sure that other minorities would argue that they are far too tough. The Scottish Executive would probably represent the middle ground. I am not so sure that this is in a similar vein to the earlier point about levels of bands.

The Convener: I have a further point for the committee before we come to a decision. If we suggest the super-affirmative procedure as a possibility for section 5(4)(e), and if we do not put the provision on the face of the bill but keep it as a delegated power, it might be difficult not to apply the super-affirmative procedure to all the paragraphs—(a) to (h)—of section 5(4). There is no problem with that, but I alert committee members to the fact that that might follow from the decision taken on paragraph (e). It would be useful

if we could get our comments back to the lead committee, which meets this afternoon. That does not, however, preclude us from having an on-going conversation about the bill. We still have time to discuss it further.

Are you happy to take away with you the committee's thoughts on these alternatives, Tommy? The provisions for penalties could be on the face of the bill, with a bit more there about what the penalties should be and any limit to them, if you feel that that might be a safer option; or you might want to maintain the delegated power and go for something stronger than the affirmative procedure—perhaps the super-affirmative procedure—which would give the Parliament more of a say. Are you happy to take that away, rather than making a quick decision now?

Tommy Sheridan: I would welcome the Subordinate Legislation Committee's report. We need to bear in mind the timescale to which we are now working. The Local Government and Transport Committee will discuss a first draft of its report today. Next Tuesday, it will consider the final draft. The intervening time that will be available for me to liaise with this committee will probably not allow for any meaningful, productive work. It would probably be better for me to make comments via the Local Government and Transport Committee, based on the Subordinate Legislation Committee's comments.

You will know from what I have said this morning that I am largely positive about the points that this committee has made. That might allow for more meaningful input. I would not want you to wait for further comments from me before coming to your conclusion. I think that we have probably had a reasonable discussion on the issue.

The Convener: Good. I would prefer it if we could send a decision to the lead committee this afternoon. I have provided two alternatives. We could suggest that either alternative might offer a way to get over the problem. Originally, we were suggesting that we could include more provisions in the bill itself. That would be the normal procedure. The alternative is that, instead of using the affirmative procedure, we could apply the super-affirmative procedure to the power, which would mean having more parliamentary debate about it.

Gordon Jackson: There is an in-between, which I would be quite interested in pursuing. We could leave the nitty-gritty about bands, penalties and that whole thing to the affirmative or super-affirmative procedure, but we could put it in the bill that people cannae get the jail.

The Convener: Sorry? You are suggesting that the bill could say—

Gordon Jackson: The bill could say that people cannot get the jail. It could say that ministers may create penalties but that those penalties cannot include going to jail.

Tommy Sheridan: Non-custodial penalties.

Gordon Jackson: We just do not like the Executive being able to create offences that give folk the jail.

The Convener: After we have gone through all the points with Tommy Sheridan, we will summarise our main views, which we will put to the Local Government and Transport Committee. I think that we are on the same track on that issue.

The final point concerns section 6, which deals with the distribution of revenue to local authorities. Subsection (3) provides that, in each financial year,

"Ministers are to divide the total revenue amongst local authorities as they consider appropriate".

The duty that the section imposes on ministers would not be subject to parliamentary scrutiny. What are the committee's views? Are members happy with that? I ask Tommy Sheridan to give us the rationale.

Tommy Sheridan: The explanation is that I and, I think, many organisations believe that the current distribution mechanism for local authority revenues is faulty. That view is probably more widely held among urban than rural representatives. The distribution of funds to take account of roads or demographics such as the number of pensioners in an area often leads to a skewing of moneys. For example, if a local authority area has X number of extra pensioners, that counts for an improvement in the revenue received. One reason for the figure could be that an area is a good place to live in and to retire to, so it might not be particularly deprived, but it could receive extra money on the basis of a deprivation statistic.

The distribution of funds to local authorities requires more thorough examination. The Convention of Scottish Local Authorities and the Scottish Trades Union Congress are mentioned in the bill because COSLA would represent local government as a whole and the STUC would represent those who work in local government and the overwhelming majority of local government service users. I hope that we would come up with a fairer distribution mechanism than that which we have. That might be a bit like rocket science—we will not satisfy everybody, that is for sure. However, we must tackle the issue.

Stewart Stevenson: The power in the bill relates simply to what would be raised via the proposed service tax, which would form a minority of local authorities' funding. Given that the thrust

of the power could be thwarted absolutely if an entirely different distribution formula applied to the majority of the funds that are given to local authorities, is the power sensible? I wonder whether it would achieve what you want, without making judgments on that. Would it not have to be more broadly drawn to cover the distribution of all funding to local authorities?

Tommy Sheridan: It was an absolute necessity to refer to the distribution to local government of the revenue raised because, to satisfy the legal competency, we had to make it clear that any revenue raised would be ring fenced for local government jobs and services. The requirement to mention that was sacrosanct.

You are right that we are talking about distributing roughly 20 per cent of a local authority's revenue, which currently comes from council tax. However, it should be borne in mind that even the Executive agreed in evidence to the Local Government and Transport Committee that, if the bill were enacted, the service tax would make a considerable surplus—£318 million, according to the Executive's figures—over what the council tax raises. That would be a reasonably large cache of money over and above what the council tax raises.

The fact that that money would be distributed on a new methodology involving specific named bodies—COSLA and the STUC—is one of the bill's advantages. Continuing to distribute 80 per cent of funding under the current mechanism would allow all 32 local authorities still to receive what is considered to be the bottom-line requirement, but having a new mechanism for the other 20 per cent would give us room to better recognise the multiple deprivation in many local authority areas. The current distribution mechanism does not recognise that.

Mr Macintosh: You want to consult COSLA and the STUC. Would you want to consult Parliament as well?

Tommy Sheridan: I would envisage that the consultation with Parliament would be done via the minister's report on the mechanism after consultation with those two bodies. I thought that you were going to mention other bodies, such as the Scottish Pensioners Forum, Age Concern and so on. One of the problems is that there are so many pensioners organisations that it is difficult to identify which one we would want to consult in that regard. The two bodies that are specifically named in the bill give us a much broader level of statutory consultation on the distribution of money than we have at the moment.

The Convener: It is hard to see how a distribution of this importance would not be laid before Parliament, perhaps as a financial report.

However, you might feel that you would want to ensure that that happens by placing a requirement to do so in the bill.

Tommy Sheridan: I welcome constructive comments from the committee. Originally, we envisaged that any distribution mechanism so agreed would be reported to Parliament via the statutory instrument and that that would be covered by the last section of the bill. If that is not clear enough and the situation has to be made clearer, what you suggest is helpful. The intention behind this section, as I hope that I have made clear, is to tackle one part of an unfair distribution system for local authority revenues.

The Convener: That is fine. Most likely, that will go forward as one of our recommendations. I hope that that will be helpful.

Thank you for coming to see us, Tommy. We will now send our report to the lead committee.

Tommy Sheridan: Thanks very much.

The Convener: Tommy Sheridan responded to the points that we raised on section 2(3), which deals with the meaning of "qualifying individual". Stewart, what would be your recommendation on that issue? Were you happy with the clarification that was given?

Stewart Stevenson: I have a remaining concern, but whether the committee wants to comment on it is a different issue. Under the powers that would be granted by the section, would one be able to refine "class of individuals" in a way that supported the broad policy intentions? For example, are we going to say that children of wealthy parents are not covered by an exclusion but children of impoverished parents are? That is my general area of concern.

The Convener: Any other points?

Mr Macintosh: Tommy Sheridan made clear his view that, although there might be certain classes of individuals who would be exempt, the qualifying level is income and that that is the deliberate policy. In that regard, there is no mistake or omission in the bill. Therefore, I have no comment to make.

Gordon Jackson: I see no problem with the bill giving ministers broad powers to exclude qualifying persons as they see fit. Neither is it necessary to include in the bill provisions specifying children as being exempt from paying tax. Like Ken, I see no problem with the broad categories or with giving ministers the power to exclude qualifying individuals by order, as and when they think it appropriate.

11:30

Stewart Stevenson: My point is a very narrow one. It is whether the phrase “class of individual” is sufficient to enable the bill to deliver what it wants to deliver. Other policy issues are for later.

The Convener: Perhaps we will identify the issue that you raise but, overall, the committee is minded that the balance in the bill is right.

Members indicated agreement.

The Convener: Our question on section 4(6) was pretty straightforward. We said that the issues that it raised were fairly sensitive and that it might be better to make the powers in subsection (6) subject to the super-affirmative rather than the affirmative procedure. Is that agreed?

Stewart Stevenson: I have serious concerns about the restrictions that subsection (6) places on ministers’ power to reduce band A below £10,000. That binds ministers so that they cannot close off certain taxation loopholes. I would prefer in this instance for that issue to be addressed in secondary legislation.

Gordon Jackson: My instinct is that it is a policy matter.

The Convener: That is my instinct too.

Gordon Jackson: I understand Tommy Sheridan’s point that it is his policy that ordinary people who earn less than £10,000 should not pay the service tax. He has a realistic view that some people with a great deal of money will always manage to do a bit of tax avoidance—rather than tax evasion. One can never stop that totally. Tommy Sheridan, as a matter of policy, would say, “Well, if the odd very wealthy person does what you suggest, that is a price that I am prepared to pay to make sure that no poor people get caught.” That is a policy judgment, not a matter for subordinate legislation.

Stewart Stevenson: We should look at the policy effects of excluding from subordinate legislation ministers’ powers to reduce band A. Without making any judgment on the rights and wrongs of the bill or on anything that might flow from it, I feel that there are specific issues involved in excluding the power to reduce band A from secondary legislation. That is the narrow point that I make.

The Convener: My understanding of what Tommy Sheridan said is that exempting people who earn less than £10,000 a year is a strong policy of his and that that is why it is in the bill. I am tempted to think that because that is such a strong policy issue for him, it is perfectly okay in this case.

The other areas are open to change and Tommy Sheridan was perfectly open about that. However,

as they are sensitive issues, perhaps they should be subject to the super-affirmative procedure. That is my summary. Do members agree with it?

Stewart Stevenson: I absolutely defer to you. I have made my point.

Members indicated agreement.

The Convener: Gordon Jackson suggested a middle road for section 5(4)(e).

Gordon Jackson: To be fair, Tommy Sheridan accepted that the committee does not really like there to be criminal sanctions in subordinate legislation. If the bill specifies that any penalty that ministers sought to impose could not include imprisonment, I think that we would be happy with that. That would deal with the civil liberty issue.

The Convener: Yes. Having heard the comments made by the member in charge of the bill, we suggest that a provision should be added to the bill stating that the penalties should not include imprisonment.

Gordon Jackson: Subsection (4) permits ministers to create penalties. All that we need to add to it to keep everyone happy is that the penalty does not include imprisonment. It would be too difficult to state in the bill the maximum level of fine and so on because there is such disagreement on those issues. I suggest a compromise.

The Convener: Are we agreed?

Members indicated agreement.

The Convener: The last power is in section 6(3), which is on the distribution of revenue. I have come round to the view that the bill should at least state that a report would be laid before Parliament. I do not know whether members think that there should be more than that.

Mr Macintosh: Tommy Sheridan obviously believes that the power in section 6(3) is covered by section 10, which states that

“Any power of the Scottish Ministers to make orders is exercisable by statutory instrument”

subject to the affirmative procedure. Is he correct?

The Convener: No.

Gordon Jackson: It is just a power in section 6(3)—there is no regulation, no order or anything.

The Convener: There is no regulation at all.

Mr Macintosh: I wanted to clarify that point, because that was my understanding. Tommy Sheridan specifically said that he thought that the provision would be covered, but it is not.

The Convener: We can make that point. If Tommy Sheridan thinks that section 10 covers that provision, we should at least make it clear that it

does not. Does Gordon Jackson want to add anything to my suggestion that the bill should state that a report would be laid before Parliament?

Gordon Jackson: No.

The Convener: Okay. We agree. We can pass those points to the Local Government and Transport Committee this afternoon.

Mr Macintosh: We could also add that I disagree with the bill.

The Convener: Sorry?

Mr Macintosh: It is okay.

The Convener: It was a frivolous comment.

Police, Public Order and Criminal Justice (Scotland) Bill: Stage 1

The Convener: Item 2 is delegated powers scrutiny of the Police, Public Order and Criminal Justice (Scotland) Bill. A number of direction-making powers have been highlighted to the committee in addition to the delegated powers and those will be included in our discussion.

The first of the powers is in section 4, which relates to the strategic priorities of the Scottish police services authority. Section 4 authorises the Scottish ministers—after consultation with the persons listed in subsection (2)—to determine strategic priorities for the Scottish police services authority. The determination is not a statutory instrument. Are members happy with the power?

Mr Macintosh: I asked about the matter before the committee meeting started because it strikes me as odd that the Executive would not wish us to debate such an important matter as strategic priorities. We could make a comparison with the national priorities in education, which I think the Executive put into subordinate legislation. We should certainly flag that up.

Whether or not the power becomes subordinate legislation is less important to me than the fact that Parliament would have a chance to debate strategic priorities. Obviously, subordinate legislation is not always debated. Perhaps the issue is to identify a way of ensuring that strategic priorities are debated.

The Convener: It strikes me that this is a particularly important area.

Stewart Stevenson: Essentially, the Scottish Drug Enforcement Agency is part of the police force and that will be increasingly the case for the Scottish crime and drug enforcement agency. If we are going to tell the police what to do—to paraphrase—we certainly should do so in the open and subject to parliamentary scrutiny.

The Convener: We have time to revisit the issue. I suggest that we flag it up as being a particularly important matter on which there will need to be some parliamentary debate, if nothing more than that, at some point.

Members indicated agreement.

The Convener: Section 13 will give the ministers power to modify the Scottish crime and drug enforcement agency's strategic priorities. The Executive takes the view that the power, which is similar to that in section 4, is executive rather than legislative.

Stewart Stevenson: The same issue arises.

The Convener: Very much so.

Mr Macintosh: For some reason, I did not feel so strongly about the power in section 13, perhaps because the new agency will have a specific role. However, a similar point arises.

The Convener: Yes—our response will be similar to the one that we have agreed to make on section 4.

Section 19(1) will confer a power on the Scottish ministers to modify section 18, which relates to the powers of the Scottish crime and drug enforcement agency. As drafted, the power will be subject to the affirmative procedure and to prior consultation with specified bodies. Does that seem appropriate?

Members indicated agreement.

The Convener: Section 21(1) will give ministers the power to make regulations in relation to the government and administration of, and the conditions of service within, the new agency. The powers are similar to those in the Police (Scotland) Act 1967. From the information that we have received, there seem to be no further points on the power. Are members happy with it?

Members indicated agreement.

The Convener: Section 22(1) will provide a power for ministers to modify section 3(2), which defines the police support services that the police services authority will be under a duty to provide. As members will know from our briefing, the power is significant, so we should consider building in some kind of restriction or perhaps even making the power subject to the super-affirmative procedure.

Stewart Stevenson: I cannot find the section, but I seem to recall that the bill will give ministers the power to require police forces to use the services. In that light, the power in section 22(1) will certainly have to be subject to the greatest scrutiny because the ministers could say that the authority should provide every single service that the police currently provide and, by that process,

in effect abolish the operational police forces. That is not in prospect but, as that is the power that will be granted, it should be subject to the most rigorous parliamentary scrutiny.

The Convener: Do members agree that we should up the procedure from affirmative to super-affirmative?

Stewart Stevenson: Yes, although that assumes that the Parliament will allow the power to remain in the bill at all. However, that is a matter for elsewhere.

The Convener: Yes. We will mention the concern about the power.

Section 23(1) will enable the ministers to require police forces to use the police support services, as specified in regulations.

Stewart Stevenson: I apologise for interrupting, but that is the power to which I was referring earlier.

The Convener: Yes.

The bill provides for extensive consultation to be carried out. Are members content with the power?

Stewart Stevenson: The same issue arises as with the power in section 22(1). The power would have to be subject to the super-affirmative procedure, but I am yet to be persuaded that it should be in the bill at all, in the present terms.

The Convener: At present, the power in section 23(1) will be subject to the negative procedure. Our proposal is to up that to the affirmative procedure.

Stewart Stevenson: I am sure that the Executive will be asked elsewhere to justify the policy intentions, but the subordinate legislation powers appear to open a big door very wide.

The Convener: Shall we recommend that the power should at least be subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 28 will authorise ministers to give directions to the new authority and agency with which they must comply. The directions will be published but will not take the form of a statutory instrument. Are we content that the directions will be executive rather than legislative?

Members indicated agreement.

11:45

The Convener: Members are happy with that—good.

Section 32 is on examination of the manner of handling a complaint. Subsection (3) will give

ministers the power to prescribe exceptions from the duty to notify complainers of the outcome and actions to be taken as a result of a complaint-handling review. Are we content with the provision and with the fact that the regulations will be subject to the negative procedure?

Stewart Stevenson: I am relatively concerned about using the negative procedure—I would have thought that the affirmative procedure should apply. That is in part because I am not sure what the power would be used for, but it sounds as if it could be open to the accusation of being used to keep the outcomes of uncomfortable complaints secret.

The Convener: If you agree, we might first ask for clarification of some of the issues. Our legal briefing is more about issues that need clarification than the level of scrutiny. Do you agree that we should first clarify the issues?

Stewart Stevenson: I agree entirely with that, especially as I might not be with the committee at subsequent meetings.

The Convener: I am sure that Stewart Maxwell will pick up the baton.

Section 33 concerns the duty of the commissioner not to proceed with certain complaint-handling reviews. It enables the commissioner to discontinue a complaint-handling review in some circumstances and contains three regulation-making powers. Scrutiny will be by the negative procedure and I want to ensure that members are happy with that. That level looks to be of the right order and to be reasonable. Is there any reason to have a greater level? It is not entirely clear why appropriate provision cannot be included in the bill, but it is suggested that the concern is not great and that the level of scrutiny is about right. Do we agree?

Members indicated agreement.

The Convener: There would be nothing wrong with asking why the provision is not in the bill. Do we agree to that?

Members indicated agreement.

The Convener: Okay—we will ask that question.

Section 36(3) deals with the duty to keep a complainer and the commissioner informed. The power is similar to that in section 32(3) and allows the commissioner to make exceptions to the duty to notify complainers of findings, outcomes and actions to be taken after a complaint has been reconsidered. Are we happy with the power? The issues are similar to those under section 32(3).

Mr Macintosh: We discussed writing to ask the Executive about its intentions.

The Convener: Yes. That is agreed. Section 37 gives the commissioner the power to discontinue reconsideration. Are we content with that? It mirrors the powers that section 33 confers and similar points arise. Members have no other comments.

Section 41(1) is on provision of information to the commissioner. It gives ministers the power to make regulations that set out the circumstances in which documents or information specified or described in those regulations should be provided to the commissioner by appropriate authorities. Members have no points on the power, which seems okay.

Section 46 concerns constables who are engaged on service outside their force—that is interesting. It will insert into the Police (Scotland) Act 1967 new section 38B, which will give ministers the power to amend section 38A(1) of that act, which governs relevant service for police officers and protects pay and pension rights. The new power will allow Scottish ministers to add to, remove from or amend the list of types of outside service that will be regarded as relevant service. Are we happy with the provision, which is subject to the negative resolution procedure?

Gordon Jackson: I am. I know that there is a point in the briefing paper about it, but it is an internal matter for the police.

Stewart Stevenson: It mirrors the existing provisions in respect of the SDEA, whereby policemen are moved into the SDEA and can return.

The Convener: The point is made that some of the changes could be subject to affirmative resolution.

Gordon Jackson: They could be. I take the point that constables' pay could be altered, but without sounding facetious, they are big boys; they can look after themselves internally.

Stewart Stevenson: I understand that police who go to the SDEA at the moment continue to be held in their own police forces. The SDEA simply sends money across. Under the new arrangements, they will become part of the new agency, so the situation is related. I do not think that there is anything to get wound up about.

Gordon Jackson: Nor do I.

The Convener: Okay, we will leave that as it is.

Section 51 is on football matches and regulated football matches. Section 51(2)(b) provides ministers with an order-making power to prescribe individual matches that are held in Scotland as regulated matches for the purposes of the football banning order legislation. Section 51(4) provides ministers with an order-making power to amend

the definition of "regulated football match" by adding to, amending or removing existing descriptions. Are we happy with that?

Members indicated agreement.

The Convener: Section 55 is entitled, "Information about making, varying or terminating order etc." When a football banning order is made, the court must ensure that the persons listed in the bill initially all receive a copy. Section 55(1)(b) allows ministers to prescribe by order other people to whom the order should be sent. No issues arise.

Section 58 is entitled, "Notices under section 57(4): further provision". Are we content with the provision in section 58(1)? If no points arise, it seems to be okay.

Sections 59 and 61 are on guidance, which members will note is to be published. The Executive considers that the guidance will be administrative rather than legislative. I need members' comments. If there are none, are the provisions agreed?

Members indicated agreement.

The Convener: Section 65 is on interpretation of chapter 1 and provides ministers with an order-making power to modify the definition of the enforcing authority, so as to appoint a different person or persons as the enforcing authority for the purpose of football banning orders. Are we content with the power as delegated? There is an issue. It is suggested that the need for the order-making power is not clear. If the intention is to allow ministers to appoint alternative authorities as they see fit, the bill could simply say that.

Mr Macintosh: Perhaps we could write to the Executive about this. The Executive does not appear to be considering changing the enforcement agency; it is just changing its definition.

The Convener: The big issue is that the provision is not clear as drafted.

Mr Macintosh: Could there be a different enforcement agency? What other agency could it be?

The Convener: Our briefing paper states:

"If on the other hand it is intended that the power should be used to specify particular enforcement agencies, in other words that Parliament should have the power to veto alternatives then this is not achieved by the power as drafted."

Mr Macintosh: We could write to seek clarification. I did not think that that was the intention.

The Convener: Shall we clarify the intention?

Stewart Stevenson: Yes. I would have thought that one might consider including the deputy and

assistant chief constables of Strathclyde police force, for practical reasons. The test that I would apply is whether the power enables ministers to do that. It seems to me that it does.

The Convener: The information that I am getting is that that is perhaps more a drafting point.

Stewart Stevenson: In that case, let us simply make the point.

The Convener: Yes. We need to clarify exactly what is meant and whether the drafting is right. Is that agreed?

Members indicated agreement.

The Convener: Section 66 is on notification of public processions. It allows ministers to exempt certain processions of a certain description from notification requirements. Are we happy with the provision?

Members indicated agreement.

The Convener: Section 68 is on minor amendments to the Civic Government (Scotland) Act 1982 and the power for ministers to issue guidance to local authorities in exercising their functions under the act. The section seems okay. Is that agreed?

Members indicated agreement.

The Convener: Section 74(7) is on the power to take fingerprints to establish identity. The power under the Criminal Procedure (Scotland) Act 1995 is amended to approve devices that can be used to take fingerprints. Are we content with the power?

Stewart Stevenson: Given the on-going debate about the technical quality of fingerprint identification and matching, I would prefer any approval of devices to be subject to some sort of parliamentary procedure.

The Convener: Yes. I was thinking along exactly the same lines, but I wonder whether that is for the lead committee to consider, because it is more a policy issue.

Stewart Stevenson: It could well be.

The Convener: Assuming that that is correct—

Stewart Stevenson: It is certainly correct to have a debate. I am not expressing a view on the debate.

The Convener: I meant that the procedure was correct. Do we agree to leave that there? We can highlight the issue to the lead committee, because it is a sensitive issue.

Mr Macintosh: What exactly are we highlighting to the lead committee?

The Convener: We are highlighting the issue of how new devices that are brought in for taking fingerprints are approved.

Stewart Stevenson: Given that the current processes for collecting the information, recording it and matching it with existing information—

The Convener: Cause problems.

Stewart Stevenson: Let us say that they are the subject of on-going debate. If we are to change the technology involved, Parliament should be involved in the process for approving that. I am not suggesting that anything more than a negative instrument is needed. I am not making any particular point; to some extent it is a policy issue.

The Convener: The clerk has the best solution, which is to highlight to the lead committee that there is no procedural problem but that the policy could be an area of concern.

Stewart Stevenson: Spot on.

Mr Macintosh: The debate that has surrounded the quality of fingerprints is politically generated in many ways. The questions that have been raised have been raised through the political process, which has not been particularly helpful.

The Convener: The fact that there has been debate about the issue makes it sensitive.

Mr Macintosh: The debate about the issue is politically generated. It relates to a specific case and is inaccurate.

12:00

The Convener: We all have different views on the matter, which makes it sensitive and means that there is some concern. There is nothing wrong with highlighting that to the lead committee, but we will also tell it that this particular power should not be subject to procedure.

Section 75 deals with the power to prescribe police areas. The power allows for a person who has been arrested to be texted—is that right? There is a typo in the papers. The sentence should read “tested for a relevant class A drug.” That seems okay.

Mr Macintosh: Has the convener been tested?

The Convener: Texted, tested—sorry about that minor error.

Section 76(1)(b) deals with assessment following a positive test under section 20A of the 1995 act. The subsection is to be removed by an amendment at stage 2. We should note that information from the Executive.

Section 82 deals with the interpretation of sections 76 to 80. The section allows ministers by

regulations to prescribe qualifications or experience necessary to deem someone a "suitably qualified person" for the post of drugs assessor. Are we happy with that?

Members indicated agreement.

The Convener: Section 86 deals with further provision under section 84. The section gives Scottish ministers the power by order to make provision for the procedure for sentence review and appeals against a decision in a sentence review. The provision in such an order will largely be a matter of administrative or procedural detail. The question raised is whether affirmative procedure is required even if the 1995 act is modified, given that the purpose of the order as set out in the act limits the extent of the power. Is that okay?

Mr Macintosh: Are we asking for a power to be downgraded for once?

The Convener: Is it a downgrading? I assumed that the argument was that we need not think of the power as being subject to affirmative resolution. However, I am advised by the clerk that is it a downgrading and that Ken Macintosh is correct. I do not think that we have ever done that before.

Section 92 deals with ancillary provision and section 94 deals with commencement. Are there any problems with the powers in those sections?

Members: No.

The Convener: Paragraph 3(8) of schedule 1 deals with the power to amend the maximum number of members of the proposed Scottish police services authority. This is a good old Henry VIII power that allows ministers to amend by order the number of board members of an authority. The power is subject to negative procedure and the Executive offers quite a lot of explanation. It seems that, in this case, because of the information provided, we can accept the negative resolution procedure unless anyone here feels strongly that it should follow the affirmative procedure.

Gordon Jackson: The number of board members is somewhat arbitrary; it could have been 12 members in the first place.

The Convener: Paragraph 1(4) of schedule 2 deals with the power to make regulations about the director of the SCDEA. It will give ministers the power to determine any requirements that must be satisfied in respect of the appointment of the director of the agency. Are we content with the power?

Members indicated agreement.

The Convener: Paragraph 1(7) of schedule 2 enables ministers to substitute another rank for the

post of director of the police services authority. Again, that is a Henry VIII power. Are members happy with it being subject to the negative procedure?

Members indicated agreement.

The Convener: Paragraph 2(2)(b) of schedule 2 provides a power to make regulations as regards the deputy director of the agency. The power is similar to the one that will apply in respect of the director. Are members content with it? I think that I am correct in saying that it is to be subject to the affirmative procedure.

Mr Macintosh: It is negative.

The Convener: Sorry, I had jumped ahead. The power is to be subject to the negative procedure. Are members happy with it?

Members indicated agreement.

The Convener: Paragraph 2(5) of schedule 2 will give a power to amend the rank of the deputy director of the agency. Again, the paragraph confers a Henry VIII power, although it is limited in nature.

Gordon Jackson: It is the same power as the one that we agreed to earlier—if we can allow it for the director, we can allow it for the deputy.

The Convener: Exactly. Do members agree that the power should be subject to the negative procedure?

Members indicated agreement.

The Convener: Paragraph 6(8) of schedule 2 allows ministers to apply provisions of the Police (Scotland) Act 1967, with modifications, to police members of the agency who have been recruited directly. Are members content with the power, which is subject to the affirmative procedure?

Members indicated agreement.

The Convener: Paragraph 2(1) of schedule 3 allows ministers to make provision for staff transfer orders. The provision is a normal one. Are members content with it?

Members indicated agreement.

The Convener: Paragraph 5 of schedule 3 allows the transfer of property rights and liabilities of a police authority, a joint police board or the Scottish ministers to the Scottish police services authority. Do members agree with the recommendation that the transfer of property should also be included?

Members indicated agreement.

Executive Responses

Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005 (SSI 2005/558)

12:08

The Convener: At last, we come to agenda item 3, which is Executive responses. We raised five points with the Executive on the regulations. The first was about the meaning of the word “should” in regulation 2(2). Are members happy with the Executive’s response on that?

Mr Macintosh: We would have preferred the word “must” or “shall”, so we should let the lead committee know that.

The Convener: That was the recommendation that we made. I suggest that we report the regulations on the ground of defective drafting. Do members agree?

Members indicated agreement.

The Convener: Secondly, the Executive was asked whether the requirement in paragraph 3 of schedule 1 is intended to be subject to section 4 of the Rehabilitation of Offenders Act 1974. The Executive confirmed that that is the intention and that applicants will not have to disclose spent convictions under the 1974 act. Should we draw that response to the attention of the lead committee and the Parliament?

Members indicated agreement.

The Convener: Thirdly, the committee asked for an explanation of what the “other legal requirements” in paragraph 4 of schedule 1 are intended to be. The Executive states that the phrase is intended to indicate the range of requirements in housing, rent and other legislation that already affects the letting of houses. Are members happy that we pass that point on to the lead committee?

Members indicated agreement.

Mr Macintosh: Perhaps we should pass on to the lead committee our concern that the Executive should be more specific about the legal requirements.

The Convener: Yes, absolutely. There should be clarification.

Fourthly, the Executive was asked for further explanation of what was meant by “identity” of any other owner and what particulars would have to be supplied. The Executive has explained that “identity” requires a statement of the name of the person as well as any other information necessary to identify them. The other joint owners should

also register, and the intention is to be able to link them together.

Shall we pass those points on to the lead committee and to Parliament on the ground of defective drafting, with the explanations that have been given?

Gordon Jackson: Okay.

The Convener: Fifthly, we asked for clarification of the phrase,

“Where the applicant has been declared under section 83(1)(c)”,

as there is no mention of any declaration in that section of the Antisocial Behaviour etc (Scotland) Act 2004. The Executive replied that the phrase refers to any person who is included in an application by a relevant person because of the requirement in section 83(1) of the 2004 act. The Executive accepts that it might have been more appropriate to reflect the wording of that section but considers that the provision is clear, as the requirement under section 83(1)(c) is to “specify” such a person, which amounts to a declaration. We can pass on our belief that the wording could have been much clearer.

Firefighters’ Pension Scheme Amendment (Scotland) Order 2005 (SSI 2005/566)

The Convener: We had a few points about the order. We asked what plans, if any, the Executive has to amend the firefighters’ pension scheme to take account of civil partnerships. That was the big issue.

The Executive responded with a full explanation of the position in relation to amending the scheme. Due to doubts as to vires under the Scotland Act 1998, the relevant amendments are being effected through a UK instrument—the Firefighters’ Pension Scheme (Civil Partnership Amendments) (England And Scotland) Order 2005 (SI 2005/3228); members will have read that in the briefing—which was made on 22 November and is due to come into force on 5 December.

Shall we draw the Executive’s response to the attention of the lead committee and to Parliament?

Members indicated agreement.

Registration of Independent Schools (Scotland) Regulations 2005 (SSI 2005/571)

The Convener: The committee noted that the regulations do not appear to reflect the enabling power of section 98(3) of the Education (Scotland) Act 1980, which obliges ministers to prescribe information to be supplied to the registrar by the proprietors of independent schools and the manner in which it is to be provided. In particular, the committee asked the Executive to explain the vires of regulation 4.

The Executive has provided a full explanation of the background to the provision and has confirmed that section 98(3) is the enabling power for regulation 4. I suggest that we report regulation 4 on the ground of defective drafting.

Do members wish to add anything about the vires issue? Perhaps we could write to the Executive about our concerns about the vires of regulation 4.

Gordon Jackson: That is fine.

The Convener: The regulation is defectively drafted.

Mr Macintosh: Is this the one on which the Executive wrote back? Perhaps it misunderstood our question. Its explanation is not clear, as it does not answer the question that we asked in the first place, so there are still doubts over the vires.

The Convener: Yes. That is my summary. Shall we write to the Executive along those lines?

Members indicated agreement.

The Convener: The committee also asked for an explanation of the omission of a provision reflecting section 98(3)(c), as its requirements appear to the committee to be mandatory. Interestingly, the Executive has explained that it anticipated the repeal of section 98(3)(c) under schedule 2 to the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, and that is why there was an omission.

Shall we draw the Executive's response to the attention of the lead committee and to the Parliament for information?

Mr Macintosh: Indeed.

Civil Partnership Act 2004 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572)

12:15

The Convener: We raised a number of points on this order. First, we asked the Executive for further information on why it chose to use the general power of section 259 of the Civil Partnership Act 2004 instead of a more specific one. It has replied that the power in section 259 could have been used; however, given the order's generic nature and the wide-ranging powers that section 259 confers, it was satisfied that the powers were sufficient. Shall we draw that response to the attention of the lead committee and Parliament?

Mr Macintosh: Yes. We should draw attention to the fact that the power is general and that the Executive should have used a specific power.

The Convener: In our previous discussion, we said that it was an unusual way of addressing the matter, and it has been suggested that a vires issue might remain. However, it might be enough to say that the Executive has explained that it simply took a different approach to the issue. Are members agreed?

Members indicated agreement.

The Convener: We also asked the Executive to confirm whether the order is intended to encompass all the amendments to subordinate legislation that are currently identified as necessary. In providing that confirmation, it has said that the order should not be regarded as the sole vehicle of modification of subordinate legislation in relation to civil partnerships. Members will recall that, last week, we tried to secure clarification of whether the order would address all aspects of civil partnerships. I suggest that we pass the response to the lead committee and Parliament for information.

Thirdly, we asked the Executive why the preamble to the order does not refer to section 259(4) of the enabling act, which appears to be relevant. Although it agrees that there should have been such a reference, it says that it is satisfied that the omission does not invalidate the order at all. I suggest that we report that to Parliament on the ground of failing to follow proper legislative procedure.

Fourthly, we sought clarification on why no amendment had been made to the heading of form G in regulations 3 and 4 of the Cremation (Scotland) Regulations 1935. The Executive has indicated that, generally, headings are not regarded as part of the instrument and so are not amended. However, it has noted our point, and will make the relevant amendments at the next opportunity. I believe that, after checking out the matter, the Executive found that there were no similar headings, which meant that confusion would not arise. However, it does not seem the best way of addressing the matter.

Do members agree to pass those comments on to the lead committee and the Parliament?

Members indicated agreement.

The Convener: We also asked the Executive to confirm whether, in amending the Scottish parliamentary pensions scheme in articles 26 to 30, it intended to omit an amendment to article N2(a). It says that it is satisfied that the amendment to article 28 is sufficient in that regard. However, we should report the matter to the lead committee and Parliament on the ground of an unusually limited use of the power. Are members agreed?

Members indicated agreement.

The Convener: The committee also asked for confirmation that the wording of article 48 in relation to the amendment to the Education Maintenance Allowances (Scotland) Regulations 2004 (SSI 2004/273) is correct. The Executive agrees that there was an omission and that it will rectify the situation at the earliest opportunity. I suggest that we report that to the lead committee and Parliament on the ground of defective drafting. Are members agreed?

Members indicated agreement.

The Convener: We also asked the Executive why the word "(Scotland)" had been missed out in the title of the order and the citation provision in article 1. It has acknowledged the error, but it says that it is satisfied that the order is still valid. I was astounded that it did not say that it would rectify the error. Anyway, we will pass on the response to the lead committee and Parliament. Are members agreed?

Members indicated agreement.

The Convener: I am really sorry that we have so much business today, but we will press on.

**Antisocial Behaviour etc (Scotland)
(Commencement and Savings)
Amendment Order 2005 (SSI 2005/553)**

The Convener: The committee noted that the title of the order amended by this order had been incorrectly cited in article 2 and in the explanatory note. Although the Executive does not think that the order's validity has been affected, it has confirmed that it will take steps to correct the error with a correction slip to ensure that the correct versions are published on the Office of Public Sector Information website and in the official printed volume. That is a good outcome. We will pass the response to the lead committee and the Parliament on the ground of defective drafting. Are members agreed?

Members indicated agreement.

Instrument Subject to Approval

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 17) (Scotland) Order
2005 (SSI 2005/585)**

12:20

The Convener: Item 4 is consideration of instruments subject to approval. No points arise on this order.

Instruments Subject to Annulment

**Act of Sederunt (Fees of Sheriff Officers)
2005 (SSI 2005/583)**

12:20

The Convener: Item 5 is consideration of instruments subject to annulment. Although no substantive points arise on the instrument, there are a few minor points that we can deal with in an informal letter. Are members agreed?

Members indicated agreement.

**Criminal Legal Aid (Scotland) (Fees)
Amendment (No 2) Regulations 2005
(SSI 2005/584)**

Gordon Jackson: I should declare that, technically, I have a direct interest with regard to these regulations and will take no part in any discussion on them.

The Convener: Thank you, Gordon.

The regulations amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to increase the fees and outlays payable to counsel in certain specified types of cases. The committee will note that regulation 2(1) provides that the new fees and outlays will apply

"only in respect of proceedings concluding on or after 4 April 2005".

It appears that that might give retrospective effect to proceedings that concluded on or after 4 April but that commenced prior to the coming into force of these regulations on 10 December 2005. However, the enabling powers cited in the preamble to the regulations do not appear to provide for that retrospection.

Are members content to write to the Executive for an explanation of the vires of regulation 2(1)?

Members indicated agreement.

Bovine Products (Restriction on Placing on the Market) (Scotland) (No 2) Regulations 2005 (SSI 2005/586)

The Convener: I have some additional information on these regulations. The Joint Committee on Statutory Instruments recently criticised regulation 3 and expressed doubts about the implementation of the European Union directive on this matter. As a result, we might want to raise the same issues with the Executive. Are members agreed?

Members *indicated agreement.*

Mr Macintosh: The regulations cover cream and butter when they are not supposed to.

Stewart Stevenson: Indeed, they cover not only cream and butter but cheese, yoghurt, crowdie and so on.

Mobility and Access Committee for Scotland Amendment Regulations 2005 (SSI 2005/589)

The Convener: No substantive points arise on these regulations.

Protection of Water Against Agricultural Nitrate Pollution (Scotland) Amendment Regulations 2005 (SSI 2005/593)

The Convener: No points arise on these regulations, although we should note that they correct an error that we identified earlier this year.

Instruments Not Laid Before the Parliament

Act of Sederunt (Fees of Messengers-at-Arms) 2005 (SSI 2005/582)

12:23

The Convener: No substantive points arise on this instrument.

Diseases of Animals (Approved Disinfectants) Amendment (No 2) (Scotland) Order 2005 (SSI 2005/587)

The Convener: No points arise on this order.

Vulnerable Witnesses (Scotland) Act 2004 (Commencement No 2, Saving and Transitional Provisions) Order 2005 (SSI 2005/590)

The Convener: No substantive points arise on the order. However, do members agree to raise a point on the explanatory note via an informal letter?

Members *indicated agreement.*

Education (Recognised Bodies) Amendment (Scotland) Order 2005 (SSI 2005/591)

Education (Listed Bodies) (Scotland) Amendment (No 2) Order 2005 (SSI 2005/592)

The Convener: No points arise on these orders.

We now move into private session, but before we do so, I should state that we agreed at our previous meeting to discuss in private the evidence that we heard at this meeting.

12:24

Meeting continued in private until 12:27.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 12 December 2005

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron