SUBORDINATE LEGISLATION COMMITTEE

Tuesday 7 March 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
8th Meeting 2006, 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)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)

CLERK TO THE COMMITTEE

David McLaren

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 7 March 2006

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

Interests

The Convener (Dr Sylvia Jackson): I welcome members to the eighth meeting in 2006 of the Subordinate Legislation Committee. I have received apologies from Gordon Jackson. I remind members to switch off all mobile phones and to insert their cards in the microphone consoles.

The first item is a declaration of interests. I welcome Jamie Stone to his first meeting and invite him to declare any interests.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): Thank you for your kind welcome. I look forward to working with colleagues on this committee. It is best to say that I declare my interests as they are currently recorded in the register of members' interests, if they are relevant to the work of this committee. That is now on the record.

The Convener: Thank you.

Delegated Powers Scrutiny

Bankruptcy and Diligence etc (Scotland) Bill: Stage 1

10:32

The Convener: Item 2 could take us a little while. Members will have copies of the Executive response to our comments on part 1, because we dealt with part 1 at an earlier meeting. You will also have a copy of the legal brief on the remaining sections. We still have time to write to the Executive on the other parts of the bill, or on any of the sections for which we have already received a response. We can consider those responses next week, when we will have our final meeting on the bill.

Members will know that there is a large number of delegated powers in the bill, and will note that the Executive's response makes a number of general points. I have noted three of them, but before I go through them I shall invite members to comment.

Mr Stewart Maxwell (West of Scotland) (SNP): This is probably a point that you were going to raise, convener, about the Henry VIII powers. I hope that I am speaking for colleagues when I say that the Executive's view of what is or is not a Henry VIII power differs from our view—it certainly differs from my understanding of what a Henry VIII power is. Of course, I have been a member of the committee for only three years, so perhaps I have not quite grasped it, but I do not think that the Executive is correct in its interpretation of what a Henry VIII power is. I find it bizarre that it is defending its position, because it seems to go against the briefings that the committee had right at the beginning and against the understanding that I have had for the past three years. I wonder whether we should seek further clarification from the Executive as to why it has taken that view.

The Convener: You were not here last week, Stewart, so I should tell you that the substance of the Executive response on part 1, which was sent as a letter to the clerk, was considered by those members of the committee who were here. We responded saying almost what you have just said—that we did not share the Executive's interpretation of what Henry VIII powers are. I shall allow Murray Tosh and Ken Macintosh to comment, because they were here last week and they initiated our response to the Executive.

Murray Tosh (West of Scotland) (Con): I know that our legal brief is normally a confidential document, and I am not suggesting that it should not be, but I hope that the full response by our legal advisers to the points in the Executive's

letter, including the appendix outlining what we think the Henry VIII term covers, will be included in our report on the bill. Given that the Executive's letter is a public document, I do not think that we can allow it to stand unchallenged on the record.

The Convener: Obviously, we have not heard back from the Executive with respect to the letter that we sent in response to the letter that the clerk received last week. In the absence of that response, we should do what Murray Tosh suggests and include in our final report an appendix that details the valuable information that we have on our interpretation of the Henry VIII powers. Do members agree?

Members *indicated agreement.*

Mr Kenneth Macintosh (Eastwood) (Lab): That sounds sensible.

Last week, I was concerned that the tone of the Executive's letter suggested that it was moving away from taking a constructive approach to the workings of the committee and towards taking a more defensive approach. I was more concerned about that than about getting into a debate about Henry VIII powers. However, in the bill there are provisions for a huge number of pieces of subordinate legislation, many of which will be negative instruments. A different approach would recognise that they should be affirmative instruments. I am concerned that we should not get into a battle with the Executive on this matter, but we should agree that we are trying to get this complicated bill into the most appropriate form possible, that we want to ensure the best form of parliamentary scrutiny, and that we would welcome the Executive reconsidering its approach to the wide-ranging powers that it is taking. We should point out that the Executive's approach does not give us huge confidence that there will be effective scrutiny of all the powers that the bill would implement.

We should approach the Executive about our concerns about the bill in general. We should raise not only Henry VIII powers, but the broad use of negative rather than affirmative procedures.

The Convener: I add to that the suggestion in the legal brief that a more open approach could be taken to some of the areas. I see that Murray Tosh is nodding.

Murray Tosh: I agree with Ken Macintosh and you, convener. When I—exceptionally, for me—reread the legal brief before the meeting, it struck me that we are seeing a sort of advance of practice. At one time, we resisted Henry VIII powers altogether. Then we said that we would accept them, but that any instruments would need to follow the affirmative procedure. Now, many of the instruments under the proposed powers in the bill would be subject only to annulment. There seems to be a qualitative advance on all fronts. The comments in our briefing consistently suggest that the advance would tend to reduce the level of scrutiny. Ken Macintosh is right to say that there is concern about the Executive's general approach.

I have not come across open procedure before, but it might be one way to give the Executive some comfort in relation to its concern about using an over-weighty procedure to deal with minor matters, while giving us a sense that it would be appropriate to use the affirmative procedure when substantive provisions are proposed.

I am not clear about what will happen if we specify the use of the open procedure and say that for significant issues the affirmative procedure will be used, but that for minor ones the annulment procedure will be used. I presume that the Executive will control that, and the committee and the Parliament will simply have to respond to the instruments that are proposed. I am not entirely clear how using the open procedure will help if the Executive is not prepared to be co-operative and to apply it reasonably. I am not saying that it would not be reasonable, but I am not sure whether the use of open procedure would change anything. It would be helpful if that issue could be clarified.

The Convener: Absolutely.

Mr Adam Ingram (South of Scotland) (SNP): I am sorry that I missed last week's meeting—or perhaps I am not.

I would like a little bit of clarification about what is meant by "open procedure". I note that the legal brief suggests that many of the instruments that are proposed under the bill could have been presented in draft. One of our regulatory framework inquiry recommendations is that that might happen more in future. I ask for clarification on what is meant by open procedure.

The Convener: We will get Margaret Macdonald to clarify open procedure, but the point about draft instruments is different. On the Animal Health and Welfare (Scotland) Bill, there seems to have been an agreement to lay some of the regulations in draft. That allows amendment to take place, which we are keen to build into the system. However, that is a separate matter, although we would like it to happen with the Bankruptcy and Diligence etc (Scotland) Bill.

I ask Margaret Macdonald to talk about open procedure.

Margaret Macdonald (Legal Adviser): Examples can be found in the European Communities Act 1972 and, indeed, the Scotland Act 1998. Open procedure allows a choice between the affirmative procedure and the negative procedure. If an instrument is not subject to the affirmative procedure, it will be subject to

the annulment procedure, or vice versa, however it is expressed. Open procedure allows the option of making important instruments by the affirmative procedure, and making other less important ones by the annulment procedure.

The Convener: Will you elaborate on the committee's role in that?

Margaret Macdonald: I suppose that if an instrument that was subject only to annulment came before the committee, it would be open to the committee to say that it thought that the instrument should have been subject to the affirmative procedure. Once an instrument is made, there is nothing much that the committee can do about it, but it can at least express a view. For the European Communities Act 1972, guidelines on which instruments would generally be subject to the affirmative procedure and which would be subject to the negative procedure were agreed with the Government of the time.

Murray Tosh: The difficulty with that is that by proposing the use of the negative procedure, the Executive is, almost by definition, saying that there would not be any significant powers. An open procedure would be likely to lead to a series of negative instruments, even in instances in which we felt that the negative procedure was inappropriate. Therefore, we should push hard, challenge the reasons for the selection of the negative procedure in the bill, and try to engage the Executive in a normal and, I hope, constructive dialogue about instruments for which the affirmative procedure would be much the preferred approach.

The Convener: That might be the right course of action. Does Adam Ingram want to add anything?

Mr Ingram: No. That clarifies the point that I was asking about.

The Convener: I had noted three general points. The first was the use of Henry VIII powers and the second was the laying of proposed instruments as drafts, both of which we have discussed. The other one is the point in the legal brief about whether it would be more appropriate for some of the instruments under the bill to be orders, rather than regulations. Perhaps we should ask the Executive to clarify its understanding of that. It is a grey area, but it might be useful to do that. Is that agreed?

Members *indicated agreement*.

The Convener: That deals with the general points, so let us move on to the detail.

Section 1, "Discharge of debtor", allows a debtor to be automatically discharged after one year instead of three years. The committee noted that the power to prescribe the discharge period is a Henry VIII power, and argued that the measure was of such importance that it ought not to be amendable other than by primary legislation. The Executive argues that the power is narrow, that it is not a Henry VIII power—although we would argue the opposite—and that affirmative procedure is appropriate. I ask members for their suggestions on the matter, because I was not at the meeting at which it was initially discussed.

Mr Maxwell: There was concern across the committee about the power. I do not understand how the Executive can say that it is not a Henry VIII power: it allows for secondary legislation to amend primary legislation, which surely is the crux of a Henry VIII power. I agree with the Executive that the power is narrow, but it is extremely important. I understand the use of secondary legislation to deal with matters that are liable to change over time. We have often discussed matters that change over time, such as the value of money, administrative procedures and technical details. However, the length of time that must elapse before a debtor is discharged is one of the bill's fundamental provisions. I remain of the view that that period is a crucial part of the bill and that it should be specified in it.

10:45

The Convener: From reading the *Official Report*, that seems to have been the general feeling of the committee.

Mr Macintosh: It is for the policy committee to decide how important the policy is, but my view is that the reduction in the period before discharge from three years to one year is one of the most crucial elements in the bill. I cannot imagine why we would wish to leave it open ended, which is what the bill does. We should express our concern again to the Executive about the use of the power and flag it up to the lead committee to find out what it thinks about the policy importance of the issue. Ultimately, that is the crucial element.

The Convener: We would normally do that in our final report to the lead committee. There is no advantage in flagging up the matter before then. Ken Macintosh suggests that we should make the point again to the Executive and make it a major issue in our report. Do members agree?

Members *indicated agreement*.

The Convener: Section 5 is on "Orders relating to disqualification". The committee argued that the criteria for disqualification should be set out in the bill and not in subordinate legislation. The Executive argues that the necessary conditions are in the bill and does not seem to understand our argument. Our legal advice is that although the power does not extend to making new disqualification provisions—it can be used only to

remove or amend existing disqualification provisions—provisions could in some circumstances be extended to other individuals. The Executive did not point that out in its response. How important is the matter?

Mr Macintosh: I am reassured by the response, which emphasises the important point that the power will be used to consolidate existing disqualification provisions. I am less alarmed than I was when first we considered the issue. However, as our legal advice points out, it will be possible for the Executive in some circumstances to extend disqualification provisions to other individuals. Although that is of less concern, we should point it out to the lead committee.

Murray Tosh: I would not want us simply to make that point in our report. It might be helpful to have time to clarify better the issue with the Executive before we conclude our report.

The Convener: Which point do you want to clarify?

Murray Tosh: I want to clarify the point to which Ken Macintosh just referred about the difference between a consolidation law and a procedure that allows disqualification to be extended to other individuals in some circumstances.

The Convener: Fine. We will raise that point with the Executive.

Section 14 is on "Debtor applications". The committee is not sure why delegated powers are thought to be appropriate here. We also asked why the time limit for debtor applications in relation to limited partnerships is to be treated differently. Although there appears to be confusion in the Executive about the committee's concerns, its response states that the provisions on limited partnerships in proposed new section 8A(2) of the Bankruptcy (Scotland) Act 1985 mirror existing provisions. Perhaps our letter to the Executive was not as clear as it might have been. Are members happier now that we know that the proposed new section mirrors existing provisions?

Members *indicated agreement*.

The Convener: Okay—we will leave that one.

Section 17 is on the "Debtor's home and other heritable property". The committee was concerned about the width of the powers and considered that, in view of the importance of the subject, delegated powers were not appropriate, especially as it was proposed that the negative procedure be used. Again, the Executive does not consider the power to be a Henry VIII power, because it is clear what can and cannot be done under it.

Members will see that the powers in sections 17(7) and 17(8) have precedents. However, we have to consider what we think about the power in subsection (4) and whether annulment under the negative procedure will provide the correct degree of parliamentary scrutiny. The committee had fairly strong views about that.

Murray Tosh: The argument that the powers in sections 17(7) and 17(8) are precedented might steer us away from challenging them, but the powers in subsection (4) appear to be significant. If the Executive is determined to pursue them through subordinate legislation, we should make the point again about the use of the affirmative procedure.

The Convener: Yes. Is that agreed?

Members *indicated agreement*.

Mr Maxwell: I agree with Murray Tosh. I know that we have discussed the Henry VIII power, but we should ask the question again. The answer from the Executive that the power is clear does not mean that it is not a Henry VIII power. That, to me, is a bizarre answer, so we should pursue the question.

The Convener: As well as making the general point about the Henry VIII power at the beginning of our report, can we dovetail it in with the useful definition that we have received from our legal adviser?

Mr Maxwell: Yes—that would be fine. My point is just that the answer bore no relation to the question. We have discussed that point before, and I think that we should pursue it.

The Convener: Okay. Section 18 is on "Modification of provisions relating to protected trust deeds". In the light of the Executive's response on sections 18 and 19, we might just need to keep a watchful eye on the provisions, but I am open to other suggestions.

Mr Maxwell: I agree, in a sense, but my only concern is that we are moving from primary to secondary legislation and, at the same time, we are moving straight to use of the negative procedure instead of the affirmative procedure, which I would expect to be used. That is quite a shift. It might be appropriate to do that, but I am concerned about our going from one end of the scale to the other in one move. I wonder what other members think.

Mr Macintosh: The point was that in this case, unlike in the rest of the bill, the Executive will—this is the crucial point—produce a draft of the proposed regulations in time for us to comment on them before stage 3 of the bill. Is that right?

Mr Maxwell: Yes.

The Convener: I am told that we are not sure. We could ask for that to happen.

Mr Macintosh: It would be good to see a draft of proposed subordinate legislation in all cases before stage 3.

The Convener: That point is made in our general points.

Mr Macintosh: Yes. Maybe that will not always happen, but in this case the Executive has said that it will produce a draft. I thought that all we were going to do was defer our consideration of it. Stewart Maxwell might be absolutely right, but I thought that we would be able to consider the draft. We will have to rethink our position if we do not get such a draft.

Mr Maxwell: That will be fine. Ken Macintosh is quite right that we can, if we get draft regulations, take a view on them at that time. If we could have it confirmed that that will happen, that would be fair enough.

The Convener: Shall we make that point in relation to sections 18 and 19, given that there has been a dramatic shift to the use of secondary legislation and of the negative procedure?

Mr Maxwell: Yes.

Murray Tosh: Paragraph 51 of the legal brief states:

"The Executive undertook to lay a copy in draft of proposed regulations in exercise of this power."

Am I right that the Executive has said that it will produce a draft of section 18 regulations, but has not made any commitment about the section 19 regulations?

The Convener: That is what I am trying to confirm.

Murray Tosh: We will write to the Executive, so perhaps we could ask it to clarify that.

The Convener: I think so. I have read the Executive's response, but I have to say that I am not at all clear about section 19. We will have the position clarified.

Section 22 deals with the "Modification of offences under section 67 of the 1985 act". It is another Henry VIII power for which use of the negative procedure is proposed. We asked the Executive whether the intention was simply to reflect inflation: it has said that the power is already in the 1985 act and that the bill will simply amend the figure that is contained in that act. However, there is nothing to restrict the existing power to inflation increases, so there is nothing on the repeated version. I seek the committee's views on the matter.

Mr Macintosh: Apart from anything else, in the interests of consistency we should ask the Executive how it approaches such matters. If the powers are needed just to reflect the change in the value of money, that should be in the bill. Plenty of other legislation has limitations that restrict the Executive's powers in that sense. If there were no such restriction, the Executive could, by changing the value, change the policy considerably. That is the crucial point. We should ask the Executive why it is happy to reflect the change in the value of money in other bills but not in this one.

The Convener: Paragraph 32 of the Executive's response seems to say that the Executive is not sure what our great concern is. I think that we should reclarify our point.

Mr Maxwell: I thought that our point was quite clear and that Ken Macintosh's explanation covered it well. I was going to suggest that we should just remake the point—perhaps then the Executive will understand.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: Section 23 is entitled "Creditor to provide debt advice and information package". In its response, the Executive seems to say that it does not intend to use the power. It has indicated that there is no optimum time period that would suit everyone and that the drafting of the bill mirrors the Debt Arrangement and Attachment (Scotland) Act 2002. The evaluation of that reform suggests that we should not prescribe a time period. In the light of the Executive's response, are members content to leave the matter for the moment?

Mr Maxwell: No. You used the word "suggests", but the legal brief states that

"evaluation of that reform supports <u>not</u> prescribing a specific period".

If the Executive's view is that it does not support the prescription of a period, why is it taking the power? We should not leave the matter but should ask about it again. The Executive seems to be holding two diametrically opposed positions.

The Convener: I am happy to ask about it again. Do you agree, Murray?

Murray Tosh: Absolutely.

The Convener: Okay. We will ask about that again.

We turn to part 2, which is the new area that concerns floating charges. Section 31 deals with the "Register of floating charges". Are members content with the proposed power and the use of the negative procedure, as laid out in section 31?

Members *indicated agreement*.

The Convener: Section 33 deals with the "Advance notice of floating charges". Are members content with it?

Members *indicated agreement*.

The Convener: Good.

Part 3 is on enforcement. Section 43 will establish the Scottish civil enforcement commission. There are two issues. First, although the need to adjust functions and add to them is clear and precedented when a new body is established, the powers that will be conferred by section 43(4) are narrow in scope, but they are not insignificant. I ask members for their views on the use of delegated powers in such circumstances and on whether the use of the negative procedure is appropriate. I gather that section 43(4) will allow the Executive to remove as well as to add functions.

Mr Maxwell: The easy answer is that I do not think that the use of the negative procedure is appropriate. It seems that the Executive could make substantial changes to the new body. My gut instinct is that any regulations should be subject to the affirmative procedure. It may be that the affirmative procedure could be used the first time and subsequently not used. However, the affirmative procedure should generally be used.

The Convener: I suppose that we want to know why the affirmative procedure is not to be used.

Mr Maxwell: Yes.

11:00

Mr Macintosh: Forgive me if I am not reading the section properly—perhaps the issue will be addressed later—but I am concerned that, in effect, we are delegating a lot of powers to the proposed civil enforcement commission.

The Convener: That is right.

Mr Macintosh: I suppose that it is a question of policy for the lead committee. However, after giving the commission certain powers, we will give it the power to change the relevant subordinate legislation. I am anxious to establish that we are sure that Parliament and the Executive want to do that and that the lead committee is happy with the way in which the policy is implemented. Normally, Parliament would have a clear role in the matter. It is possible that it would be better for the proposed civil enforcement commission to deal with it, but we need to consider the issue carefully.

The Convener: We need to phrase the question in terms of our powers, rather than in terms of policy issues for the lead committee. The gist of what you are saying is that this is a significant issue and that we should question the power to make regulations under the negative procedure. We need to be told why the negative procedure is sufficient and why we should not go a little further by using the affirmative procedure.

Mr Macintosh: There is another issue. Am I right in thinking that, after we pass the bill, the proposed commission will be able to change some of its powers?

The Convener: As we proceed, you will see that there are codes of practice and so on.

Mr Macintosh: I am ahead of myself.

The Convener: The proposed commission will not be able to change its functions.

Mr Macintosh: No, but it will be able to change the codes of practice.

The Convener: We will deal with those in a minute.

Section 43(7) provides that ministers may by regulation make further provisions about the structure and procedures of the proposed commission. However, there is no statutory requirement on ministers to consult before making regulations. As Ken Macintosh says, that is a big step. Should we ask about consultation?

Members *indicated agreement*.

The Convener: We will also ask about the issue that Stewart Maxwell raised.

Section 47 deals with the "Register of messengers of court", which sounds very grand. It provides for the proposed civil enforcement commission to make rules about information that is to be recorded in the register and to regulate associated matters. It is thought that the power is appropriate, but the issue of public interest has been raised. It is suggested that the matter is of such public interest that the rules should be made by ministers, in the form of a statutory instrument, rather than by the commission, as is proposed. Ken Macintosh raised that issue; he has concerns about the power.

Mr Macintosh: Yes. I want to be sure that we are agreed on the issue as a matter of policy. It should be flagged up to the lead committee so that we can be absolutely sure. Once we have established that, we can consider what existing rules, as opposed to subordinate legislation, say. We have come across many examples of rules, codes of conduct and guidance that have legal implications but are not laid before Parliament or subject to parliamentary scrutiny.

The Convener: I have been trying to have clarified what the proposed civil enforcement commission will be able to do. I was informed that it would be able to regulate associated matters. I wonder how far that power will extend. The issue is encapsulated in what Ken Macintosh said. We should ask the lead committee to consider it.

Members *indicated agreement*.

The Convener: Section 48 will require the proposed commission to prepare and publish a

code of practice governing the work of messengers of court. There is no obligation on the commission to consult before issuing the code, which is not subject to any parliamentary procedure. I invite members' thoughts.

Mr Maxwell: The same issues that arose in relation to section 47 apply to section 48.

The Convener: We have the same concerns.

Mr Macintosh: Perhaps we should flag it up that even if we agree that the proposed commission should have all the proposed responsibilities, we still think that the code should be laid before Parliament.

Margaret Macdonald: The code will be laid before Parliament.

Mr Macintosh: Right. That is good. However, it will not be possible for the code to be annulled or anything.

The Convener: It will not be subject to any parliamentary procedure; it will simply be laid before Parliament.

We must consider whether it is appropriate for the power to prepare a code of practice to be delegated to the proposed commission rather than to ministers—that is Ken Macintosh's first point—and whether it is acceptable for the code not to be subject to parliamentary procedure. We are concerned that the code will merely be laid before Parliament. We need to ask what the code of practice will do.

Mr Maxwell: It depends what the code's legislative impact will be; it might be minor or it could be wider. As with many of the bill's provisions, we do not know what the detail will be because we do not have a draft of the code, which makes it difficult to agree a final position. That is part of the problem that we face.

The Convener: Shall we ask the Executive for more information about the code?

Members *indicated agreement*.

Mr Macintosh: We are straying into matters of policy. It is the policy that is flagged up by the relationship between the proposed commission, the code and our committee. In general, we are moving away from self-regulation and from a position in which professions are a law unto themselves, so I find it odd that we are moving in the opposite direction with this code. The issue is whether there is public interest in how the code works or whether it is entirely a matter for the messengers of court and the administration of good practice in the courts. If there is public interest in the code, that takes us into policy areas. The bigger the public interest, the more important it will be that the Parliament plays a role.

The Convener: Until we know how important the code will be, it is difficult for us to make a decision about the correct balance.

Mr Maxwell: That is my point. There is a fine line to walk in considering whether the code should be part of our role or part of the policy committee's role. If we knew the specifics of the code, we could say whether it was appropriate for it not to be dealt with in subordinate legislation. We have a role to play in making such a judgment.

The Convener: If we ask about the code and express our concern, we might be able to make a better decision at our next meeting. Is that agreed?

Members *indicated agreement*.

The Convener: Section 49 is entitled "Publication of information relating to debt collection" and will authorise the proposed commission to publish information that promotes good practice and informs the public about what the bill defines as informal debt collection. The Executive has not commented on that power. There is no requirement for consultation on the information that is produced, which may take the form of a code of practice or guidance, and no duty to send a copy of it to ministers or to lay it before Parliament, so the status of the code or guidance is not clear. We should obviously ask about that. Do members agree to do that?

Members *indicated agreement*.

The Convener: Section 52 relates to appointment of messengers of court. The proposed commission will have the power to recruit and appoint messengers of court and will be allowed to make rules about qualifications, examination and training. The Executive's view is that the development of those arrangements should be undertaken by the commission and should not be the subject of a statutory instrument. Are members happy that the rules will be made by the commission rather than by the Executive and that those rules will not be subject to parliamentary procedure? Should the bill include an obligation to consult?

Murray Tosh: If the proposal in section 52 appeared in isolation, we might be more relaxed about it, but we have just dealt with three sections on which we have made the same point, which is that we are not clear what the provisions mean, how they will work or whether they should be subject to parliamentary procedure.

We are advised that, usually, at least part of the type of material that it is proposed will be included in the rules would be incorporated in a statutory instrument. People who are much more knowledgeable than I am will have some idea of what those precedents are, but it might be useful

to cite them to the Executive and to seek clarification of why it proposes to handle the appointment of messengers of court in a different fashion. That would at least give us an idea of the thinking behind the proposal.

The Convener: Again, it is a case of getting at the Executive's thinking. When we understand that, we will be able to make a better decision.

Section 53 is entitled "Annual fee", which says that the rules must be approved by ministers but there is no requirement to consult. We can therefore make the same point about consultation. The rules will be made by the proposed commission rather than by the Executive. We can therefore make the same point as has arisen before. Are members happy with that?

Members *indicated agreement*.

Mr Maxwell: I am sorry—before we move on, is not there a difference between section 53 and section 52? Under section 53, will ministers not have to approve the rules?

The Convener: Yes, but that is the only difference.

Mr Maxwell: Another question therefore arises: why will ministers have to approve in this case but not in the other case? Why is there a difference?

The Convener: Yes—well spotted. We will ask why there is a difference. A drafting point also arises in section 53, as described in our legal briefing. We will ask about that.

Section 55 is on "Regulation of messengers of court". The section provides that ministers may by regulation add, remove or modify the functions of messengers of court. It is expected that the regulations that will be made under this section will be extensive and will be subject to the negative procedure. I suggest that we ask why they will not be subject to the affirmative procedure.

Members *indicated agreement*.

Murray Tosh: The question also arises whether there ought to be consultation. It seems that the regulations will be of considerable importance to messengers of court, so it might be appropriate for the bill to include a requirement to consult them.

The Convener: Is that in section 55(4)?

Murray Tosh: Section 55(3) will oblige ministers to consult the proposed commission, but it does not oblige the commission to consult the people who will be affected by the decisions.

The Convener: I was jumping ahead of myself—you are quite correct.

Similar points arise in relation to section 55(4). The powers are not subject to consultation, so we can ask whether an obligation to consult should be in the bill.

Mr Maxwell: Do you mean an obligation on the proposed commission to consult?

The Convener: Yes. Subsection (4) confers powers on the proposed commission to make rules regarding the conduct of messengers of court.

Section 56 is entitled "Messengers of court's professional association". The section provides that ministers must designate a professional association for messengers of court and must make provision in relation to the functions, constitution and procedures of that association. Are we content that those provisions will be subject to the negative procedure?

Mr Macintosh: We should ask why they will be subject to the negative procedure. I am not sure why because we do not have enough information. We are also getting into policy areas. For example, how important will the association be?

The Convener: When we write to the Executive, we will put a number of points together and say that—as you suggest—it is difficult for us to make decisions without more information.

Murray Tosh: A drafting point arises in relation to section 56—a similar point arises for at least one later section. In the term, "messenger of court", the main noun is "messenger". The Executive acknowledges that when it makes the plural "messengers of court". In the title of the section, should the apostrophe not adhere to "messengers" rather than to "court"?

Mr Stone: Pedant.

Murray Tosh: It is all in the interests of correct legislation and good drafting. It will not be a professional association for the court, but for the messengers.

11:15

The Convener: Thank you. I must admit that I am keen on the apostrophes being in the right place.

Section 61 is on "Referrals to the disciplinary committee".

Mr Maxwell: Before we move on, I want to comment on paragraph 131 of the legal brief, which refers to the Executive pointing out the difficulties inherent in section 56. Do we have any idea of the timescale by which it will get back to us with a resolution of those inherent difficulties? The brief says:

"Legal advisers await with interest the instrument that resolves these difficulties."

I just wonder whether we will have to wait for the instrument or whether we will get any advance information.

The Convener: We will ask.

Mr Maxwell: I just want to clarify that. If even the Executive thinks that there are such difficulties, it would be helpful to know about them.

The Convener: Yes. We will ask the Executive to clarify. Have we finished with section 56?

Members *indicated agreement*.

The Convener: Section 61 enables the commission to develop comprehensive and detailed procedures for the disciplining of messengers of court. The rule-making power is delegated to the commission and will not be in the form of a statutory instrument, so we must decide whether we are content with that power and whether we consider that some form of parliamentary procedure is necessary. I think that Ken Macintosh may want to comment on that.

Mr Macintosh: Unlike other legislation that we have considered, there is quite a lot of detail in the bill about what provisions have to be observed, and so on. It is interesting that the Executive has done that in this case, but has not done it for the professional association.

The Convener: Do you want us to ask that question?

Mr Macintosh: I suppose that that depends on the information that we receive in response to our previous questions about the messengers' professional association.

The Convener: What is the general view? Murray, do you agree?

Murray Tosh: Yes.

Mr Maxwell: The more information we have, the better, I think. We should probably tell the Executive that we are not necessarily looking to overburden Parliament with all sorts of subordinate legislation that is not of huge interest to either the public or the committee, but that we do not have enough information to make a judgment at the moment.

The Convener: Okay. We need more information.

Section 62, "Disciplinary committee's powers", sets out the powers of the commission to deal with misconduct or criminal behaviour by a messenger of court, including the imposition of a fine. Regulations under that section are subject to the negative procedure. It is seen as an important provision that has the effect of a Henry VIII provision, and it is not clear how the intended power should or could be used. There may be a question about why it is not an affirmative power.

Mr Macintosh: The key issue is the fact that there is no limit on the level of the fine. In effect, the fine is a matter for the disciplinary committee, not for Parliament. It is not a criminal matter, but the fine could be limited.

The Convener: Yes, so why not limit the power? Are there any other comments?

Members: No.

The Convener: Section 65 concerns the fact that a messenger of court's actions are void where the messenger has an interest. The Executive has given a full and helpful background to that provision in the memorandum, and has stated that it considers the negative procedure appropriate. Are there any other points?

Murray Tosh: Just the drafting point again.

The Convener: Okay, just the point about the apostrophe. Are members content with the power and the procedure?

Members *indicated agreement*.

The Convener: We move on to part 4 and chapter 2, on the attachment of land.

Mr Maxwell: I am sorry, convener, but I have a question about section 62, before we move on. I am slightly confused.

The Convener: We are dealing with a lot.

Mr Maxwell: I should have asked before we moved on, but I would like to take us back for a second. The bill refers to

"an order imposing a fine on the messenger of court not exceeding level 4 on the standard scale".

Is not that the limit that we were asking about, or is there a different limit?

Margaret Macdonald: The point is that ministers can change that.

Mr Macintosh: They could change the level from level 4 to level 5.

Mr Maxwell: The Executive could change it.

The Convener: Yes.

Mr Maxwell: So the provision is unlimited in that sense. Okay, that is fine.

Mr Macintosh: In other words, the Executive's policy in the bill is to set the fine at that level, but it also has the ability to change the level and increase the fine dramatically.

The Convener: So we should raise the issue.

Mr Macintosh: Yes.

Mr Maxwell: Thank you, convener.

The Convener: Right. We will proceed.

I turn to part 4, chapter 2 on the attachment of land and, in particular, to section 70. The power in

section 70(7) is a Henry VIII power and is subject to the negative procedure. The Executive has not given an indication of how often or, indeed, whether it expects to have to use the power. We should question it on those areas and ask why the affirmative procedure is not being used.

Murray Tosh: Should we not also raise the point that is covered in the briefing on orders and regulations?

The Convener: Yes. Is that the point about—

Mr Macintosh: The power is to make regulations when an order would be more appropriate.

The Convener: Right. Are we agreed?

Members *indicated agreement*.

The Convener: I turn to section 79, "Effect of debtor's death after land attachment created". We are asked to note that the power to make procedural rules has been drawn rather more widely than is usually the case. Given that they will not be subject to parliamentary procedure, we should raise the matter with the Executive. Is that agreed?

Members *indicated agreement*.

The Convener: I turn to section 81, "Applications for a warrant to sell attached land". Despite the power in section 81(2) being an unlimited one, any regulations would be subject to the negative procedure. Usually in such instances, we think that it is appropriate for the affirmative procedure to be used. We should raise the question.

Murray Tosh: Yes.

The Convener: Why not?

I turn to section 86—

Murray Tosh: Should we also query the appropriateness of using the negative procedure in respect of the power in section 81(4)(f)?

The Convener: Thank you, Murray. I am sorry; I should have asked members about the appropriateness of the power in section 81(4)(f) to add to the list of persons.

Murray Tosh: I just want to be clear that, in raising questions about section 81, we include section 81(4).

The Convener: Yes. Are other members happy with that?

Mr Maxwell: Yes.

The Convener: I now turn to section 86, which provides for a full hearing on an application for a warrant for sale. Are we content with the delegated powers? If so, is it appropriate to use the negative procedure?

Murray Tosh: I am happy with the delegation of powers, but we should raise the question whether it might not be more appropriate to use the affirmative procedure.

The Convener: Right. We will ask the question.

I turn to section 97, on the appointed person. In essence, although the power in section 97(8) is a Henry VIII power, it is—again—subject to the negative procedure. Are members content with the power?

Murray Tosh: I am not clear whether our legal adviser was suggesting that this is a suitable case for two procedures to be used. As I understand it, the negative procedure would be used in instances when ministers want to add to functions; otherwise, the affirmative procedure should be used. Does our adviser think that that is the appropriate way of doing things?

Margaret Macdonald: It is up to the committee, but that option is open to you.

The Convener: Do you want us to ask about that option, Murray?

Murray Tosh: It would be interesting to test the Executive's thinking on the matter.

The Convener: Right. Let us ask the question.

I turn to section 101—[*Interruption.*] I am sorry; we should be on section 103. I was reading something that Jamie Stone gave me as he left the meeting and I lost the plot a bit as a result. No points have been raised on section 103, "Audit of report of sale". Are members happy that the power in question be subject to the negative procedure?

Members *indicated agreement*.

The Convener: No points have been raised on section 109, "Expenses of land attachment". Are members happy that the power in question be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 116 concerns interpretation. Under section 116(3), ministers may, by order subject to the negative procedure, modify definitions. The Executive has explained that its principal reason for seeking the power is that it wishes to avoid waiting for a suitable legislative opportunity. However, it is not entirely clear that there is sufficient reason for taking delegated powers on the matter.

Murray Tosh: If that is indeed what the Executive really means, I think that its explanation is commendably honest. In any case, we should clarify whether that is its position. Other things being equal, I do not find its justification for taking delegated powers on the matter awfully good and it would help if it provided a more general

response not just on this provision but on whether it is changing the ground rules to avoid having to deal with situations that it is necessary to find time to deal with. If the matter was important enough, the Executive would find the time to deal with it.

The Convener: Do members want to ask why the power is not subject to the affirmative procedure?

Murray Tosh: Indeed. In fact, the question is all the more important in the case of powers that it is proposed to deal with in instruments simply because there is no time to deal with them under other procedures. There might even be a case for using the super-affirmative procedure in such circumstances.

Mr Maxwell: The fundamental question is not whether the negative or affirmative procedure should be used but whether the Executive should be doing this at all. I think that the matter should be dealt with in primary legislation.

Murray Tosh: After all, the important thing about skeleton legislation is the presence of bones.

The Convener: And a wee bit of tissue. We will ask the fundamental question about why the Executive is doing this at all.

We move on to chapter 3, which deals with residual attachment. It is proposed that the delegated powers in section 117 will, once again, be subject to negative procedure. Do members feel that the correct balance has been struck between the use of primary and subordinate legislation? Is the use of the negative procedure sufficient?

Murray Tosh: I get the sense from the briefing that although the negative procedure would be sufficient in some circumstances, its use might be questionable in others. It has been suggested that, in this case, an open procedure might be used. As the principles underlying the provision are perhaps less fundamental than those that underlie earlier provisions, it serves as a useful example on which to base our suggestion that the Executive might consider a more open approach to the matter. After all, given that the bill itself is advancing frontiers, we might find it useful to advance this frontier.

The Convener: So do members agree to suggest to the Executive that an open procedure could be introduced for this provision?

Mr Maxwell: I do not disagree but, as I said in relation to the previous provision, the Executive's argument might well be that it might have been more appropriate to set out these matters in primary legislation in the first place. That makes two such provisions in a row. I am concerned—to put it mildly—that although the Government understands, accepts and acknowledges that such powers should have been set out in primary legislation, it is simply going ahead and putting them in subordinate legislation. I find it all a bit strange. I understand that there might be reasons of expediency, but I do not think that that is a good excuse.

The Convener: Are you suggesting that we put our comments on sections 116 and 117 together?

Mr Maxwell: A similar question arises in relation to both.

The Convener: Okay. We should be on the safe side.

The delegated powers in section 130, "Effect of death of debtor", would allow the court to modify primary legislation for the purposes indicated. Are we content that the court should have the proposed powers under a statutory instrument that is not subject to any parliamentary procedure?

Murray Tosh: That is difficult for us to answer. Is there a precedent?

The Convener: The legal advice is that we do not know and that it would have to be checked.

Murray Tosh: Given that we are not very familiar with the matter, we should ask why it is proposed to give the court such powers.

11:30

The Convener: Okay. That is a similar issue.

Section 131 is on "Expenses of residual attachment". The power is subject to the negative procedure. It is suggested that we make a similar point to the one that we are making in relation to section 109, which we were quite happy about. Is that all right?

Members *indicated agreement*.

The Convener: The power in section 133, on interpretation, is similar in effect to the power in section 116, which we considered earlier and about which we asked the big question. I take it that we should ask the same question. Is that agreed?

Members *indicated agreement*.

The Convener: We move on to part 5, "Inhibition", which introduces new sections into the Titles to Land Consolidation (Scotland) Act 1868. Section 134 is on certain decrees and documents of debt to authorise inhibition without the need for letters of inhibition. The power is similar to the powers in sections 116 and 133, which we have just discussed. Should we ask the same question again?

Murray Tosh: I understood the legal brief to be advising us that the issue would be raised in

relation to the sections that followed, rather than the sections that preceded. It states:

"Whether negative procedure is always appropriate will be considered on a case to case basis below."

The Convener: I am on section 134.

Murray Tosh: Sorry, have you skipped past me?

Mr Maxwell: That bit relates to section 151, convener.

The Convener: You are correct and, somehow, I am not. We missed that bit. Let us have a look at section 151 first. There is no comment.

Mr Maxwell: I presume that Murray Tosh made his point because you said that the power was similar to that in section 116.

The Convener: It is our error. I do not have that bit in my brief. We are happy with section 151.

Murray Tosh: Subject to what we say about section 134.

Mr Maxwell: We reserve the right to disagree.

The Convener: We move on to section 134 now. I am reliably informed that the powers in section 134 are similar to those in sections 116 and 133, which we have asked the fundamental question about. We are quite happy to ask that again.

Murray Tosh: So the issue was raised above as well as below. Is that another example of an open procedure?

The Convener: It could well be.

We now move on to section 135. Although there was a little slip up in the brief, the clerk has done incredibly well in his first meeting, the agenda for which means that it is one of the busiest that we have ever had.

Murray Tosh: We were not blaming the clerk.

The Convener: It was the convener's reading.

Section 135 is on "Registration of inhibition". No points arise. Do members want to raise any points?

Murray Tosh: I raise the opposite point to that made earlier. We are wondering why the powers are conferred on ministers rather than the Court of Session, as they are earlier in the bill. I have no idea which is right.

The Convener: Let us ask why it is thought necessary to confer the powers on Scottish ministers rather than on the Court of Session.

Section 136 substitutes a new section for section 155 in the 1868 act. Do any points arise?

Members: No.

The Convener: Section 149 inserts a new section 159A into the 1868 act. Are there any further points on that?

Members: No.

The Convener: Section 151 amends section 159 of the 1868 act. Are there any points on section 151?

Mr Maxwell: Can you pronounce that word in the first sentence?

The Convener: Lit—liti—litigiosity?

Mr Maxwell: I have never come across that word. Litigiosity.

The Convener: I felt safer with that word than with the one that we had about two months ago. We will have a word about that afterwards.

Are there any further points on section 151?

Murray Tosh: It falls into place if we are happy with everything else in this part of the bill. It is subject to what we ultimately decide when we have the Executive's responses to the questions that we are raising about sections 134 and 135 in the context of the questions that we have raised about sections 116 et al.

The Convener: Let us make the point, then, that the one depends on the other.

Murray Tosh: I do not think that we need to. We just need to hold back until we get responses and decide what we are going to say about the generality. Our legal advisers will impose order, discipline and intelligence on it all.

The Convener: Let us ensure that we hold on to that issue for next time.

We move on to part 6, "Diligence on the dependence". Section 156 inserts a new part 1A on diligence on the dependence into the Debtors (Scotland) Act 1987. On the proposed new section 15D(2)(d) of the 1987 act, which deals with applications for diligence, the question—which also applies to other powers in this part of the bill—is whether regulations rather than an order are the correct form for an instrument under the power. Shall we ask that question?

Members *indicated agreement*.

Murray Tosh: There is also the question whether it should be done by act of sederunt, although it is suggested that that is a matter of policy. We have asked the question twice earlier. It would be consistent not to challenge what is being done but to question the consistency of what is being done. That falls reasonably within our remit.

The Convener: That is fine. I can see that you are really getting stuck into this, Murray, which is very good.

Proposed new section 15H of the 1987 act is entitled "Sum attached by arrestment on dependence". The question is whether the Executive has made the case for varying the figure of 20 per cent that is specified in the bill and, if so, whether the proposed negative procedure is appropriate, given the fact that the power is one to vary primary legislation. I suggest that we ask why the affirmative procedure is not proposed.

Mr Maxwell: The second bullet point on page 34 of the legal brief gives the figure as

"20% of that sum, or such other figure as Scottish Ministers prescribe by regulations subject to negative procedure".

Scottish ministers could change the figure to whatever they saw fit.

The Convener: Yes.

Mr Maxwell: There could be quite a wide variation.

The Convener: Yes. Do you not think that we should ask why the affirmative procedure is not proposed?

Mr Maxwell: Yes. I just wanted to clear up that point.

Mr Macintosh: The figure is a maximum limit, but it could be increased. It is almost exactly the point that we made earlier.

The Convener: It is very similar.

We move on to part 7, "Interim attachment". Section 160 inserts a new part 1A on interim attachment into the Debt Arrangement and Attachment (Scotland) Act 2002. Proposed new section 9C(2)(d) of the 2002 act deals with the application for warrant for interim attachment. The provision is not dissimilar in purpose to proposed new section 15D(2)(d). The same question arises, regarding whether regulations rather than an order are the appropriate form of instrument under the power. Exactly the same point arises as Murray Tosh made before.

Part 8 is "Attachment of money". Section 162 deals with the meaning of "money" and related expressions. The section contains a Henry VIII power to vary the definition, which is subject to the negative procedure. Are we happy with that?

Mr Macintosh: It is another circumstance in which our legal advisers suggest that an open procedure might be appropriate. Although the removal of references to what can be defined as money could be subject to the negative procedure, it might be appropriate for the adding of such references to be subject to the affirmative procedure. It would depend. Therefore, an open procedure would be preferable.

Murray Tosh: I do not disagree with that—an open procedure would be preferable to the negative procedure. However, the legal advice is clear that the power might be used to alter the definition fundamentally. Perhaps we should ask for an affirmative procedure rather than leave the matter open. That would mean that minor changes would need to be made under the affirmative procedure, but that might be better, because it would require substantive changes to be made under the affirmative procedure, too. The balance should perhaps be that we go for the affirmative procedure.

Mr Maxwell: So you think that the affirmative procedure should apply, even though some of the changes might involve small, redundant references.

Murray Tosh: The difficulty with the open procedure is that the selection of the procedure would be up to the Executive, so significant changes could be made that were subject only to annulment. I am not clear that we would want that.

The Convener: I agree with Murray Tosh.

Mr Maxwell: So we should err on the side of caution.

The Convener: I think so. We will say that the power should be subject to the affirmative procedure, although we can see a case for allowing either procedure to be used, depending on the issue. I am a bit worried about how the open procedure would work.

Mr Maxwell: I do not see how we can, in effect, leave it up to the Executive to decide which procedure should be used. We must decide on one procedure or the other.

The Convener: We will go for the affirmative procedure, then. Do members agree?

Members *indicated agreement*.

The Convener: Section 172, "Release of money where attachment unduly harsh", again contains a Henry VIII power, so we would normally expect the affirmative procedure to be used. Do members agree to ask why that procedure is not used?

Members *indicated agreement*.

The Convener: Section 184 is "Liability for expenses of money attachment". Section 184(2) provides that ministers may, by order subject to the negative procedure, modify schedule 3 to add or remove types of expenses or to vary descriptions. Are we happy with that?

Mr Macintosh: We should question whether the negative procedure is sufficient.

The Convener: A lot of research on the background is needed by the legal advisers, so perhaps we should err on the side of caution.

Mr Maxwell: Is it possible to put the issue aside until next week? Would that provide the legal advisers with enough time to consider it? I do not want to place extra work on the legal advisers, but I am unsure about the matter.

Mr Macintosh: We know that, in principle, the power is one to amend primary legislation, so we can ask the question.

Mr Maxwell: Yes, but it would be helpful if we got further information.

The Convener: We will ask the question anyway—because we would expect the power to be subject to the affirmative procedure—and hope that we have enough time to get a bit more background information.

Section 186 is on interpretation. Section 186(2) provides that ministers may modify definitions by order subject to the negative procedure. Are members happy with that?

Mr Macintosh: A similar point arises to the ones that we made about earlier interpretation sections.

The Convener: It is clear from the Executive's response that the power is an important one with implications for the interpretation of the bill. We will ask the same question as we intend to ask about the other interpretation sections.

Paragraph 4 of schedule 3 is on circumstances in which no expenses are due to or are to be paid by either party. No points arise on the provision.

Mr Maxwell: Is the power to change certain amounts of money?

The Convener: Yes.

Mr Maxwell: That is fine.

The Convener: The use of the power is precedented and is not unreasonable.

Part 9 is "Diligence against earnings". Section 189, which is on provision of information, will insert new section 70A, on the employer's duty to provide information, into the Debtors (Scotland) Act 1987. Do members agree that no points arise on the provision?

Members *indicated agreement*.

11:45

The Convener: Part 10 concerns "Arrestment in execution and action of furthcoming". Section 192, "Arrestment in execution", inserts new part 3A into the 1987 act. Section 73A of new part 3A says that arrestment and action of furthcoming shall proceed only on decree or a document of debt. Section 73A(5) of new part 3A provides that ministers may, by regulations subject to the negative procedure, modify definitions. Are we content with that? I gather that we should treat this in the same way as section 116.

Mr Maxwell: Is it furthcoming or forthcoming? Both spellings are used.

The Convener: Furthcoming. It is obviously some legal term.

No points arise on section 73B of new part 3A, "Schedule of arrestment to be in prescribed form".

Murray Tosh: It is an interesting observation that until recently matters of this importance would have been found in primary rather than subordinate legislation. It is a useful indication of how much the business of legislation has shifted towards putting responsibility on the shoulders of ministers and introducing significant measures by means of a lower form of scrutiny. It underlines the significance of the committee being scrupulous about challenging whether the correct procedure is recommended and whether some issues ought properly to be in primary rather than secondary legislation. The Executive can be assured that we do not ask such questions and make such points lightly or frivolously.

We do not need to do anything about that—it was just a rhetorical flourish.

The Convener: Yes. Do we agree about the provision in new section 73B?

Members *indicated agreement*.

The Convener: I have no points on section 73D, "Funds attached". Are we agreed?

Members *indicated agreement*.

The Convener: Section 73E(6) provides that ministers may, by regulations subject to the negative procedure, vary the types of account referred to in section 73E(2) and the definition of "bank or other financial institution". The powers here are Henry VIII powers, and our question is why the regulations would not be subject to the affirmative procedure.

Murray Tosh: An open procedure is raised again in this case but here it is a bit clearer. It is not a question of major or minor; the question raised is whether we should treat adding to the lists differently from reducing or removing from the lists. It might be worth raising that with the Executive.

The Convener: It would be, because it is clearer how it could be worked in this case. Are we agreed that that might be a way in which we could proceed?

Members *indicated agreement*.

The Convener: I have no points on section 73F, "Arrestee's duty of disclosure". Do we agree about that provision?

Members *indicated agreement*.

The Convener: I have no points on section 73N, "Mandate to be in prescribed form". If members have no points, are we agreed?

Members *indicated agreement*.

The Convener: We are now at part 15, "Disclosure of information". Section 198, "Information disclosure", enables a Scottish information disclosure order scheme. Regulations under section 198 deal with sensitive and important issues. The first regulations under the power will be subject to the affirmative procedure, with subsequent regulations subject to the negative procedure. Are we content for the Executive to deal with the regulations in that way?

Members *indicated agreement*.

The Convener: In particular, are we content that subsequent regulations will be subject to the negative procedure?

Murray Tosh: The legal brief makes the case for there being circumstances in which subsequent changes or regulations might be sufficiently significant that there would be a desire at least to have the option of using the affirmative procedure. An open approach might therefore be reasonable.

The Convener: If we say that we should take an open approach, are we not saying that it would be for the Executive to choose which procedure to use?

Murray Tosh: Yes. However, we are saying as an irreducible minimum that the first set of regulations should be subject to the affirmative procedure, because they will develop the key principles and mechanics of the scheme. It is possible that everything that follows will be relatively insignificant by comparison and that the negative procedure will be appropriate. Rather than our placing the entire burden on the use of the affirmative procedure, it may be best for us simply to recommend that that should be a shot in the ministerial locker. There may be occasions on which ministers will wish to use the affirmative procedure for a significant instrument and on which Parliament may be persuaded that it would be inappropriate to allow a negative instrument to proceed without being annulled.

The Convener: I take it that we would make it clear that, if a fundamental or major change was to be made, we would expect the affirmative procedure to be used.

Mr Maxwell: I wanted to make essentially the same point. This is a bit like our previous discussion. If we agree to take an open approach, we leave the matter in the hands of the Executive. I accept that the first set of regulations, at least, should be subject to the affirmative procedure. However, if we say that in some circumstances subsequent regulations could be subject to the negative procedure, we leave the whole issue open. There could be a complete shift in policy and subsequent sets of regulations could be fundamentally different from the initial set. I am not entirely convinced that it is appropriate for us to leave the matter open. I accept that there could be minor changes, but that is the same argument that we heard previously. Perhaps we should require the affirmative procedure to be used.

Mr Macintosh: This is a difficult matter. Although it is sensitive, I am still trying to work out from the subject matter whether there is any reason for us to be alarmed by the possibility that subsequent regulations would be subject to the negative procedure after the affirmative procedure had been used for the initial set. We should write to the Executive to flag up our concern that the affirmative procedure should be used to begin with. I do not believe that the affirmative procedure is necessary for subsequent sets of regulations.

Mr Maxwell: If there were a guarantee that only minor amendments would be made in future, I would accept that. We agree that the first set of regulations should be subject to the affirmative procedure. However, the second set could be completely different from the first. The regulations could be amended in a wholly unexpected way, which would make them just as important as the first set. It is not necessarily the case that every amendment that is proposed after the introduction of the first set of regulations will be minor. That is why I argue that the affirmative procedure should be used. Amendments could be minor, but a complete change might be made in the second, third, fourth or 10th set of regulations. In that case, why should we not rule that regulations should be subject to the affirmative procedure?

Murray Tosh: I am persuaded that we should put that case and get the Executive's response to it.

Mr Ingram: I agree with Stewart Maxwell. This is a sensitive matter, because it relates to provision of information to creditors. For that reason, the regulations should always be subject to the affirmative procedure.

The Convener: That is now the majority view. We will argue that, given the sensitivity of the issue, subsequent regulations should also be subject to the affirmative procedure.

Part 16 of the bill consists of general and miscellaneous provisions. That must mean that we are near the end. No points arise on section 201, "Orders and regulations".

Section 202 contains an ancillary provision. The committee has previously expressed disquiet at the width of such powers. From its memorandum, it seems that the Executive no longer considers that power to be as limited as previously agreed. Is that a cause for concern?

Mr Maxwell: That is a change from the view that the Executive originally presented to us, which was that the power was limited. Now, it is saying that the power is not so limited. Perhaps that confirms our original concerns.

The Convener: What should we do about it?

Mr Maxwell: We have been around the track on the matter.

Murray Tosh: We have, but we were given clear guidance in informal meetings that the Executive agreed with our interpretation and, reluctantly, we agreed that there was a need for incidental, supplemental, consequential, transitory, transitional or saving provisions to be made. However, the balance is changed now that we have examples in which the Executive has made significant changes through such a power. That undermines a wee bit the trust on which one happily nods such powers through.

The Convener: We must make the point that we are concerned about the width of the ancillary power in section 202.

Mr Maxwell: We are remaking a point that we have made in the past, but there are some recent examples that we might be able to use effectively to reinforce the point. The legal adviser points out that the boundaries have been pushed to breaking point in recent instruments. If that is the case, we should use those examples to point out the fact that that is the reason that we expressed concern in the first place.

Mr Macintosh: In some ways, we are asking for comfort from the Executive. In the past, the Executive has accepted that such powers are limited, but it seems to be making wider claims for the power in section 202. We should ask the Executive whether it really wants to make those claims, because we have reservations about them. Perhaps the Executive should rethink its position, although I do not know what we could do if it did not. We do not want the bill's accompanying documents to make claims that are not supported, but could be referred to at a later stage.

The Convener: We could have a useful correspondence on that, because we could raise our previous concerns that the use of such powers pushes the boundaries and point out that the power in section 202 reinforces our concerns. We could put in the examples to which committee members have referred.

Mr Maxwell: It is clear from the Executive's memorandum that it has changed its position, so it is entirely appropriate for us to raise the matter at this juncture.

The Convener: It is appropriate. It is a good opportunity.

Murray Tosh: Should we, in addition to raising the matter on the bill, flag up a more general concern? Perhaps we should do that at a higher level within the Executive, such as the officials with whom we have dealt when we have discussed the matter in the past. Our concern is about more than the bill.

The Convener: We can write a separate letter on the issue.

Section 204 concerns the short title and contains a customary commencement provision. However, that provision is defectively drafted in that only section 204 will come into force on royal assent. It is suggested that not only section 204, but section 201 and, possibly, all the other sections in part 16, except section 203, should be commenced on royal assent. The Executive has agreed to lodge amendments at stage 2 to rectify the drafting.

There is an additional point concerning schedule 5. A strict interpretation of the amendment to section 104 of the Debtors (Scotland) Act 1987 that is proposed in that schedule would have the side effect of making all court orders that are made under the act statutory instruments.

Mr Macintosh: We should congratulate our legal advisers on having pointed that out to the Executive already.

The Convener: Yes. They have done a tremendous amount of work.

The bill contains a number of other delegated powers on which no points arise. They are listed on the front page of the legal brief. We will deal with them in our report.

Legislative Consent Memorandums

Legislative and Regulatory Reform Bill

12:00

The Convener: The first memorandum is a supplementary one on the Legislative and Regulatory Reform Bill. Amendments concerning the delegated powers in this bill were considered by the committee on 21 February. The committee indicated that it was generally content with the proposed subordinate legislation-making powers.

Two further amendments inserting two new clauses have since been tabled. They further refine the enabling powers in section 2(2) of the European Communities Act 1972 and deal with the combination of powers. A supplementary legislative consent memorandum has been lodged by the Executive.

It is suggested that the amendments appear to be sensible additions to the amendments that have already been proposed. Are members content with the proposed subordinate legislation-making powers?

Members *indicated agreement.*

Mr Maxwell: Although I accept what the legal briefing has to say on the narrow points relating to this particular piece of subordinate legislation, I would reiterate the point that I made two weeks ago. This is an awful bill and I hope that Westminster throws it out. The bill undermines democracy. Parliamentary democracy is under attack from the current London Government and the bill should not be supported by anyone in any way.

The Convener: We will make sure that we get that noted, Stewart.

Just so that you know, I should point out that, since the committee papers were issued, the Executive has accepted that the reference to article 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096) in proposed new paragraph 2C(c) of schedule 2 to the European Communities Act 1972 is incorrect, and the drafter has been instructed accordingly.

Police and Justice Bill

The Convener: The next legislative consent memorandum relates to the Police and Justice Bill. The Justice 2 Committee will consider and report on this matter at its meeting this afternoon. Standing orders say that we may report to that committee. If there are issues that we want to raise, we can send them in writing. The clerk has told me that, even though we are getting to quite a late hour, he is sure that he can turn around a report in time for the Justice 2 Committee's meeting. Do members agree to that?

Members *indicated agreement.*

The Convener: A number of delegated powers fall to this committee to consider. The first is in clause 1 and paragraph 46(1) of schedule 1 to the bill, and relates to the functions of the proposed national policing improvement agency. The power involves the abolition of the Police Information Technology Organisation and the establishment in its place of the new agency.

The only issue that arises in this clause is in relation to the wide power that could be used to extend the functions of the proposed NPIA into areas that are presently devolved.

The Executive recognises that provisions are needed to ensure appropriate involvement of the Scottish ministers or the Scottish Parliament and it is proposed that appropriate amendments to that effect will be tabled.

Are members content to recommend that the provisions ought to be approved only on the basis that the proposed amendments are made and to say that we are otherwise content with these provisions?

Mr Maxwell: I agree with your recommendation and think that it is important to establish that point.

At the moment, there are Scottish police representatives on the board of PITO. However, under the new arrangement, the NPIA board will not contain Scottish representatives. However, there will be a new relationship with the Scottish ministers. This might be a policy matter rather than a subordinate legislation matter. I am not sure whether it fits in the bill or is a general policy point. Scottish police representatives are on PITO for obvious reasons to do with the need to ensure that the Scottish position is taken into account in relation to technology that relates to United Kingdom-wide policing matters and it strikes me as odd that there will be no Scottish representation on the new board. At the moment, the Scottish representatives and the ministers represent Scottish interests but, under the new arrangements, only the Scottish ministers will. I do not know whether the legal advisers can tell us whether that can be dealt with through the bill or whether there is some other way of dealing with it.

Margaret Macdonald: That is a policy matter, really.

Mr Maxwell: I will raise it this afternoon, then.

Margaret Macdonald: You will notice that clause 44 provides for the consent of the Scottish

ministers to be obtained prior to the commencement of the provisions.

Mr Maxwell: I am quite happy with that. I am concerned about the fact that there is a fundamental change in relation to representation on the board of the new agency.

The Convener: Members might remember that there was a more general point that we raised previously in relation to the Health Bill—that there should be a mechanism for informing the Parliament where amendments are made to Scottish primary legislation, even where those amendments are purely consequential on UK legislation in reserved areas. We wrote to the convener of the Procedures Committee in January about the matter and received a response that indicated that there were no provisions for that under the Sewel convention. We could await a response from the Executive and consider any mechanism that this committee might wish to suggest. We have not had anything back so far.

David McLaren (Clerk): We have had an interim response, which just confirms what the Procedures Committee told us; we await a formal response.

The Convener: I suggest that we pursue a fuller response from the Executive, as it is still a matter of on-going concern. Is that agreed?

Murray Tosh: The current circumstances just strengthen the case that we have put to the Executive, and we might usefully fire in a brief supplement to our earlier points, simply to underscore the message and to ask for a definitive response.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: Clauses 40, 42, 43 and 44 concern commencement and ancillary powers, and contain the usual commencement and ancillary provisions. As drafted, the power in clause 42(3)(b)(i) appears not to extend to amendment of acts of the Scottish Parliament or subordinate legislation made. That may be deliberate, but it seems slightly strange, particularly in relation to the powers conferred on the Scottish ministers. Do members want to make the lead committee aware of that point, and should we ask the minister to clarify the position at this afternoon's meeting of the Justice 2 Committee?

Members *indicated agreement*.

The Convener: Are there any other points that members would like to include in the letter for this afternoon?

Members: No.

Executive Responses

Charity Test (Specified Bodies) (Scotland) Order 2006 (draft)

Further and Higher Education (Scotland) Act 1992 Modification Order 2006 (draft)

Protection of Charities Assets (Exemption) (Scotland) Order 2006 (draft)

12:07

The Convener: We asked the Executive two questions on the orders. First, we asked when it is intended that section 7 of the Charities and Trustee Investment (Scotland) Act 2005 will be commenced in full, and we have been told that section 7 is due to come into force on 24 April 2006. The coming into force of the orders will therefore coincide with the coming into force of the substantive provision of the act. Are members happy for us to bring that information to the attention of the lead committee and of the Parliament?

Members *indicated agreement*.

The Convener: Secondly, we asked why the Executive did not consult more widely on the orders. As you will see from the response, the Executive has indicated that the consultation that was carried out was more extensive than what appeared in the Executive note, so one might ask why that information was not included in the Executive note.

Murray Tosh: The legal brief also observes that, in relation to the draft Further and Higher Education (Scotland) Act 1992 Modification Order 2006, the Executive has not indicated whether there were any representations or whether any action was taken to address concerns. Not only did the Executive consult more than it admitted to, but it has not reported fully on the extent to which it did consult, which seems quite unsatisfactory. It might be worth asking the Executive to clarify that further point, even though it may be too late.

The Convener: Unfortunately, we have to report.

Murray Tosh: We could report that, although we asked the Executive about consultation, we did not get a response on the draft Further and Higher Education (Scotland) Act 1992 Modification Order 2006 and that, at the time of reporting, a definitive response from the Executive on the matter was awaited.

The Convener: We need to report that to the lead committee and to the Parliament. We should also say something about the Executive note being a little inadequate.

Mr Macintosh: I seek clarification on an issue on which other members might have received information before last week's meeting, but I did not. I have since picked up a letter that was sent to us by the Scottish Trades Union Congress, in which it flags up its concerns about the lack of consultation on the proposed modifications to the Further and Higher Education (Scotland) Act 1992.

I am talking about policy matters, on which the STUC's view is clear. It thinks that ministerial powers of direction are so important in ensuring good governance in colleges that their maintenance is more important than colleges' retention of charitable status, which generates only between 3 per cent and 3.5 per cent of their income. Ensuring good governance is particularly important, given the examples of poor governance that exist in some Scottish colleges.

I had not seen the letter last week. The lead committee should be made aware of the STUC's concerns on an important matter. The letter states:

"The STUC is deeply alarmed and disappointed that the Order was laid in the Scottish Parliament without meaningful consultation with all stakeholders including staff, unions, students and employers."

It is possible that the organisation is revisiting an issue that was debated extensively—people sometimes do that—but I do not think that that is the case on this occasion. The STUC is extremely worried that the proposals are not being discussed fully. In other words, the debate that took place during stage 1 consideration of the Charities and Trustee Investment (Scotland) Bill was a debate about how to preserve the income of further and higher education institutions, whereas ministerial powers of intervention are vital for other reasons.

The Convener: I will ask the clerk whether we received any other material.

Mr Macintosh: The STUC's point about consultation is not merely academic. A significant number of stakeholders have concerns about the proposed policy change, which at the very least should be discussed. We should flag that up to the lead committee and to the Executive.

The Convener: Do other members have anything to add?

Murray Tosh: I want to raise a procedural matter. Although Ken Macintosh is the only member to have a paper copy of the briefing in question with him, I think that all members received it electronically. Given that it has informed our discussions, it might be appropriate for us to treat it as a tabled paper and to add it to the papers for the meeting to help any third party who might wish to follow proceedings. That would be a good exercise in transparency.

The Convener: We can add the letter to the various documents for the meeting.

We will draw those matters, including the point about the Executive note, to the attention of the lead committee and the Parliament and we will include in the papers the material that Ken Macintosh has brought to our attention. Is that agreed?

Members *indicated agreement*.

The Convener: The point has also been made that the lack of adequate consultation could make the orders ultra vires. We will mention that in the report, too.

Instruments Subject to Annulment

Sheep and Goats (Identification and Traceability) (Scotland) Regulations 2006 (SSI 2006/73)

12:14

The Convener: We move on to agenda item 6.

Are we content to ask the Executive to explain the delay in making the regulations, given that European Union Council Regulation (EC) No 21/2004 came into force in January 2004?

Members *indicated agreement*.

The Convener: There is also a minor point that we might want to raise informally with the Executive.

NHS Education for Scotland Amendment Order 2006 (SSI 2006/79)

Older Cattle (Disposal) (Scotland) Amendment Regulations 2006 (SSI 2006/82)

Road Traffic (NHS Charges) Amendment (Scotland) Regulations 2006 (SSI 2006/84)

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2006 (SSI 2006/86)

The Convener: No points arise on the instruments.

Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006 (SSI 2006/88)

The Convener: Is the committee happy that we ask the Executive to explain the purposes and effect of rule 7(2)? Clarification of the legislative intention is needed before we can reach a final view on the rules.

Members *indicated agreement*.

Police Grant (Scotland) Order 2006 (SSI 2006/91)

Non-Domestic Rate (Scotland) Order 2006 (SSI 2006/92)

The Convener: No points arise on the orders.

Instruments Not Laid Before the Parliament

Charities and Trustee Investment (Scotland) Act 2005 (Commencement No 2) Order 2006 (SSI 2006/74)

Act of Sederunt (Child Care and Maintenance Rules) Amendment (Vulnerable Witnesses (Scotland) Act 2004) 2006 (SSI 2006/75)

Act of Adjournal (Criminal Procedure Rules Amendment) (Vulnerable Witnesses (Scotland) Act 2004) 2006 (SSI 2006/76)

Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2006 (SSI 2006/83)

Criminal Justice (Scotland) Act 2003 (Commencement No 7) Order 2006 (SSI 2006/85)

Act of Sederunt (Rules of the Court of Session Amendment No 2) (Fees of Shorthand Writers) 2006 (SSI 2006/87)

Local Government in Scotland Act 2003 (Commencement No 3) Order 2006 (SSI 2006/89)

12:15

The Convener: There are no substantive points on any of the instruments, although there are minor points that we can raise informally with the Executive on SSI 2006/74, SSI 2006/76, SSI 2006/85 and SSI 2006/89. Is that agreed?

Members *indicated agreement*.

The Convener: Stewart Maxwell's head is still down. Are you content?

Mr Maxwell: I was just reading the final part of the briefing.

The Convener: That is fine. The next meeting of the committee will be on Tuesday 11 March. I thank members, the clerks and the legal advisers for staying the course.

Meeting closed at 12:16.

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