SUBORDINATE LEGISLATION COMMITTEE

Tuesday 14 March 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
9th 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

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 1

Scottish Parliament

Subordinate Legislation Committee

Tuesday 14 March 2006

[THE CONVENER *opened the meeting at 10:30*]

The Convener (Dr Sylvia Jackson): I welcome members to the ninth meeting in 2006 of the Subordinate Legislation Committee. I have received apologies from Ken Macintosh and from Jamie Stone, who might appear, but we think that he is somewhere near Inverness fighting his way through the snow. We will see. I remind members to switch off their mobile phones and to enter their cards into the console.

Delegated Powers Scrutiny

Planning etc (Scotland) Bill: Stage 1

10:31

The Convener: Item 1 is delegated powers scrutiny. This week we are considering the Planning etc (Scotland) Bill. Members have received quite a long legal brief; we must congratulate the legal team and clerks on the work that they have done.

There are a large number of delegated powers, many of which are administrative and subject to the negative procedure, although one or two might occupy our minds a little. The first power is in section 1, and it requires ministers to prepare and publish a national planning framework. As members will see from their notes, a type of super-affirmative procedure is proposed, which will ensure that there is consultation with the Parliament and others.

We have received an e-mail from RSPB Scotland on the bill in general and, more specifically, on the national planning framework. The RSPB recommends that

"the Parliament is able to appoint an 'assessor' or 'Reporter' from the Scottish Executive Inquiry Reporter Unit to undertake a public examination of the NPF and then present his/her findings to Parliament."

We might be straying into policy areas, but I would like to hear members' views on that. I have to declare an interest, because I am on the Scottish committee of the RSPB.

Murray Tosh (West of Scotland) (Con): I agree that there are policy issues and I am aware that some organisations support the call for a more extensive consultation period than the 40 days for which the bill provides, because it would be impossible to make representations within that time. The RSPB suggests that an assessor should be allocated six weeks to examine the NPF in public and present their findings. However, a committee would need more time than that. There is a time restriction in the bill that would, in effect, prevent the Communities Committee—or whichever committee was the lead committee—carrying out consultation and the sort of public assessment that we expect for even the most minor private bill. The bill does not appear to allow variation of the 40-day period—unless legal advisers consider that section 52(2) would provide such flexibility.

Margaret Macdonald (Legal Adviser) *indicated disagreement.*

Murray Tosh: I did not think so, but we know that supplementary provisions can allow ministers to do almost anything when it suits them.

Mr Stewart Maxwell (West of Scotland) (SNP): My initial reaction is that it is for the lead committee to decide whether to take up the RSPB's recommendations; it is not for us to delve into that part of the bill. It is fairly normal for documents such as the national planning framework to be laid before Parliament in the way that the convener set out. I cannot think of examples of when they are laid differently. If there is a particular issue to investigate, the lead committee, rather than this committee, should investigate it. We call for the super-affirmative procedure to be used in certain cases. It seems that it would be used in this case, and I do not have a problem with that.

The Convener: Paragraph 8 of the legal brief details the procedure:

"After consulting, … Ministers must lay the proposed Framework before Parliament for a period of 40 days"—

we have just discussed that—

"and in finalising the Framework must have regard to any resolution or report of the Parliament or one of its committees expressing views in relation to the Framework. Once the Framework is finalised, Ministers must lay a copy of the published Framework before Parliament together with a statement",

which is obviously to do with any changes that have taken place. The issue is whether we think the Executive should do more than that. I get the feeling from members and from our legal advice that what the Executive suggests is sufficient at this point.

Mr Maxwell: Effectively, there will be a statutory obligation on the Executive to consult. The RSPB is concerned about who would and would not be consulted, but it is not normal to list in a bill who would be consulted, for obvious reasons:

organisations change their names, new organisations come along and others disappear. In this case the bill is following normal procedure. The fact that the Executive has a statutory obligation to consult is a point in its favour.

The Convener: The only thing that we could add is that, without naming specific bodies, the general area for consultation should be made clearer. However, there are always difficulties in doing that.

Murray Tosh: It is clear from the hierarchy of plans that local plans will have to conform to strategic development plans—where they exist—and that local and strategic development plans will have to reflect the national planning framework. Both kinds of plans are covered by extensive consultation procedures, such as the right to have a reporter or equivalently qualified person conduct a public hearing in certain circumstances and report back, and to have various actions taken as a result of that. The national planning framework is central to everything, and it seems to involve less scrutiny than do the consequences that flow from it. That, of course, is central to many of the objections and representations that we have received from third parties. However, I agree with Stewart Maxwell that, ultimately, the only matter for us is whether 40 days is adequate to do what is envisaged. It clearly is. Whether there is satisfaction with what is envisaged is more properly a matter for the lead committee.

The Convener: Yes. I think that we are agreed that what is proposed seems adequate. However, we will pass on to the lead committee the RSPB e-mail so it can consider the issues. We can also send it the *Official Report* of the meeting.

I welcome Gordon Jackson to the meeting.

We move on to consideration of the delegated power under proposed new section 4(1) of the Town and Country Planning (Scotland) Act 1997, which provides the power to designate a group of planning authorities to prepare a strategic development plan. That is regarded as essentially an administrative provision to divide the country into appropriate geographical areas. Are there any comments on whether the power should involve more than the negative procedure? Are we happy with what is proposed?

Members *indicated agreement*.

The Convener: Good. Do members have a view on whether there ought to be a statutory requirement to consult planning authorities? This is about dividing Scotland into various planning authority areas.

Mr Maxwell: Frankly, I am not sure that I want to go as far as making that a statutory obligation. I suspect that the Executive would consult; I cannot envisage any reason why it would not. The Executive normally says that it will consult such bodies; it would seem odd if it did not. However, it might be worth commenting to the Executive that we expect it to consult and asking it to confirm that that will be the case. Beyond that, I do not think that it is necessary to oblige the Executive to consult.

Murray Tosh: I broadly agree. Consultation is embedded in the ethos of the Development Department, which consults on massive amounts of documentation. However, rather than insist that there must be consultation, we should ask the Executive why it did not put such a requirement in the bill, and take the matter from there when it responds.

The Convener: Okay. We will ask that question.

We move on to proposed new sections 7(1) and 7(2) of the Town and Country Planning (Scotland) Act 1997, "Form and content of strategic development plan". Are we happy that the negative procedure should be used?

Murray Tosh: I wondered about that. I am not entirely clear about what is meant by "Form and content". For local authorities in the city regions, where strategic development plans will apply, there will be a division of responsibility on planning between the strategic development plan for the city region and the individual local development plans for the constituent local authorities. Some local authorities—Fife is an example—may be in more than one strategic development plan area. Most of Scotland's local authorities will be able to plan in their areas of policy competence, but local authorities in the city regions will not be able to do so because they will be subject to the frameworks of the strategic development plans. It strikes me that there is scope for some of the difficulties that existed in the early stages of regionalisation—when districts and regions contested policy areas and argued about who should regulate what, where planning fees should go and so on—to re-emerge.

We could put to the Executive the argument that the first set of regulations, which would set out the framework, might usefully be subject to the affirmative procedure. There should be no requirement for any subsequent refinements or modifications to be subject to the affirmative procedure, because such changes would represent tidying up in the light of experience. I am not saying that such an approach should be adopted. I am not clear whether the new sections are intended to address differentiations in policy, but it might be worthwhile asking the Executive. The matter could be more controversial than legal advisers anticipate.

The Convener: It is important that we get as much clarity as possible. We should pass the point on as quickly as possible to the lead committee to ensure that it asks questions on the issue. What about the issue that we can concern ourselves with, which is whether the first set of regulations should be subject to the affirmative procedure?

Mr Maxwell: I am not against us asking Murray Tosh's question, as further justification and explanation from the Executive would be helpful, but I am not overly concerned about the use of the annulment procedure. The process seems to be administrative in nature, so I am not concerned that the negative procedure is to be used. However, further explanation might help us to decide whether, as Murray Tosh suggests, the first set of regulations should be handled under the affirmative procedure, and the negative procedure should be used after that.

The Convener: Okay. We will ask for clarification, then we will make a final decision. We have got time for the response to come back. Are we agreed?

Members *indicated agreement*.

The Convener: Are members agreed that there are no reasons why the powers in new section 8(1)(b), "Preparation of the strategic development plan etc", should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Are members agreed that there are no reasons why the powers in new sections 9(4) and 9(6), on the publication of main issues reports, should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Identical powers are included in sections 10(1)(a), 10(6), 12A(7) and 18(1)(a), and are mentioned at the bottom of the page in the legal brief. Does the committee also approve those?

Members *indicated agreement*.

The Convener: New sections 10(1)(d) and 10(7) are on the preparation and publication of proposed strategic development plans. Is there any reason why the negative procedure should not be used?

Mr Maxwell: I do not think that there is a problem with the procedure as it is laid out.

The Convener: Okay, we are happy with that.

We move on to new section 12, "Examination of proposed strategic development plan". Should instruments that are made under new section 12 be subject to the negative procedure?

10:45

Murray Tosh: I wondered about the extent of the regulations that are envisaged in new section 12(3), which specifies three areas on which the Scottish ministers may make regulations. It states:

"the form the examination is to take … is to be at the discretion of the person appointed."

That struck me as a bit odd. I found no similar provision in the Town and Country Planning (Scotland) Act 1997 when I tried to ascertain what the new provision is intended to replace. A number of provisions in the bill provide that councils will be directed to ensure that hearings take place and that people who are entitled to be heard are heard, so it strikes me as strange that in the context of examinations of proposed strategic development plans the Scottish ministers will not make regulations on the circumstances in which written or oral submissions are allowed or in which assessment will take place in public.

In a bill that is so concerned with public involvement and public process, it is strange that the form of the examination should be left to the discretion of the person who is appointed to conduct it. I am sure that in the vast majority of cases the person who examines the plan will determine that everything should be done in public and with full involvement, but I would have thought that ministers would at least provide guidance to clarify their expectations of how the examination should be carried out. If councillors are being told that they must give five minutes to applicants and objectors when they deal with planning applications, how much more important is it that the Scottish ministers should specify that a hearing to assess a strategic development plan should take place in public and that people should have the right of representation?

The Convener: New section 12(3)(b) says that the Scottish ministers may make regulations as to

"procedures to be followed at such an examination",

so regulations will cover such matters—I am being advised by the legal adviser that the position is not clear.

Murray Tosh: The bill provides that the person who examines the plan can determine the form of the examination. It is not clear what procedures will be mandatory and what will be at the examiner's discretion. Indeed, the bill explicitly leaves to the examiner's discretion sensitive matters, which are likely to lead to a degree of grief down the road.

The Convener: I get the gist of what you are saying. You make a good point.

Mr Maxwell: I agree with Murray Tosh, but I wonder whether we are straying into policy areas.

The Convener: I think that we are.

Mr Maxwell: I am not sure that it is strictly for the Subordinate Legislation Committee to consider such matters. Far be it from me to restrict what we do—I usually go the other way—but it appears to be a policy matter.

The Convener: To be fair to Murray Tosh, new section 12(3) provides that the Scottish ministers may make regulations, and he is seeking clarification about those regulations. He is correct to raise the issue.

Murray Tosh: I am asking whether the regulations should also cover matters that would normally be included—and, indeed, are regarded—as fit subject matter for regulations in other provisions in the bill. The matter is clearly within the remit of this committee.

The Convener: We need to know the balance, so we need to be clear about the procedures that will be laid down and the procedures that will be at the examiner's discretion.

Mr Maxwell: We can ask.

The Convener: We will ask the Executive about the matter.

We move on to new section 12A(8), on further provision regarding examination under section 12(2). Is the committee content that instruments will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: We move on to new section 15, "Form and content of local development plans". Are members content that instruments will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: The powers in new section 16, "Preparation and monitoring of local development plans", mirror the powers in new section 8(1)(b), which we discussed. Are members happy that instruments will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: The powers in new section 17, "Main issues report for preparation of local development plan", mirror the powers in new sections 9(4) and 9(6) on strategic development plans. Are we content that instruments will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 2 of the bill will insert new section 18, "Preparation and publication of proposed local development plan", into the Town and Country Planning (Scotland) Act 1997—the principal act. Section 18 mirrors new sections 9(4) and 9(6). There is a minor drafting point that we can raise in an informal letter, but are members happy that the powers will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: The minor drafting point is in new section 18(1)(e)(ii), in which "matter" should be in the plural.

New section 19 of the principal act is on "Examination of proposed development plan". The powers in new sections 19(5) and 19(10) mirror those in new sections 12(3) and 12A(8). Are we content that the powers should be subject to the negative procedure?

Murray Tosh: I would like to make the same point about new section 19(5) that we made about an earlier section. There is an apparent conflict between new section 19(5)(b), which refers to procedures being specified in regulations, and the text that follows, which gives the person who has been appointed to conduct the hearing discretion to determine the form of the examination.

The Convener: You are certainly getting brownie points today, Murray. Are we happy that the powers in new section 19 will be subject to the negative procedure?

Murray Tosh: Paragraph 56 of the legal briefing refers to new section 19(1), but I think that new section 19(10) is meant. Section 19(10)(a)(i) deals with the action that planning authorities are required to take in response to reports that are made after assessments in public. The legal advisers have done well to pick up the fact that an authority may decline to make modifications

"on such grounds as may be prescribed".

I take it that it is proposed that that power will be subject to the negative procedure.

The Convener: Yes.

Murray Tosh: It strikes me that that is a significant new power. I understand that, at the moment, local planning authorities are not required to accept the modifications that are recommended by reporters. In East Renfrewshire in the past couple of years, there have been significant areas of disharmony between the reporters' conclusions and the council's final decisions. It appears that the measure that we are debating would close that loophole—if ministers see it as a loophole—and would represent a significant accretion to ministerial power to prescribe the limitations within which local authorities may exercise the discretion that they currently enjoy.

I am not sure whether the provision will replace sections 18 and 19 of the principal act, which provide for the Scottish Office—now the Scottish

ministers—to call in and approve a local plan, which is a procedure that ministers never use. The provision that we are debating may be an alternative to that power, if that power is to be abolished. I cannot work out whether the original provision will remain in place. Given that under the principal act the power applies to local plans, which will no longer exist, I presume that it will not remain. I assume that the procedure for ministerial call-in and inspection will not automatically transfer to local development plans.

It would be interesting to clarify the matter. We should establish whether the regulations that would be made under new section 19(10)(a)(i) would replace the role of Scottish ministers as defined under previous legislation, or whether this is a genuinely new power. In that case, we may want subsequently to return to the question of whether the power should be subject to the negative or the affirmative procedure. On the face of it, we are dealing with a significant new power with which local authorities may feel very uncomfortable.

The Convener: We will ask that question. Part of the problem is that the memorandum on delegated powers does not provide us with much information on new section 19. Another issue is the exceptions, about which there is no clarity in the policy memorandum. We should ask about the whole area.

Apart from that, there is a huge question about whether the power should be subject to the negative procedure. The remainder of the powers are all okay in terms of their being subject to the negative procedure.

We move on to new section 19A, which is entitled "Further provision as regards examination under section 19(4)". The power mirrors the power in new section 9(6) in relation to the publication of a local development plan. Is the committee happy that the power will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Is the committee happy that the power in new section 20B(5), "Development plan schemes", will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Gordon, are you okay?

Gordon Jackson (Glasgow Govan) (Lab): My eyes glazed over about 10 minutes ago. I am so far out of my depth this morning that I am just sitting quietly. These boys have done a lot of homework, and I am very far off the pace.

The Convener: As I say, I must give Murray Tosh his brownie points this week.

Both of the powers in new section 21, "Action programmes", are precedented in new sections 9(4) and 20B(5), which we have discussed. Is the committee happy that those powers will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Is the committee happy that the power in new section 22, "Supplementary guidance", will be subject to the negative procedure?

Members *indicated agreement*.

Mr Maxwell: I am not unhappy about that, but I am not sure whether I understand the voluntary nature of supplementary guidance. I suppose that it will be voluntary because it will be supplementary. If supplementary guidance is needed, should it be voluntary? The legal briefing tells us that only if a planning authority makes supplementary guidance may

"Ministers … make regulations to regulate the consultation requirements".

A planning authority might not issue supplementary guidance even though people in the area thought that supplementary guidance was required. Will not the power allow a local authority, or whoever issues the local development plan, not to issue supplementary guidance because it would be regulated by ministers if it did so? I question the voluntary nature of the supplementary guidance.

The Convener: Okay, we will ask the question.

Murray Tosh: In practice, the issue of supplementary guidance comes up in relation to things such as open space standards and the affordable housing element that is to be required in a residential planning development. Supplementary guidance is what local authorities issue to flesh out their plans and to exercise a degree of discretion in providing further information for the guidance of developers. It frames the conditions that local authorities will attach to planning consents that they grant. In effect, new section 22(2) will give them the power to issue such guidance, subject to ministerial direction on areas in which that is competent. The Executive tends to push local authorities to produce supplementary guidance for the benefit of their local plans. I think that it is satisfactory for the power to be subject to the negative procedure.

Mr Maxwell: I have no difficulty with the power's being subject to the negative procedure. Murray Tosh obviously knows more about the matter than I do, but it seems odd to me that the issuing of guidance will be voluntary. That opens up the possibility of local authorities avoiding issuing guidance where it might be helpful to those who are involved in the local development plan process. Maybe that is a policy question.

The Convener: There is no problem in our asking the question. The Executive memorandum makes it clear that supplementary guidance

"will be subject to public consultation. New section 22(2) gives Scottish Ministers regulation making powers to set out the procedure for the adoption of supplementary guidance".

Mr Maxwell: I have no problem with that. The question is not about what happens when such guidance is issued; it is about what happens when local authorities choose not to issue it. Murray Tosh may know more about that than I do.

Murray Tosh: I do not know that that is as much a problem as the opposite would be. What happens if a local authority wants to issue supplementary guidance in areas of policy where the regulations do not permit it to do so? To that extent, the voluntary nature of the guidance might arise. It might be appropriate to ask whether local authorities would be empowered to adopt supplementary guidance where they saw fit, subject to the procedural requirements that have been laid down by the Executive for consultation on, and the presentation of, supplementary guidance. We could ask both questions.

11:00

The Convener: Yes. We will ask both questions.

New section 23D of the principal act is entitled "Meaning of 'key agency'". The issue is that there may be different key agencies in different parts of the country. The power is not a Henry VIII power because the power would be to prescribe in more detail a term that is already in the bill. On balance, that seems to be okay.

Murray Tosh: I am not saying that it is not okay, but I have a question on meaning. I think that the legal briefing says that the criteria that would qualify a body to be considered a key agency are not clear. There is no reference to infrastructure providers, for example, which there could be. A body that has an environmental standards role could be a key agency. It would be useful to have clarification of such matters.

Local authorities could be required to consult almost any body, including private sector companies such as utility companies. However, given that a duty will be placed on agencies to co-operate with local authorities, the provisions could apply only to Scottish Executive agencies. In that case, would Scottish Water—which I do not think is, strictly speaking, an agency—be included? Would the rail companies, which are public sector bodies in a sense—they are quasi-public-private bodies, but not Scottish Executive agencies—be required to consult on rail infrastructure planning? What the key agencies are and in what circumstances Scottish Executive agencies, other public sector bodies and possibly private sector bodies that have significant infrastructural roles would be included is not clear. It might be worth our while to try to obtain more information from the Scottish Executive about that.

The Convener: We will ask what bodies the term "key agency" covers, whether it covers the agencies that Murray Tosh mentioned and whether the key characteristics of such agencies should be identified. Do members think that the key characteristics should be identified in the bill?

Murray Tosh: It is a fundamental difficulty that the bill does not define "key agency".

The Convener: The memorandum on delegated powers does not do that, either. The definition does not necessarily need to be included in the bill, but I wonder how keen members are on having it included.

Murray Tosh: I am easy about whether the meaning should be given in the bill. We hear regularly that the inclusion of definitive lists in bills can be difficult, so there may be sufficient clarification for long-term use of new section 23D if the Executive clarifies its thinking in the memorandum or in a public response to the committee.

The Convener: Do members agree that we should ask for such clarification?

Members *indicated agreement*.

The Convener: We will return to whether members are content with the power's being subject to the negative procedure.

Part 3 of the bill is "Development Management". I refer to section 3(1)(a), on the meaning of "development". The proposed amendment to section 26 of the principal act is aimed at bringing the addition of mezzanine flooring in retail outlets within the planning control regime, which has been quite a big and sensitive issue. It is felt that a loophole exists in the planning control regime. Are members content with the power and that it should be subject to the negative procedure?

Murray Tosh: It is a sensitive issue in a sense, but the principle of controlling retail floor space has been established in policy for a long time. A loophole will effectively be closed. The power will therefore be less significant in practice than it appears to be, because there is no new policy intention. The negative procedure is perfectly all right.

The Convener: Do members agree?

Members *indicated agreement*.

The Convener: Section 3(1)(c) will insert new subsections (6C), (6H) and (6G) into section 26 of

the principal act. The power in new subsection (6C) is wide and could be exercised as a Henry VIII power. An order will be subject to the affirmative procedure, even when it does not amend primary legislation, and every order must be subject to consultation before it is made. The proposals seem to be reasonable. Are members happy with them?

Members *indicated agreement*.

The Convener: Section 4, "Hierarchy of developments for purposes of development management etc", sets out the three categories to which all developments will be allocated: national, major and local developments. Given that the description of classes of development will have a bearing on the planning application procedures that will apply, we may wish to consider whether planning authorities should be consulted on the making of the regulations that will describe the different classes of development.

Murray Tosh: I agree that we should ask that question, but I would like more information. It sounds beautiful that we will have national, major and local categories and that everything will slot nicely into that, but much of the discussion behind the scenes, specifically in the context of housing consents, has concerned what will be "local" and what will be "major". Various numbers have been bandied about.

One can imagine that this is not a matter of policy but of definition. In na h-Eileanan an Iar, for example, 50 houses might constitute a major development whereas one would hardly notice such a development in Glasgow. The differences between local and major development might be numerical, which raises an interesting question about whether the regulations will be general regulations that will apply to all local authorities or whether there is the possibility of local orders that would specify different thresholds in urban and rural contexts. It would be helpful if that could be made clear. It would lead us to a better understanding of whether annulment would be the best way to deal with the issue.

The Convener: Okay—we will revisit that.

Mr Maxwell: To be honest, I had not looked at the matter that way, but that is an important point. I am sure that Murray Tosh has heard of the proposed development in Lagg on Arran. Lagg is a hamlet of four houses and the proposed development is for an additional four houses, which will double the size of the hamlet. It is only four houses, but it will have quite an impact. Murray Tosh's point is well made.

The Convener: Are there any more points about consultation?

Murray Tosh: As you said, convener, it is reasonable to suppose that councils would wish to contribute to the making of regulations, so it would be useful to know the Executive's intentions in relation to consultation.

The Convener: We will include that.

Murray Tosh: Councils will be particularly concerned about how they should differentiate between local and major issues and they will be keen to ensure that the regulations are tailored to their requirements as far as possible.

The Convener: Are we happy that the powers in Section 6, "Applications for planning permission and certain consents", will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Are we also happy that the powers under section 7, "Variation of planning applications", should be subject to the negative procedure?

Members *indicated agreement*.

The Convener: It is suggested that the powers under section 9, "Publicity for applications", be made subject to the negative procedure. Are members happy with that?

Members *indicated agreement*.

The Convener: Section 10 is on "Pre-application consultation". There are three powers in new section 35A of the principal act. First, the new section will place a duty on prospective applicants to obtain planning permission for certain prescribed classes of development. Ministers will have a power to make regulations. Are members happy that the regulations will be subject to the negative procedure?

Murray Tosh: For the first two powers, yes.

The Convener: The second power, under new section 35A(5), on the form of notice, will be subject to the negative procedure. Are members okay about the first two?

Members *indicated agreement*.

The Convener: The third power, in new section 35A(7) of the principal act, will require a planning authority to provide a statement confirming its opinion to the applicant within 21 days of the notice being given. That power is a Henry VIII power, because the regulations will be able to amend the period of notice that is mentioned in the bill and there is no restriction on the use of the power. Ministers could therefore increase or decrease the 21-day period within which a planning authority must respond.

Murray Tosh: We need to ask a wee bit more about that one. A 21-day period has been stated in the bill, so it has been decided that that is an appropriate period. It may be that the Executive

started by guessing how long might be reasonable and that it intends to vary the period in the light of experience. If that is the case, it would be helpful for the Executive to tell us that that is its intention. If the Executive has attached such significance to 21 days that it has put that period in the bill, we should ask it to explain why it has done that and whether it is considering any limitations within which it might be prepared to vary the period. The situation may be less serious than that. I do not wish to be flippant, but the Executive may have just thought of a number, but intended to look at the provision later. If that is how the Executive sees the matter proceeding, perhaps we can be relaxed about it.

The Convener: Shall we ask the question and then return to the matter?

Mr Maxwell: I do not disagree with Murray Tosh, but it seems odd that the Executive would—to use Johnny Ball's phrase—"think of a number" and then put it in the bill and give ministers the power to amend it. If the period is liable to change for whatever reason or if the Executive will want to change it in the light of experience—I think that that is the phrase that Murray Tosh used—it should be stated in regulations in the first place. We should ask the Executive about that point. Why is it taking the power? We would expect provisions that are likely to change to be in regulations rather than in the bill. As Murray said, the fact that the 21-day period is in the bill suggests that the Executive thought long and hard about the matter and decided that that is where it should be, so why is it taking the Henry VIII power to amend the period? That is rather odd; I would be happier if the period was stated in regulations because that seems to be the obvious place for it.

Murray Tosh: It is possible that the Executive is just trying to send out a signal. Under the new procedure, planning authorities will be required to make responses that they have not previously been required to make, and I think that the Executive is signalling that that should be done within a defined period, which is reasonable. The fact that it has specified a number and said that it will change it is really more of a curiosity than anything else. I do not think that it is all that sinister, but the question will elicit the answer.

Gordon Jackson: Is the procedure brand new?

The Convener: Yes.

Gordon Jackson: As it is a brand new procedure, it may be that an arbitrary number was picked because the Executive wanted to see whether it will work.

Mr Maxwell: It is not usual to include an arbitrary number in a bill. That seems odd.

Gordon Jackson: You are right.

Murray Tosh: It is probably not arbitrary. The period of 21 days is probably used in other contexts. Rather than include it in regulations, the Executive has probably specified a period in the bill in an attempt to be helpful.

The Convener: I am just checking the policy memorandum to see whether it says anything else on the matter.

Murray Tosh: We are just talking to give you time to do that, convener.

The Convener: Absolutely. I do not think that the memorandum gives the reason for the 21-day period. We will ask the Executive about that and come back to the matter.

Are we agreed that there is no reason why the power in new section 35B of the principal act, "Pre-application consultation: compliance", should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Okay. New section 35C of the principal act will allow ministers to prescribe by regulations the form of a pre-application consultation report. Are we agreed that there is no reason why that power should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Are we agreed that there is no reason why the power in section 11, "Public availability of information as to how planning applications have been dealt with", should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 12, "Keeping and publication of lists of applications", contains proposed new section 36A of the principal act. The points that arise are similar to the points that we discussed in relation to proposed new section 35A.

Murray Tosh: I tried to find the relevant provisions in the principal act, but I think that they are probably specified in the regulations, so it is difficult to say how significant the change is. I think that local authorities are required to publish information weekly. It may be that the Executive wants to give local authorities longer because they will have a heavier workload but, again, it would be helpful if the Executive could clarify its thinking. It might be reasonable to have different periods, but it is difficult for us to judge that in the absence of any reasoned explanation.

The Convener: Absolutely.

Are members happy with the powers in section 13, "Pre-determination hearings", which will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Are members happy with the power in section 15, "Manner in which applications for planning permission are dealt with etc", which will be subject to the negative procedure?

Murray Tosh: I wonder about the power. Our legal briefing argues that it is appropriate and that it is largely technical, but there are some potentially difficult issues that might have major implications for applicants for planning consent. For example, the bill will create a different time period for consents, which will last three years rather than five years. That is likely to impact on things such as suspensive conditions and regulations for the commencement of development. I am not convinced that everything in section 15 is unimportant enough to be dealt with under the negative procedure.

The Convener: What would you like us to ask questions about?

Murray Tosh: I have not got as far as deciding that.

11:15

Mr Maxwell: I have questions for Murray Tosh. Is the power new? Will it change previous arrangements or will it just replace what already exists?

Murray Tosh: The power seems to be new, because it appears to be a mechanism that will allow ministers to require local authorities to attach conditions to planning consents and thereby avoid the call-ins of the past. That sounds very neat administratively, but the conditions that are attached and the powers that will be taken to attach conditions could have significant implications for developments.

What is being done and whether it will have limitations are unclear, and substantial policy concerns are likely. There is a lack of clarity—or perhaps it is too clear that ministers are trying to eliminate the requirement for call-ins. A possible implication is the extensive accretion of power to the Scottish Executive.

I am not finding it easy to articulate my concern.

Mr Maxwell: I understand the concern.

Murray Tosh: The provision seems to represent a significant increase in ministerial power, so I am not entirely convinced that the negative procedure is appropriate. I would like the Executive to make a better case for the power, to say what its benefit will be over the current procedure and to offer assurance that the conditions that it will attach will not necessarily be found to be unduly onerous when compared with current processes and procedures.

The Convener: In addition, given that the legal briefing says that section 15 will amend and extend the power, we should ask for more detail about what will be involved. Murray Tosh has made a good point. We will decide on the procedure after we have received some answers.

Section 16, "Local developments: schemes of delegation", will introduce new powers in subsections (1) and (3) of new section 43A of the principal act. Are members agreed that there is no reason why the negative procedure should not be used?

Members *indicated agreement*.

The Convener: Subsections (7) to (14) of new section 43A of the principal act set out procedures under which an applicant can require a review, by a planning authority, of a delegated decision. Members will see in the legal briefing a note about applicants' human rights. Is there any reason why the negative procedure should not be used?

Murray Tosh: There is quite a concern about the provisions, which I have seen mentioned in several submissions to the Communities Committee. It is important to understand both how planning applications are dealt with and the relationship between officers and local authority members. Councillors can discuss planning applications extensively with officials, receive formal or informal briefings from them and ask questions or make representations. Ultimately, a planning application is determined by a committee of councillors who are informed by a briefing with recommendations from their officers. The safeguard in that system is always that, if any applicant feels that he has been dealt with harshly, he can appeal to the Scottish Executive.

The bill proposes that an authority will hear appeals against its own decisions. Councillors will hear appeals against decisions that officers have made, but no Chinese walls differentiate officers from councillors. That is a significant issue. In effect, authorities will be asked to judge their own decisions. I do not disagree with the legal advice that such a system can be run in a way that complies with the European convention on human rights, but I wonder what the operational implications are for how local authorities conduct business—I am not aware that the Executive has fleshed them out. For example, will councillors no longer be entitled to informal briefing from, or contact with, their planning officers? Will appeals have to be heard by councillors who are not planning committee members? Many of these matters stray into policy, but the fundamental issue that is within our remit is whether, as it stands and without further guidance and regulation, proposed new section 43A will be compliant with the European convention on human rights.

As it stands, a lot of careful thinking will have to be done in local authorities about procedural and

management issues. That does not happen at the moment. When members and officers of local authorities see the new section, they will consider altering radically the traditional working patterns. Therefore, we need to get more information about it.

The Convener: I accept your point that until we get more information, it is difficult to know whether the procedure is correct.

Mr Maxwell: Murray Tosh makes a valid point. At the moment, the ability to go from a refusal at local level to an appeal to the Scottish ministers at national level seems entirely appropriate. It is surprising that there is a proposal to remove that, so that people would have to go straight to the Court of Session. I have been involved in a number of cases in which people were prepared to take their appeal as far as the Scottish ministers, but not the Court of Session. For many people, that is a step too far. To remove the current levels of appeal seems strange and I want a lot more information about it.

The Convener: Yes, let us ask for that.

Murray Tosh: Stewart Maxwell raises an interesting point. At the moment, relatively few people go to the Court of Session because they tend to go there only on a point of law, as opposed to on a point of policy or as the result of a decision, which is what they would appeal to ministers. However, there has been case law in recent years—the Alconbury decision, for example—where people have gone to the Court of Session on points of fact. One of the consequences of the proposed change might be that not having a right of appeal beyond the local level would compel many more people to go to the Court of Session to draw matters of fact into legal decisions. The Executive might find it useful to consider its proposal again.

The Convener: Okay, let us ask those questions.

Gordon Jackson: That sounds awful like a policy argument.

The Convener: It strays into policy, but we have to know the answers.

Gordon Jackson: I know that it is a difficult issue, but Murray's argument sounded more like one about policy than about what form the regulations should take. I never mind straying into other people's business, but it sounds like policy. Do you not think so, Murray?

Murray Tosh: I said that the matters strayed into policy, but I suspect that because of the issues about the European convention on human rights, a lot of subsequent guidance will be required. It is worth trying to pull that out at this stage, to get some idea from the Executive of what it thinks will be necessary to ensure in practice that the proposed system will be ECHR compliant. That is legitimately within our remit.

Mr Maxwell: If we get more detail, it will allow us to answer the question whether we believe that annulment is the correct procedure.

The Convener: We have to do that. Okay, it is agreed that we will seek more information.

Section 18 is concerned with appeals. Do we agree that there is no reason why the power should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 22, "Planning obligations", proposes new sections 75 to 75C of the principal act. Do we agree that there is no reason why the power in new section 75A should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: New section 75B confers a number of powers on ministers that relate to procedure, the period of notice and the form and content of notices of appeal. Do we agree that there is no reason why those powers should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 23, "Good neighbour agreements", introduces powers that mirror those in section 22. Do we agree that there is no reason why they should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Part 4 deals with enforcement. Section 24 relates to temporary stop notices. Are we okay with using negative procedure here?

Members *indicated agreement*.

The Convener: Part 5 is entitled "Trees". Do we agree that there is no reason why the powers in section 26, "Tree preservation orders", should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Part 6 is entitled "Correction of errors". Do we agree that there is no reason why the powers in section 27, "Correction of errors", should not be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Part 8 is entitled "Financial provisions". Section 29, "Fees and charges", confers wide powers on ministers to make regulations that are subject to the affirmative procedure, with two exceptions that are subject to the negative procedure. Do we agree that there are no problems with that?

Members *indicated agreement*.

The Convener: Part 9 deals with business improvement districts. The bill provides for annulment for all delegated powers in this part of the bill. Section 32, "Joint arrangements", confers a Henry VIII power. The Executive explains that the power to modify or amend the act is limited to matters relating to the implementation of joint arrangements. Annulment is, therefore, considered appropriate in the circumstances. Do we agree with that view?

Members *indicated agreement.*

Murray Tosh: This is a good example of the committee's flexibility in how it evaluates the use of Henry VIII powers in practice.

The Convener: Section 35, "BID Revenue Account", appears to be an administrative matter. There is a concern, however, about the width of the power, which allows ministers to make "further provision" in relation to the BID revenue account. Should we ask for further information from the Executive?

Murray Tosh: I think that we should. If we are given no information about how the Executive envisages the power being used or the justification for taking the power, we are entitled to ask for that information. My instinct is that this is an area in which the affirmative procedure should be used rather than the negative. I would therefore like to hear what the Executive's case is.

The Convener: Do we agree to that proposal?

Members *indicated agreement.*

The Convener: Are members content that the power in section 36, "BID proposals", is subject to the negative procedure?

Members *indicated agreement.*

The Convener: In section 39, "Power of veto", there is an issue about why the circumstances in which a local authority will be entitled to veto a business improvement district proposal cannot be set out in the bill, given the significance of the issue. Should we therefore ask the Executive why this has been delegated and is not set out in the bill?

Murray Tosh: It is surprising that it has not been set out in the bill because this is quite a significant piece of new policy. I am sure that there will be circumstances in which it would be reasonable for a local authority to veto a business improvement district, but you would have thought that the Executive would want to vest the legislation with some sense of urgency or drama so that there would be an expectation that the business improvement district would not be vetoed unless some fairly major criteria existed. You would expect such criteria to be in the bill. We should press for a bit more clarity and, possibly, an amendment of the bill.

The Convener: Do members agree with that proposal?

Members *indicated agreement.*

The Convener: Are members content that the power in section 40, "Appeal against veto" is subject to the negative procedure?

Members *indicated agreement.*

The Convener: Are members content that the power in section 42, "Duration of BID arrangements etc", is subject to the negative procedure?

Members *indicated agreement.*

The Convener: Are members content that the power in section 43, "Regulations about ballots", is subject to the negative procedure?

Members *indicated agreement.*

The Convener: Are members content that the power in section 49, "Further amendment of the listed buildings Act", is subject to the negative procedure?

Members *indicated agreement.*

The Convener: Are members content that the power in section 52, "Supplementary and consequential provision", is subject to the negative procedure?

Members *indicated agreement.*

The Convener: Section 53, "Commencement", makes the usual provision to commence the provisions of the act by statutory instrument. This provision is commenced on royal assent and is not subject to any procedure, as is customary. Do members agree that that is acceptable?

Members *indicated agreement.*

Executive Responses

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

11:28

The Convener: The Executive has provided a full explanation of the background to the making of the regulations. Are members content to draw the attention of the lead committee and the Parliament to that further information?

Members *indicated agreement.*

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

The Convener: We asked the Executive to clarify rule 7(2), where the effect of the reference to rule 15 was uncertain. The Executive's view differs from that of our legal advisers, who still consider the issue to be a serious drafting error.

11:30

Mr Maxwell: This is kind of odd. I have read and reread the response and am still slightly confused. The Executive has accepted that the reference in rule 7(2) to rule 15 should be amended and has said that it intends to do that. The Executive was obviously trying to speed things up—I will not say that it was cutting corners—by applying rules 15 and 17 to directions made under rule 7(1), but the Executive now accepts that there is a problem with that.

However, simply decoupling rule 7(2) from the other rules will not solve the problem; that will just leave it sitting isolated. If the intention is that it will never be used, or you cannot envisage it being used, what is the point of it? Although the Executive's argument is not quite circular, I cannot see where it is going. If the Executive, having accepted that the drafting is wrong, amends rule 7 in a way that solves one problem but leaves us with the central problem of how the detail is supposed to operate, I do not see how that solves anything.

The Convener: The last sentence of the Executive's response states:

"the Executive are of the view that the current wording of rule 7(2) does not cause particular or immediate difficulty in the application of these Rules."

The Executive seems to be saying that the application of rule 7 would not cause a particular problem. The Executive does not say, as Stewart Maxwell suggested, that there is no intention to use the power.

Mr Maxwell: The legal brief is quite clear that rule 7(2) just does not work. If it does not work, it cannot be used. The Executive argues that the paragraph causes no particular or immediate difficulty, which will certainly be the case if the rule cannot be used. However, if the rule is intended to be used at any point, there will be a difficulty. There may be a difference of opinion between the Executive's view and our legal advice, but there seems to be a fundamental problem.

The Convener: We do not have time to write to the Executive again, so we will need to report the issue to the lead committee. We will say that the Executive accepts that it will need to amend the rules and intends to do so, but that we do not know the timing for that. We will also highlight our concerns that, according to our legal advice, rule 7(2) is unworkable.

Murray Tosh: Obviously, we cannot do much about the matter other than report it to the lead committee, but there is a good case for saying that the Executive should withdraw the rules, amend them and re-lay them before the Parliament in a correct form. Perhaps Stewart Maxwell can lodge a motion asking the lead committee to annul the rules. He could go along to the lead committee to argue the case and see whether that committee is brave enough.

The Convener: We will report the defective drafting and other matters to the lead committee.

Mr Maxwell: Yes, we have serious concerns about the drafting.

The Convener: In particular, we shall point out that the Executive accepts that the drafting should be amended but has not provided any timescales for that.

Instruments Subject to Annulment

Prisons and Young Offenders Institutions (Scotland) Rules 2006 (SSI 2006/94)

11:33

The Convener: The rules provide no specific power to amend or revoke any direction that is issued under the rules, although such a direction could be amended or replaced by the making of a new direction. Do we want to raise that point formally with the Executive or should we suggest informally by letter that the issue could be tidied up at a later date?

Murray Tosh: This issue occurs regularly. Although the matter is not itself very important, it is disappointing that the Executive does not automatically provide for such revocation. I suggest that we send a formal note about what we expect and that we should do that whenever revocation issues arise, until the Executive gets into the habit of applying what ought to be best practice.

The Convener: Is that agreed?

Members *indicated agreement*.

Smoking, Health and Social Care (Scotland) Act 2005 (Consequential Amendments) Order 2006 (SSI 2006/95)

The Convener: There is an issue about whether the order should have been made using general powers or specific powers. Should we ask the Executive to explain why it has chosen to use general powers under the Smoking, Health and Social Care (Scotland) Act 2005 as the vires for the order, rather than the specific powers under the Town and Country Planning (Scotland) Act 1997? It appears that powers under the 1997 act would have been available and might have been more appropriate for the purpose. As the legal brief explains, there is a bigger issue about whether general or specific powers are more appropriate.

Mr Maxwell: I agree with the legal advice that the specific power should have been used. It seems odd to use the general power when the specific power is available. I can see no reason for not using the specific power. It will be helpful to have that clarified.

The Convener: We will raise that question, along with the other minor points, in an informal letter.

Police Act 1997 (Criminal Records) (Scotland) Regulations 2006 (SSI 2006/96)

The Convener: Two issues arise on the regulations. We may wish to ask the Executive to explain the purpose and effect of the words:

"For the purposes of section 113B(2)(b)",

in regulation 9. The words:

"for the purposes of section 119(7)",

in regulation 17, also require explanation. Those sections of the Police Act 1997 appear to be simply regulation-making powers. We may also wish to ask the Executive to explain the reference in regulation 17 to "appropriate police authority", which does not appear to be a term used in section 119(3) of the 1997 act. Is that agreed?

Members *indicated agreement*.

Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2006 (SSI 2006/97)

The Convener: Three substantive points arise on the regulations. We may wish to ask the Executive whether the definition of "statutory office-holder" in regulation 2(1) will include persons who are appointed under acts of the Scottish Parliament. We may also wish to ask the Executive to explain the purpose and effect of the words:

"for the purposes of section 120A(7)",

in regulation 7. The words:

"for the purposes of section 120(3)(ac)",

in regulation 10, also require explanation. Those sections of the Police Act 1997 are simply regulation-making powers. We might also ask the Executive to explain the reference in regulation 7 to "appropriate police authority", which does not appear to be a term used in section 120(5) of the 1997 act.

Do we agree to raise those points with the Executive, and also to raise two further minor points in an informal letter?

Members *indicated agreement*.

Fish Labelling (Scotland) Amendment Regulations 2006 (SSI 2006/105)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment Order 2006 (SSI 2006/108)

Abolition of Feudal Tenure etc (Scotland) Act 2000 (Specified Day) Order 2006 (SSI 2006/109)

Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2006 (SSI 2006/110)

Transfer of Property, Rights and Liabilities from the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive to the West of Scotland Transport Partnership Order 2006 (SSI 2006/111)

The Convener: No substantive points arise on the regulations or the orders, but we will raise some minor points in an informal letter to the Executive.

Strathclyde Passenger Transport Area (Variation) Order 2006 (SSI 2006/112)

The Convener: Under section 40 of the Local Government etc (Scotland) Act 1994, ministers are required to consult before making the order. The Executive note refers to the consultation requirement that is set out in section 10(8) of the Transport (Scotland) Act 2005, but that does not appear to be relevant to the order. Information relating to the fact that consultation was carried out should have been narrated in the preamble to the order, as it is relevant to the vires of the order. Are members content to ask the Executive why it did not include that information?

Members *indicated agreement*.

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2006 (SSI 2006/113)

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2006 (SSI 2006/114)

Civil Partnership Family Homes (Form of Consent) (Scotland) Regulations 2006 (SSI 2006/115)

The Convener: No substantive points have been identified on the regulations. There are minor points, which we can raise with the Executive in an informal letter.

Diligence against Earnings (Variation) (Scotland) Regulations 2006 (SSI 2006/116)

The Convener: No substantive points arise on the regulations, but members will note that the Executive has chosen not to revoke the regulations that these regulations have superseded. Do members wish to raise that point with the Executive?

Gordon Jackson: We should ask the Executive about that.

The Convener: Formally or informally?

Gordon Jackson: We should get an answer from the Executive on the record.

The Convener: I agree.

National Bus Travel Concession Scheme for Older and Disabled Persons (Eligible Persons and Eligible Services) (Scotland) Order 2006 (SSI 2006/117)

Beef Carcase (Classification) (Scotland) Amendment Regulations 2006 (SSI 2006/118)

The Convener: No substantive points have been identified on the order or the regulations. There are minor points, which we can raise with the Executive in an informal letter.

Dairy Produce Quotas (Scotland) Amendment Regulations 2006 (SSI 2006/119)

The Convener: The regulations correct errors in the Dairy Produce Quotas (Scotland) Regulations 2005 (SSI 2005/91) and have been made available free of charge to all known recipients of the original regulations. I am sure that we are happy about that and support it, but the Executive note makes no comment on whether any person has been disadvantaged by the errors and, if so, what, if anything, has been done to put matters right. Shall we ask about that?

Members *indicated agreement*.

The Convener: On regulation 7(b), are members content to ask for confirmation that no penalty will be applied in respect of statements submitted before the date when the regulations come into force?

Members *indicated agreement*.

The Convener: There is also a minor point that we can raise in an informal letter.

Provision of Water and Sewerage Services (Reasonable Cost) (Scotland) Regulations 2006 (SSI 2006/120)

The Convener: Do members wish to ask the Executive to explain the policy intention behind the drafting of regulation 3, which is not clear?

Members *indicated agreement*.

National Health Service (Tribunal) (Scotland) Amendment Regulations 2006 (SSI 2006/122)

The Convener: No substantive points have been identified on the regulations. There are minor points, which we can raise in an informal letter.

Gordon Jackson: I do not know how you want to deal with the matter, convener, but the number of minor points that we are identifying is disturbing.

The Convener: Today?

Gordon Jackson: Yes, points of drafting error are being raised on almost every instrument. We are describing them as trivial—typos and errors in brackets or subparagraphs. The number is remarkable. Our legal adviser picks them up, so why are they not picked up elsewhere?

Mr Maxwell: Why do we not ask the Executive to introduce a system whereby we could make changes? If it were to publish instruments in draft form, we could change them.

Gordon Jackson: That is another argument for a big cop-out; we would have to deal with the errors. Presumably the system is that, although we do not get instruments in draft form, they are drafted somewhere and somebody checks them. I accept that there will always be errors—that is inevitable—but the checking system is not working. The matter may not be one for the minister of whatever it is that we call her, but individual departments should check their drafts.

The Convener: We should write to the Executive to ask about the checking system.

Gordon Jackson: I am sorry if I am sounding petty, convener.

The Convener: No, you are not. We have had more errors today than is normally the case.

Gordon Jackson: In isolation they are trivial things, but there seems to be a huge number of errors.

Murray Tosh: I think that the minister and the official report would like Gordon Jackson to specify the minister to whom he referred.

The Convener: I thought that you wanted to come in, Murray, to say that the number of errors is because of the number of instruments before us today.

Gordon Jackson: It is partly to do with that.

Murray Tosh: No, it is to do with the P-aren't acts.

The Convener: It may have something to do with the number of instruments that we have before us this week. We have raised the point about timetabling.

Mr Maxwell: We have many instruments to deal with, but that is because all instruments end up before us. They come from different departments, however; each individual department does not have to deal with many instruments.

Gordon Jackson: We have one or two people finding all these mistakes and yet the instruments have been checked by dozens of people.

The Convener: Okay. Are we agreed that we will write to the Executive asking about the checking system in individual departments?

Members *indicated agreement*.

Mr Maxwell: Perhaps we should also suggest that it should consider a system of laying draft instruments.

Gordon Jackson: There may be an argument in that respect.

Mr Maxwell: There is. We discussed that possibility during our inquiry, and the rate of errors is partly why we ended up discussing it.

Gordon Jackson: Absolutely. I agree totally.

Local Government Pension Scheme (Scotland) Amendment Regulations 2006 (SSI 2006/123)

The Convener: No points arise on the regulations.

Non-Domestic Rates (Levying) (Scotland) Regulations 2006 (SSI 2006/124)

The Convener: Are we content to ask the Executive why it has chosen not to cite the 2005 instrument by the title given in that instrument, which provides that it is to be cited as an order, not as regulations?

Members *indicated agreement*.

The Convener: We have also a minor point to raise by way of an informal letter.

Non Domestic Rating (Rural Areas and Rateable Value Limits) (Scotland) Amendment Order 2006 (SSI 2006/125)

Water Environment and Water Services (Scotland) Act 2003 (Designation of Responsible Authorities and Functions) Order 2006 (SSI 2006/126)

The Convener: No points arise on the orders, other than a minor point on SSI 2006/126, which we can raise by way of an informal letter.

Members *indicated agreement*.

Water Environment (Consequential Provisions) (Scotland) Order 2006 (SSI 2006/127)

The Convener: No substantive points arise on the order. The point that we discussed earlier on the use of general as opposed to specific powers arises again, however. Do we want to ask the question again, or will we leave it in this case?

Murray Tosh: The point is similar to that we made earlier. It would therefore be consistent to make it again. The use of general powers is a recurring issue.

The Convener: Yes. We will raise the matter, just to be consistent.

Again, a minor point arises, but we can raise it by way of an informal letter.

Waste Management Licensing (Water Environment) (Scotland) Regulations 2006 (SSI 2006/128)

The Convener: No substantive points arise on the regulations.

Gordon Jackson: I do not claim to have checked this personally of an evening, convener, but we are told that these regulations are the 20th amendment of the principal regulations. I am sure that the figure is right. Surely consolidation is looming on the horizon.

Mr Maxwell: You would not want the Executive to rush into things.

Gordon Jackson: We should mention it.

The Convener: We will include that point in the letter that we will send about the minor points that arise. We should ask the Executive when it proposes to consolidate the regulations. Are we agreed?

Members *indicated agreement*.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/102)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 14) (Scotland) Order 2005 Partial Revocation Order 2006 (SSI 2006/103)

11:44

The Convener: The usual food protection orders are before us. No points arise on the orders.

Gordon Jackson: We should probably write a letter to say that we are delighted that no points arise.

Instruments Not Laid Before the Parliament

Planning and Compulsory Purchase Act 2004 (Commencement No 1) (Scotland) Order 2006 (SSI 2006/101)

11:45

The Convener: It appears that there are some problems with the order, as the commencement seems to be too limited. For the order to have full force and effect, there is a need to commence certain other provisions of the 2004 act. Are members happy for us to ask the Executive why it has not commenced sections 90(4) and 117(8)?

Members *indicated agreement*.

Antisocial Behaviour etc (Scotland) Act 2004 (Commencement and Savings) Amendment Order 2006 (SSI 2006/104)

The Convener: Stewart Maxwell would like to make a point about the order.

Mr Maxwell: Clearly, there has been a delay in commencement, which has been deferred for a month. A similar point was made about the previous instrument. The order deals with only one commencement, and one wonders what happens to all the others. Do all those commencements still stand? Should they not have been changed at the same time? One would have thought that the delay of a month would have a knock-on effect and that the other commencements would have to be brought into line. Does the Executive simply have its fingers crossed? Is it just hoping for the best and that no one will notice? Will the courts accept that the original date means the new date—who knows? It seems strange that the Executive is not changing all the other commencements at the same time.

The Convener: Shall we ask whether all the consequential changes to commencement dates have been made?

Members *indicated agreement*.

Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No 4) Order 2006 (SSI 2006/121)

The Convener: No points arise on the order.

The committee's next meeting will be on Tuesday 21 March. I thank members for staying the course this morning. We have done very well.

Meeting closed at 11:47.

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