SUBORDINATE LEGISLATION COMMITTEE

Tuesday 9 May 2006

Session 2

£5.00

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

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SUBORDINATE LEGISLATION COMMITTEE
15th Meeting 2006, Session 2

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DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

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*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)

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LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 9 May 2006

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

Delegated Powers Scrutiny

Criminal Proceedings etc (Reform) (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 15th meeting in 2006 of the Subordinate Legislation Committee. I have no apologies, so I expect other members to arrive later. I remind members to switch off their mobile phones and put their voting cards into their consoles.

Agenda item 1 is delegated powers scrutiny of the Criminal Proceedings etc (Reform) (Scotland) Bill at stage 1. The bill contains a number of provisions aimed at improving the operation of the summary justice system and reforming the operation of the bail and remand system. The bill contains provision for 38 delegated powers.

Members will have among their papers the delegated powers memorandum, which appears to be a model of its kind. It is clear that the Executive has given considerable thought to the appropriateness of the delegation of each legislative power. The committee welcomes such an exemplary model.

The first delegated power is on the rules of court. The bill will confer a number of powers on the court to make rules of court. The powers will be exercisable by Scottish statutory instruments that will not be subject to Parliamentary procedure, but they seem to be appropriate in each case. Are members content with the powers?

Members *indicated agreement*.

The Convener: We welcome Murray Tosh to the meeting.

The bill contains a number of direction-making powers and, again, they seem to be appropriate. Are we content with them?

Members *indicated agreement*.

The Convener: We move to section 6(2), on the power to determine which police officers have the authority to liberate an accused on an undertaking, which inserts new section 22(1E) into the Criminal Procedure (Scotland) Act 1995. There appear to be no concerns about that. Are members content with the power and that it is subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 7(1), on the power to modify the meaning of "electronic signature", inserts new section 305A(10) into the 1995 act. That will give ministers the power by order to modify the definition of electronic signature in so far as it relates to provisions of the 1995 act. Although the power may be used to amend primary legislation, it is suggested that, as the use of the power is tightly constrained, the negative procedure is appropriate. Are we content with that?

Members *indicated agreement*.

The Convener: Section 7(2) provides that the Scottish ministers may make provision for the use of electronic documentation, storage, and communication. The Executive's reasons for taking the power are the same as those that we discussed for section 7(1). Again, although the power could be used to amend primary legislation, it does not seem necessary for it to be subject to the affirmative procedure. We may wish to raise a technical point with the Executive on the lack of definitions that will apply in the new act for the terms "electronic complaint" and "electronic communication".

Are members content with the power and that it is subject to the negative procedure, and that we ask the Executive why there are no definitions of the two terms to which I referred?

Members *indicated agreement*.

The Convener: I welcome Gordon Jackson to the meeting.

Gordon Jackson (Glasgow Govan) (Lab): I am only a wee bit late.

The Convener: We are on section 35(3) of the Criminal Proceedings etc (Reform) (Scotland) Bill. This section will allow ministers to make textual amendments by SSI to the relevant penalty provisions that are affected by section 35(1). Are members content with the power and that it is subject to the negative procedure?

Members *indicated agreement*.

The Convener: We move on to section 35(4), on the power to increase the maximum term of imprisonment to 12 months. The use of delegated powers here is well precedented and seems appropriate, but there are two technical points. First, it is not entirely clear why the generic translation in section 35(2) cannot be applied to powers in acts as well as to actual penalties; secondly, it is not clear that the definition of "relevant power" in section 35(6) is sufficient. Are

members content with the power and that it is subject to the negative procedure, and that we ask the Executive about the two technical points?

Members *indicated agreement*.

The Convener: Section 36(1) is on the power to amend the maximum length of imprisonment, level of fine or amount of caution in a justice of the peace court in sections 7(6) or 7(7) of the 1995 act. As members will see from the legal brief, that is a significant power. However, the power to extend the jurisdiction of the JP courts is limited and it is subject to the affirmative procedure. Do members have comments on whether the power is appropriate? Are you happy that there are sufficient limits to the power and that it is subject to the affirmative rather than the negative procedure?

Mr Stewart Maxwell (West of Scotland) (SNP): The power should not be subject to the negative procedure because there is a large policy issue here. At the very least, it should be subject to the affirmative procedure. Given the importance of the matter, however, I wonder whether it should be on the face of the bill. I do not know enough about the subject to be sure about this, but it seems to me that being able to expand the role of justices of the peace is a fairly central power. I wonder whether other members think that it would be better for such a provision to be on the face of the bill, given that it is so important.

Murray Tosh (West of Scotland) (Con): If the provision were included in the bill, I presume that primary legislation would be needed every time that it required to be amended. The Executive might consider that to be a bit oppressive. It might be more appropriate, therefore, simply to ask the Executive to expand on its thinking, if the matter is not adequately covered in the memorandum.

The Convener: Should we ask for a bit more explanation of why the power is delegated?

Members *indicated agreement*.

Gordon Jackson: It is a serious power, but I take Murray Tosh's point that if its provisions were once included in primary legislation, they would have to continue to be included in primary legislation—it is a hard balance.

Mr Maxwell: Yes, but my concern is what happens if we go down the Executive's proposed route. Serious issues such as this should be dealt with in primary legislation. Although it is troublesome to use that route, perhaps that is just the way that it must be sometimes and it is right and proper that we do that.

Gordon Jackson: It is a hard one.

The Convener: Okay, we will ask for more explanation, as agreed.

We move on to section 36(2), on the power to amend the maximum length of imprisonment or level of fine in a JP court in any enactment other than sections 7(6) and 7(7) of the 1995 act. It is similar to section 36(1) and I take it that members think that we should ask the Executive the same question as for that section?

Members *indicated agreement*.

The Convener: We move on to section 39(1)(f), on the power to make provision for fixed penalty discounts, which inserts new section 302(7A) into the 1995 act. There is a technical point in relation to the drafting of paragraph (a) of new section 302(7A) that concerns the use of the word "may" and whether that would preclude the order requiring discount to be applied in appropriate circumstances. Are members content with the power and that it is subject to the negative procedure, and that we ask the Executive about the technical point?

Members *indicated agreement*.

Gordon Jackson: It is sensible for the Executive to introduce the power. Currently, other kinds of fixed penalties have discounts.

The Convener: We move on to section 39(2), which inserts new section 302A(8) into the 1995 act, on the power to prescribe the maximum level of a compensation offer. The power involves fixing the maximum amount of compensation. Are members content with the use of delegated powers and that the negative procedure should be used rather than the affirmative procedure?

Gordon Jackson seems to be a bit easy-osy about it. I know that members got the legal brief a bit late, so I will give you a bit of time to read it.

Gordon Jackson: One's instinct is that powers that change amounts should be subject to the affirmative procedure.

The Convener: I think that the legal brief suggests that as a possibility.

Murray Tosh: I always agree with Gordon Jackson's instincts in these matters.

Gordon Jackson: But it is not one that you would die in a ditch over.

The Convener: No, it is not.

Mr Maxwell: I wonder whether we can seek further clarification of why the Executive has taken the approach it has, given that paragraph 55 of the legal brief states that

"the payment of compensation is dependant on Ministers making the order."

Paragraph 55 goes on to suggest another possible approach.

The Convener: However, paragraph 56 of the legal brief states:

"the Committee will note that the enabling power *requires* Ministers to make the relevant order so this would probably meet any concerns that Ministers could frustrate the will of Parliament by failing to make the order."

Mr Maxwell: Perhaps we should take up Gordon Jackson's suggestion by asking why the proposed power will not be subject to the affirmative procedure. For a power that simply changes the monetary value, the negative procedure is probably okay, but we should ask anyway.

The Convener: Okay, we will put that question to the Executive.

Section 40 inserts new section 303ZA into the 1995 act. New section 303ZA(14) gives ministers the power to prescribe the kinds of activity that may be performed as part of a work order. The section forms part of the provisions that create and regulate the work order, which is an alternative to prosecution that can be offered by the procurator fiscal, and it gives ministers the power to make provisions that include the kinds of activity to be carried out.

Are members content with the delegation of the power? Is the negative procedure appropriate? The legal brief suggests an alternative option, which I will give members the chance to read.

Gordon Jackson: If I may, I will just fire away while members read the brief. I see no real problem with the proposed power. It will simply allow ministers to specify the kinds of work that can be included.

Mr Maxwell: I understand the theoretical concern, but even I am not that suspicious.

Gordon Jackson: I cannot see ministers allowing fiscals to say, "You will be a galley slave for 40 weeks"—

Mr Maxwell: —"on the Renfrew ferry".

Gordon Jackson: That seems a little fanciful. Theoretically, that is possible, but one would need to be a little cynical.

The Convener: That would make the headlines. I see that members do not feel too strongly about the proposed power, so we will leave it at that.

Section 43 inserts new section 226A into the 1995 act. New section 226A(4) will allow ministers to authorise persons to act as fines enforcement officers and to set out their general functions. FEOs are to be introduced on a phased basis and some of their powers may be piloted before being rolled out nationally.

The power is significant, but very little detail is given on the face of the bill as to how it is to be used. What are members' views?

Gordon Jackson: The Executive has made the power subject to the affirmative procedure, which is fair enough. However, we should perhaps get a bit more detail. At the moment, the intention seems vague. We should perhaps even ask for draft regulations.

The Convener: Okay, we will ask for more detail about the FEOs.

Section 43 will also insert new section 226D into the 1995 act. New section 226D(10) will allow ministers to make regulations in connection with the power for FEOs to direct that a motor vehicle belonging to an individual in default of their fine payments be immobilised or impounded. Are members content with the power and that it is subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 43 also gives ministers the power to make detailed provision regulating execution of relevant diligences by a fines enforcement officer. Under new section 226F(6) of the 1995 act, when a court makes an enforcement order, one of the range of powers that will be available to the FEO will be to recover a fine by way of certain forms of civil diligence. The manner in which those are executed will be detailed in regulations. The power is wide and could modify or extend without restriction the types of diligence that could be used. Do members have any views?

I welcome Jamie Stone, who has just joined the meeting.

Do members think that the power, which it is currently proposed will be subject to the negative procedure, should be subject to the affirmative procedure, given the words of caution in our legal brief?

Mr Maxwell: As with other sections, we should ask the Executive for further detail on what the thinking is behind choosing the negative procedure. On the face of it, I think that it would be more appropriate if the power were subject to the affirmative procedure.

The Convener: I think that we need to ask the question, given that the power is wide and could modify types of diligence.

10:45

Gordon Jackson: Our legal brief contains the phrase:

"the Executive is unable to give any indication of the type of provision that might be included on the regulations."

It is a bit odd that the Executive cannot even give us a clue as to what might be in the regulations.

Mr Maxwell: We should push the Executive a little further on that.

The Convener: We will ask what the certain forms of civil diligence might be.

Gordon Jackson: It is as though the Executive has said, "This sounds like a good idea, but we do not have a clue what we would use it for."

The Convener: We must get more details on what the power means.

For the benefit of Jamie Stone, I should mention that we are considering section 43 of the Criminal Proceedings etc (Reform) (Scotland) Bill. We are at, I think, paragraph 66 of the new legal brief.

Mr Maxwell: We are at paragraph 85.

The Convener: Sorry, we have moved on to paragraph 85.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): I am reading that paragraph now.

The Convener: Section 43 also inserts new section 226I(1) into the 1995 act, which contains various definitions of terms and will give ministers the power by order to include other penalties in the definition of "relevant penalty" and to specify which court should be the "relevant court" in respect of those other penalties. Are members content with the power and that it will be subject to the negative procedure?

Mr Maxwell: I am content. The power will just allow ministers to add things to the list, so I see no big problem with it.

The Convener: Are members content with that?

Members *indicated agreement*.

The Convener: Section 46(2) will provide ministers with the power to establish justice of the peace courts. The power simply does what it says. Are members content with it and that it will be subject to the negative procedure?

Members *indicated agreement*.

Gordon Jackson: The power is just about moving the deck chairs.

Mr Maxwell: Is that on the slave galley?

The Convener: Section 46(6) provides that ministers may by order provide for the relocation or the disestablishment of a JP court. Are we content with the power and that it is subject to the negative procedure?

Gordon Jackson: This is just the other side of the coin of the previous power.

The Convener: Section 50(2) provides ministers with the power to provide that a JP court is to be constituted by one JP only. There are two issues to consider. First, are we content that the power is delegated to subordinate legislation and that it is subject to the affirmative procedure? Secondly, should we ask the Executive for further clarification of its intentions in relation to section 50(5)?

Murray Tosh: It struck me that it is a bit peculiar that such a change should be made by subordinate legislation. Given that the clear policy intention is that the change will eventually be made in every area, should it not be set out on the face of the bill? When the Executive is ready and when everyone has adapted to the new ways of working, the change could then be commenced. That might be preferable to leaving it to be rolled out through subordinate legislation. I do not know whether that would be a valid approach, but it strikes me that it is quite a significant change to be left to statutory instruments.

Gordon Jackson: What does Murray Tosh suggest that the primary legislation should provide?

Murray Tosh: If single JP courts were provided for in the bill, it would be clear that that was the position that the Executive wishes to be established. The provision would not need to be commenced immediately.

Gordon Jackson: It would be worth asking why the Executive has not included a provision in the bill that could be commenced later.

Mr Maxwell: Would that mean that the provision would need to be commenced in different areas at different times?

Murray Tosh: At the moment, in some districts one, two or three JPs sit on the bench. The Executive could state that by a certain date—let us say, for the sake of argument, by 2011—only one JP would sit on the bench. All the areas that currently have two-JP or three-JP panels would still have time to adapt their practices in exactly the way that is proposed, except that instead of the policy being carried out on a rolling basis the policy intention would be set out clearly on the face of the bill. That seems to me to be the correct way. At the moment, the bill has things back to front.

Gordon Jackson: I see that, but I caught the point that Stewart Maxwell hinted at, which is that the Executive might not want to make the change everywhere at the same time. For example, there might be 10 three-JP benches. Although eight benches could be changed, there might be pressure, for local community reasons, to leave two as they are.

Mr Maxwell: Yes. I was referring to that sort of situation.

Murray Tosh: The Executive might cite that sort of situation in its response, but it would be reasonable to suggest that the Executive should make a policy statement. The issue would therefore be the commencement. If it got to the point that there were two areas where, for local reasons, they could not commence the provision they would not do so, but by then everyone else would have introduced the change on a rolling basis. They would know the policy intention and they would know that it was likely that a commencement date would be set at some point. That would also set a target for the two areas where a little local difficulty, whatever it might be, had been identified.

The Convener: I have been told by the legal adviser, who is always very good on this, that the registration of titles was done in exactly the way that Murray Tosh outlines.

Murray Tosh: I could be a draftsman.

The Convener: We will ask the Executive why it has not gone down that route and whether there is another explanation for why it proposes to deal with the matter through statutory instruments. Is that agreed?

Members *indicated agreement*.

The Convener: Should we ask the second question, which asks for clarification of section 50(5), or is that included in the previous question?

Murray Tosh: I do not think that it is. Section 50(5) prescribes that the clerk of a JP court will have certain prescribed functions, including

"such other functions as the Scottish Ministers may confer".

We should ask what will follow procedurally to confer those other functions and whether that will be done by statutory instrument.

The Convener: We will ask for clarification on section 50(5).

Members *indicated agreement*.

The Convener: Section 51(1) provides that ministers may, by order, provide for any district court to be disestablished and may impose specific requirements on the local authority responsible for the court in relation to the disestablishment. The power also allows provision to be made in relation to staffing and the property of the district court. Are members content with the power and the fact that it is subject to the negative procedure?

Murray Tosh: I have a technical question arising from our inquiry, which has looked at local instruments. Would such orders be local instruments, or would they be general instruments because they eventually do the same in every locality?

The Convener: They would probably be general instruments.

Murray Tosh: Thank you. I like the probably.

The Convener: Section 51(4) confers on ministers a power to repeal provisions of the District Courts (Scotland) Act 1975. Different parts of the 1975 act will be repealed over time by orders subject to annulment. Although to some extent the need for the power is largely consequential on other provisions in the bill, it is thought that the policy might not be wholly covered by the ancillary powers conferred by section 69 and that an express provision in the bill is necessary. Members will see that the power is subject to the negative procedure. Are they happy with that or should it be the affirmative procedure?

Murray Tosh: The argument advanced in the legal brief is that the power could be subject to the negative procedure if the bill were amended to make clearer the purpose of the provision, which is described in the delegated powers memorandum. We should invite the Executive to do that and we should indicate that if it is not prepared to make the purpose clearer, use of the affirmative procedure would be the appropriate course to take.

The Convener: So we should ask the question that comes out of paragraph 123 of the legal brief. Are we agreed?

Members *indicated agreement*.

The Convener: Section 51(5) confers on ministers a power to apply enactments relating to JP courts to the remaining district courts. The issue is whether we want to ask the Executive about its choice of the negative procedure in the absence of any restrictions on the use of the powers in the bill and in light of the fact that the powers will be used to modify the application of primary legislation.

Murray Tosh: Again, we should ask the Executive whether it can restrict the powers in the bill and, if not, whether it would not be more appropriate to use the affirmative rather than the negative procedure.

The Convener: Okay. We will ask that question.

Members *indicated agreement*.

The Convener: Section 51(6) confers on ministers a power to modify enactments for the purpose of the continued operation of the remaining district courts. The power raises similar issues to that in section 51(5). I assume that we will ask the same question.

Murray Tosh: Yes. We should also ask the same question on the next one.

The Convener: That is section 51(7). Are we agreed?

Members *indicated agreement*.

The Convener: Section 54(5) is on the power to regulate procedure and consultation in certain appointment processes for JPs. It is not entirely clear from the delegated powers memorandum whether ministers intend to exercise the powers conferred by the section. There is no obligation on them so to do and it is suggested that some clarification of the Executive's intentions might be useful. What are members' views?

Gordon Jackson: I have lost the place. Where are we in the legal brief?

The Convener: We are on page 20 of the legal brief.

Gordon Jackson: Sorry. I had jumped ahead.

The Convener: The legal brief raises that point and also notes that the existing power is exercisable by affirmative rather than negative instrument. It suggests that the committee may wish to consider whether instruments under this section should be affirmative rather than negative. Those are the two points.

Murray Tosh: It would be worth asking the question that is implied in the comment in the legal brief. There appears

"to be nothing in the power that would prevent the order from containing its own provisions for exemptions from its provisions".

We should clarify the drafting. The next paragraph notes that the existing power is exercised subject to the affirmative procedure, whereas it is proposed to use the negative procedure. We should ask the Executive to give the reason for the change.

The Convener: Are we agreed?

Members *indicated agreement*.

The Convener: Section 54(7)(a) confers on ministers a power to specify the date on which the current appointment of JPs ceases to have effect. It seems from the delegated powers memorandum that the reason for taking delegated powers in this instance is that the Executive has not yet made up its mind on the appropriate date. Are we happy that the Executive has justified the delegated powers and that the negative procedure is appropriate?

Murray Tosh: We are all having difficulty this morning because the briefing paper that we had before the meeting had unnumbered paragraphs, whereas the briefing that we are working with now has numbered paragraphs.

The Convener: That is why I am giving members a bit of time.

Murray Tosh: The point that I picked out this morning was the comment that is now in paragraph 143. It states:

"It is possible—although unlikely—that Ministers will decide that JPs should switch to the new system of five year appointments for full JPs on different dates in different parts of the country."

That would perhaps be an explanation for not including a date. It strikes me that it might be worth asking about that. If that is not the explanation—our legal advisers think that it seems unlikely, but unless the Executive just cannot decide the date it is a possible explanation in the absence of any other—we should ask the Executive why it has not put a date in before we agree what attitude to take about the level of procedure in the necessary instrument.

The Convener: Okay. We will ask the question and decide about the procedure at the next meeting, based on the explanation that we receive.

Section 55 is on conditions of office. Subsections (4) and (5) empower ministers to make a scheme for the payment of allowances to JPs. The statutory instrument procedure will not be used. Do members think that an instrument subject to the negative procedure would be more appropriate?

Murray Tosh: I think so. We are all much more alert now to how allowances and payments are set out. It seems odd that a scheme of this nature should be determined by ministers. It would be in everybody's interests for there to be an agreed procedure for introducing a scheme of allowances to JPs.

Mr Maxwell: Under the District Courts (Scotland) Act 1975 allowances were set by statutory instrument, but now they will not be. We should ask the Executive why it has changed its mind.

The Convener: That adds weight to the point. Are we agreed that we will ask that question?

Members *indicated agreement*.

The Convener: Section 56(1) is on the power to make provision for the training and appraisal of justices of the peace. The section also confers functions upon the Lord President. Are members content with the power and the fact that it is subject to the negative procedure?

Members *indicated agreement*.

11:00

The Convener: Section 58(6) will confer on the Scottish ministers the power to make provision for tribunals for the removal of justices of the peace. Contrary to what is said in the delegated powers memorandum, the power in the Justices of the Peace (Tribunal) (Scotland) Regulations 2001 (SSI 2001/217), which will be superseded by the power in section 58(6), is subject to the affirmative procedure by virtue of section 9A(9) of the District Courts (Scotland) Act 1975. Given the importance of the subject matter, would an order made under the new power merit the greater degree of scrutiny that the affirmative procedure would provide?

Murray Tosh: We are encountering a recurring theme, whereby a power proposed in the bill would be subject to the negative procedure but would replace a power that is subject to the affirmative procedure. There might be a good reason for that, but we should ascertain whether the Executive has a satisfactory explanation for its approach.

Gordon Jackson: I feel more strongly about the matter. I would fight for the use of the affirmative procedure in the context of the procedure for the removal of judges. A JP is not the world's most senior judge, but complaints against judges are always serious because there can be all kinds of motive for making a complaint. I accept that the power relates to the detailed procedure and not to the appointment of the tribunal. However, every aspect of the procedure for dealing with an allegation that might lead to the removal of a JP should be subject to as much scrutiny as possible.

The Convener: Your comment backs up Murray Tosh's point. Do Gordon Jackson's remarks reflect members' general views on the matter?

Members *indicated agreement*.

The Convener: We could also ask the Executive whether it is proposed to list the tribunal in schedule 1 to the Tribunals and Inquiries Act 1992, so that any order made under the power would have the benefit of input from the Scottish committee of the Council on Tribunals.

Murray Tosh: It would be odd if the Executive did not propose to include the tribunal in the list. However, given that the situation is not clear, it would be well worth our asking the Executive about its intention.

The Convener: Section 61(9) will confer on ministers a power to regulate the procedure and consultation process to be followed in relation to the appointment of stipendiary magistrates. The drafting of the provision seems a little odd, because although ministers would be bound to comply with an order that was made, nothing in the bill would require them to make an order in the first place. The power also appears to be sufficiently wide to allow for exemptions from an order's provisions. What are members' views? Would the affirmative procedure be more appropriate than the negative procedure?

Murray Tosh: Again, the equivalent power in the 1975 act is subject to the affirmative procedure. The bill would diminish the level of scrutiny afforded to the appointment of stipendiary magistrates. In the legal brief our legal adviser suggests that the matter might be of sufficient weight to merit the choice of the affirmative procedure. We should ask the Executive to clarify its thinking in that regard.

The Convener: Are members content that we do that?

Members *indicated agreement*.

The Convener: Section 61(12) will confer on ministers the power to specify the date on which the current appointment of stipendiary magistrates will cease to have effect. The power is technical and the Executive considers the negative procedure to be appropriate in that context. Are members content with the power and that it would be subject to the negative procedure?

Mr Maxwell: I am content with the approach, but there is a question about the drafting of sections 61(12)(a) and 61(12)(b), which seems to give rise to confusion. I assume that we will ask the Executive about the matter.

The Convener: Okay. Are members content to ask the Executive about the matter?

Members *indicated agreement*.

The Convener: We move on to section 69, on ancillary provision. The committee normally accepts the need for such provisions, which appear to be of particular importance in the context of this bill. The power to amend provisions of the bill itself is not unprecedented, but it is unusual.

Murray Tosh: We never like such provisions. We are advised in the legal brief—as we usually are in such situations—that the extent to which the power could be used would be limited and there would be doubts about the vires of any instrument made under the power that attempted to make substantive policy changes to the bill after it had been enacted. Subject to that caveat, we must probably accept the approach, even if we instinctively feel little warmth towards it.

The Convener: Are members content with the approach in section 69?

Members *indicated agreement*.

The Convener: Section 71(1) is the standard commencement provision in the normal form. The

drafter has obviously tried to address concerns about the lack of parliamentary scrutiny by limiting the type of additional provision that could be included in a commencement order. In the light of that, are members content with the power?

Members *indicated agreement*.

The Convener: We move on to the schedule. Paragraph 23(4) will confer on ministers the power to substitute for any reference to the district court, the area of the district court or a justice of the peace, a reference to the JP court, the area of a JP court or a JP appointed under section 54(1). Although the power could be used to amend primary legislation, it is restricted in nature. Are members content with the power and that it would be subject to the negative procedure?

Members *indicated agreement*.

Crofting Reform etc Bill: Stage 1

The Convener: We must report on the bill this week, because the Environment and Rural Development Committee will take evidence from the Minister for Environment and Rural Development next week—there will be no time to go back to the Executive.

Section 1 will insert into the Crofters (Scotland) Act 1993 new section 1A, on the general duties of the Crofters Commission. The committee asked the Executive how it envisages that the power in new section 1A(1) to confer such duties on the commission will be used, given that the term "general duties" is not defined. The Executive's response indicates that the provision was worded to give more flexibility than is offered by current legislation. However, the Executive suggested that there might be situations in which ministers wanted to apply a policy across all non-departmental public bodies and implied that in some cases directions might be legislative rather than administrative in character.

Are members content with the Executive's response? Should we draw the lead committee's attention to the matter?

Mr Kenneth Macintosh (Eastwood) (Lab): I am happy with the Executive's response. The Executive said that it does not intend to use the power often, but highlighted a couple of examples of circumstances in which it might do so, which would probably relate to administrative duties. That suggests that some directions might be legislative rather than administrative in character, although they would not necessarily relate to substantive matters.

The Convener: Should we report the Executive's response to the lead committee?

Mr Macintosh: Yes.

Mr Maxwell: I do not entirely disagree with Ken Macintosh, but the Executive's response does not clear up the question whether directions would be legislative or administrative in character.

The committee wanted to ensure that the commission's duties would be published, so that people who would be affected by them could read them and the Parliament could have an opportunity to scrutinise them. That more major concern of the committee has not been addressed.

Mr Macintosh: The Executive addressed that point, in that it said it would not make an order—

Mr Maxwell: Yes, but how do we ensure that the duties would be published, so that people could be aware of what was happening and there could be parliamentary scrutiny?

Murray Tosh: Paragraph 189 of the legal brief refers to the Executive's example of a use of the power that would relate to administrative matters. The Executive might apply a cross-cutting policy by giving all NDPBs a ministerial direction. I presume that the Executive would send a letter of instruction, but the approach might escape wider scrutiny if the details were not posted on a website or published in an order. The Executive should flag up its approach, perhaps through a departmental circular, but its response does not make clear how that would happen. Significant issues could be raised, which ought to be in the public domain.

Mr Maxwell: Given that we must report on the bill and that no more time is left for us to consider matters, we could report that we are still concerned about the issue and ask the lead committee to take it up in order to try to clarify publication arrangements.

The Convener: So our main issue is how we will know about the general duties.

Mr Maxwell: Yes.

The Convener: Is publication sufficient? Are you saying that there should be some other form of scrutiny?

Mr Maxwell: When I talk about publications, I am talking about publications that are widely disseminated, rather than those that go on to a dusty shelf that no one knows about at the back of a library somewhere.

The Convener: It is important to know about such publications.

Murray Tosh: If a circular on or a statement of a cross-cutting policy were published in some way, the committee would become aware of it and there would be scrutiny if the committee wished there to be scrutiny. As things stand, it appears that the committee would not be aware of a new general

duty, or a change to the general duties, because there would be no trigger for drawing such things to the committee's attention.

The Convener: Okay. Does Ken Macintosh want to say anything about any of the points that have been made?

Mr Macintosh: No. The appropriate points have been made. The lead committee should simply be asked to make its assessment and to decide whether the general duties should be published. There will be written directions, which the Executive could bring to the Parliament's attention, but it might not do so. The question is whether the lead committee thinks that that approach is sufficient or whether the Executive should be obliged to bring the duties to the Parliament.

The Convener: Basically, we are saying that there would be concern if they were not brought to the Parliament in some form so that it was made aware of them.

Mr Macintosh: If the matters were substantive.

Mr Maxwell: The issues are publication and the widespread dissemination of publications to those who would be affected by them, but it is up to the lead committee to take up those issues. We can only express our concerns. I wonder whether Jamie Stone, who represents an area that contains crofting communities, has any points to make.

Mr Stone: Not at this stage. The concerns have been well aired by Alasdair Morrison, me and others and are not pertinent to what we are discussing.

The Convener: Perhaps you agree that knowing about the general duties would be welcomed.

Mr Stone: I would not take issue with that.

The Convener: Okay. I think that we agree that we will tell the lead committee about our on-going concerns about the issue so that it can take them up.

Section 4 will insert new section 42A, "Power of the Commission to make schemes and arrangements for grants", into the 1993 act. We asked the Executive two questions on the section. Are members content with the Executive's response and the wording in new section 42A(1), and that the power as drafted is reasonable?

Mr Macintosh: We highlighted that there is perhaps a lack of clarity about the wording, as the word "and" suggests that there are two different tests. I suggest that we draw the matter to the lead committee's attention.

The Convener: We should point out the difficulty that the drafting causes. Do members agree?

Members *indicated agreement*.

The Convener: Section 5 will insert new section 58A, "Obtaining Commission approval or consent", into the 1993 act. We thought that because an important power that has implications for landlords, tenants and others is involved, the information should be in the bill. We also sought clarification of the decision to delegate the power to subordinate legislation. Do members wish to recommend that, although the power is to be exercisable by affirmative instrument, it should be restricted to adding to rather than removing the criteria?

11:15

Murray Tosh: Again, all that we can do is flag up the issue for the lead committee. We could say that this committee sought an explanation, but the Executive did not really provide one. The issue seems to be largely within the policy committee's remit, so it might wish to pursue it.

The Convener: Okay. Is that agreed?

Mr Maxwell: I refer to the final line in paragraph 203 of the legal brief. I wonder whether Murray Tosh thinks that we should recommend that the power should be restricted to adding to rather than removing the criteria. Should we at least point out that matter to the lead committee for it to take up? Does he feel strongly that we should push the matter?

The Convener: I thought that that was what he was saying.

Murray Tosh: I am not entirely clear that I want to say that the committee would have pushed the matter, but we might have explored it further if we had the time to do so. The lead committee might wish to consider the matter.

The Convener: Yes. The lead committee could consider it. We could emphasise that it could consider whether there should be a restriction to adding to rather than removing the criteria.

Section 8, "Maps and scheme of charges", will insert new section 41B into the 1993 act. We thought that there should be a requirement for the scheme or approval of the scheme to be incorporated into a statutory instrument. As the bill contains restrictions on the amount of fees charged and requires the approval of ministers for any fee-charging scheme, the committee may think that additional parliamentary scrutiny is not needed. Are members happy with the response? If so, perhaps we should simply report it to the lead committee.

Murray Tosh: I would not say that I am happy with the response because the Executive has not clarified why there is a difference in approach between fees charged under new section 41B(1) and those charged under new section 41B(4). However, the bill contains restrictions on the amount of fees charged and the approval of ministers is required, so there is not a major point of constitutional significance. That said, it is a bit funny that the Executive has done two very similar things in two different ways.

The Convener: We should flag up the fact that the Executive has done things differently in those two subsections.

Murray Tosh: I do not think that we can explain why the Executive has done things in different ways, because it has still not clarified that. However, we could point out that it has done things differently. The lead committee might think that the matter is important and might want to pursue it; alternatively, it might like to note it as a little quirk of how such things work and pass on.

The Convener: Possibly. Is that agreed?

Members *indicated agreement*.

The Convener: Section 10, "New crofts", will insert new section 3A into the 1993 act. Members will remember that we noted with concern that there is no statutory requirement for prior consultation before an order under the section is laid before the Parliament. Members have received the Executive's response.

Murray Tosh: It is funny that whenever we ask for a statutory consultation requirement, we are told that it is unnecessary because there will always be consultation. If the Executive will always consult, why should the consultation not be made statutory?

The Convener: Absolutely.

Mr Macintosh: In this case, the Executive's argument is that if it asks for consultation, the fact that it has not asked for consultation on other points means that such consultation is definitely not required, but that is false logic. The courts might not interpret things in that way, but it is still false logic.

The Convener: The Executive has reiterated its policy on consultation. We were concerned about consultation in this area.

Mr Stone: I had to read the legal brief a few times before I got the hang of what it says. Are you saying that the requirement for consultation must be included in the bill?

The Convener: The Executive is not saying that.

Mr Stone: Are we saying that?

The Convener: We can say whatever we decide to say.

Mr Stone: Tell me if I am straying from the point, but there is concern out there that the creation of new crofts will mean the subdivision of existing crofts or that there will be completely hopeless ideas about taking over Forestry Commission land, which the crofting communities do not see as realistic. Therefore, consultation, whether or not required under the bill, is absolutely vital. I am sorry if I am straying into the lead committee's area, but there is a credibility gap with respect to not only this issue but other parts of the bill.

Mr Macintosh: I think that we flagged up previously that it is almost inconceivable that the Executive will create new crofts without consulting the landowners. Therefore, I do not understand why it does not include a requirement to consult in the bill. We should flag up the matter. The decision is really a policy decision for the lead committee.

Mr Stone: I will not mince my words. There is a fear that a lot of guff is being spoken and a lot of talk going on about things that will never happen. It would be great if new crofts were created, but they must be real new crofts rather than imaginary or pretend ones.

The Convener: Consultation falls within our remit. Paragraph 25 of the Executive's response says:

"Furthermore if the Bill were to contain an explicit requirement to consult in this particular case a court might reasonably conclude that to mean that there is no expectation that we should consult on matters covered by the other secondary legislation requirements in the Bill."

Mr Macintosh: I said that that was false logic.

Mr Maxwell: The Executive's response makes no sense. If that is the case, why does it not apply to other bills? I do not accept the argument, which is weak.

The Convener: I just read out the Executive's reasoning.

Mr Maxwell: It is weak. We have expressed our concern. Last week, we said that consultation on the issue was vital. As other members have said, given that the Executive has said that it will consult, the consultation should be statutory. I do not accept the Executive's argument that that would affect other secondary legislation requirements—that view is nonsense.

Murray Tosh: An interesting general point is raised. If that is the Executive's key argument, the question for us is whether there is any such precedent in any other legislation, because the point would apply to any legislation that specifies a requirement for statutory consultation. Given the weight that the Executive attaches to the

argument, it ought to be a sound general principle, but I suspect—although I do not know—that plenty of precedents exist for such consultation.

The Convener: I am told that there are such precedents.

Murray Tosh: I am not entirely surprised. In that case, the argument is bogus. The Executive cannot just deploy that argument here—it is not like an infantry battalion that is wheeled on because the sound of gunfire is heard. The argument involves a general principle, which is either applied, or not applied, everywhere. If it does not apply everywhere, it is not substantive.

The Convener: Am I correct to say that we raised the issue because the Executive did not say in the background information that it would consult?

Mr Maxwell: Yes. That was why we raised the matter. The Executive had not said whether consultation would take place.

The Convener: Our question was why no statement was made anywhere that consultation would take place.

We are fairly agreed that consultation is so important that it should be required under the bill. We will pass that on to the lead committee with all the necessary background information.

Mr Maxwell: We also do not accept the Executive's argument for why consultation should not be required under the bill.

The Convener: We will include that information.

Mr Maxwell: That point is important, because the lead committee will face the same question as we have.

The Convener: To supplement what is in the *Official Report*, we could say that plenty of bills treat consultation as a very important matter.

Murray Tosh: We could say that in the opinion of legal advisers, a requirement to consult would not invalidate the expectation of consultation on other measures. I am sure that the legal advisers could provide a good example that falls within the lead committee's competence, to assure it that the point is soundly based.

The Convener: Yes. We will find an example to put in our report.

Section 12, "Complaints as respects breach of the statutory conditions", will insert new section 5B into the 1993 act, subsections (10) and (11) of which contain delegated powers. We acknowledged that section 5B has serious implications and asked the Executive whether the policy objective might be achieved by a more general provision that avoided the need for delegated powers. We have the Executive's response. Our point has been accepted, but the Executive says that there is no viable alternative to referring to the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 (SSI 2004/518) in the new section. Do we accept the need for a power to make subordinate legislation for technical reasons? The clerk tells me to remind members that such subordinate legislation would be subject to the affirmative procedure.

Mr Maxwell: The answer is yes, given that the Executive does not intend to redraft the section.

The Convener: I suggest that we report to the lead committee that although we thought that the delegated power should not be provided, a change was not possible for the reasons that the Executive has given.

Mr Maxwell: I do not know whether a change is not possible.

The Convener: The Executive says that it is not possible.

Mr Maxwell: Yes, but that is slightly different from our saying that.

The Convener: In the legal brief, our advisers ask

"whether it might be possible to avoid the … difficulties"

to which the Executive referred

"by redrafting the provision in generic terms while still preserving the policy intention thus avoiding the need for subordinate legislation."

Mr Maxwell: We should point that out to the lead committee.

The Convener: Do we agree to suggest that in our report to the lead committee as an alternative way to proceed?

Members *indicated agreement*.

The Convener: We asked the Executive two questions about section 36, which will insert into the 1993 act new section 46A, "Regulations concerning loans". The Executive has explained why the recovery provisions relate solely to the death of a crofter and confirmed that reference to any part of the loan is not intended to preclude recovery of the whole loan. Are we content with the response?

Murray Tosh: Not really. The tenure of a croft might end in circumstances other than the death of a crofter—for example, the crofter might assign the croft or pass it on in some way, perhaps to his son—and in which the repayment of a loan, or at least its renegotiation to apply to the person who succeeds to the croft, would be sought.

The argument about the whole of a loan and a part of it seems bizarre. The bill refers explicitly to a part, and the Executive thinks that a part includes the whole. I am neither a judge nor a dictionary compiler, but I think that the words "part" and "whole" are opposites and that a whole is composed of many parts. If the recovery of part is specified, that does not mean the whole, unless the phrase "part or parts" is used, which would allow for the recovery of all parts. The bill should therefore say "part or whole", so that it covers the possibility of recovering the whole loan.

The Convener: In the legal brief, legal advisers say that they recall seeing recently an amendment to legislation to clarify that point.

Murray Tosh: The whole is greater than the sum of the parts.

The Convener: We will raise the issue of the meaning of "part".

Your examples of other circumstances are good.

Murray Tosh: We might suggest that the lead committee should pursue that. There may be a reason why my observation is not appropriate but, on the face of it, all that the bill says is that death is the only circumstance. The matter would repay further thought, so that the committee is clear that the Executive is right about that.

The Convener: Does Jamie Stone think that that is reasonable?

Mr Stone: That is very fair and sensible.

The Convener: We wrote to the Executive about our concern over the drafting of subsection (4) of section 45, "Transitional provision etc", and the Executive has said that it is considering the matter further. Do we agree to pass that on to the lead committee to take up?

Members *indicated agreement*.

Legal Profession and Legal Aid (Scotland) Bill: Stage 1

11:30

The Convener: I am aware that we have a big public agenda as well as our items in private on reports, so keep with us.

On section 15, "Handling by relevant professional organisations of conduct complaints: investigation by Commission", the committee asked the Executive to explain the reason for delegating to subordinate legislation the date from which the six-month expiry period will run in relation to a handling complaint. It appears from the Executive's response that the power is acceptable, but I ask for members' views on that. The legal brief suggests:

"the Executive's response is a helpful elaboration of the purpose of the power in subsection (4)(b)."

Murray Tosh: I think that we can accept that.

The Convener: On section 16, "Investigation under section 15: final report and recommendations", the committee noted that the delegated powers memorandum says that

"there is a requirement for consultation"

on amending the maximum level of compensation but that that requirement is not reflected in section 16(8). The Executive was grateful to us for pointing out the discrepancy and intends to lodge an amendment at stage 2 that will require consultation on altering the maximum level of compensation.

Murray Tosh: We should certainly welcome that and I hope that doing so does not undermine consultation on other elements of the bill.

Mr Maxwell: It may well do.

The Convener: You could not get in quickly enough with that response. The circumstances are close to those that we discussed on the Crofting Reform etc Bill, I must admit.

On section 17, "Abolition of Scottish legal services ombudsman", the committee asked for clarification of the scope of the power in section 17(4)—in particular, whether it is intended to deal with the Scottish legal services ombudsman's staff and property—and observed that it could be insufficient for dealing with the ombudsman's staff and property and that express provision might be necessary. Are members content that no further provision appears to be necessary in light of the information that the Executive has provided?

Members *indicated agreement*.

The Convener: On section 23, "Duty of Commission to make rules as to practice and procedure", and schedule 3, the committee asked the Executive to clarify what matters are intended to be included in the rules and whether it is proposed that the Scottish legal complaints commission should be listed in schedule 1 to the Tribunals and Inquiries Act 1992.

Members will no doubt welcome the Executive's helpful response to the committee's difficulties with the power. The Executive has also sought our views on amending the section, so we need to get our ideas together on the matter. I gather that Stewart Maxwell is on the lead committee; is that correct?

Mr Maxwell: Yes.

The Convener: The lead committee and, I think, the Law Society of Scotland have raised some drafting errors in schedule 3. Perhaps Stewart Maxwell can tell us more about those.

Mr Maxwell: The independence of the proposed Scottish legal complaints commission is an extremely important issue. It is crucial to the regulatory process. I do not want to say too much about it, because the Justice 2 Committee has only just started taking oral evidence on the bill, but there is no doubt that a number of those who have given oral evidence and many of those who have submitted written evidence to the Justice 2 Committee are concerned about that point. In particular, the Law Society and the Faculty of Advocates are concerned about whether the commission would be independent, given the possibility of political interference in a variety of ways. Therefore, I can understand the Executive's caution on the matter. It is crucial that we get it right, but it is a bit early to say where the Justice 2 Committee will come down on the issue.

The Convener: Are you saying that for the commission's rules to be subject to the affirmative procedure would be to interfere too much and that the negative procedure would be more appropriate?

Mr Maxwell: I am not saying that. I am saying that there is an issue with the fact that there is a political connection at all. That leaves us in a bit of a bind, but a lot of attention is being paid to the degree of separation between ministers and the commission. It is difficult either way and I am not sure that there is a way round it.

The Convener: Is it a matter that we could simply keep an eye on and come back to at stage 2?

Mr Maxwell: We might have to, because it is very early in the stage 1 proceedings at the moment.

The Convener: Would a way forward be for us to pass on to the lead committee the response that we have received from the Executive, inform the lead committee that we are going to keep an eye on the matter and, possibly, mention that drafting issues have been pointed out in schedule 3? Actually, as far as I can gather, the lead committee knows about the drafting issues already, so perhaps we do not need to mention them. The Law Society has also been talking about them.

Mr Maxwell: Yes. That was discussed fairly fully last week.

Mr Macintosh: There is obviously an issue to do with how regularly the rules are amended and, therefore, the relationship between the Parliament and the new commission. The point whether the affirmative or negative procedure should be used is relatively subtle. We should take a view on whether Parliament approving changes to the rules is important enough that the affirmative procedure should always be used or whether the first set of rules should be subject to the affirmative procedure and any subsequent changes should be subject only to the negative procedure.

The Convener: In the light of what Stewart Maxwell said, it seems that the negative procedure might be more appropriate than the affirmative procedure.

Mr Macintosh: I suppose that what we decide has a bearing on the relationship between Parliament and the commission.

The Convener: The issue is ministerial involvement.

Mr Macintosh: No, it is parliamentary involvement.

Mr Maxwell: Ministerial involvement would be the same in either case. The question is whether there should be further parliamentary scrutiny. We are talking about the difference between negative and affirmative procedure.

The Convener: I would suggest that we leave the matter until stage 2, when the situation will be a bit clearer, although I take Ken Macintosh's point.

Murray Tosh: Given that it is suggested that there are likely to be stage 2 amendments, would it not be better to review the matter in the light of those amendments?

The Convener: I think so. The matter is delicate.

Mr Maxwell: The general point is that the matter is not settled yet. The comments of the convener and Murray Tosh are appropriate. It is difficult to make a decision when we are not sure when things will settle down. There might well be amendments at stage 2.

The Convener: We should earmark the power for reconsideration at stage 2. Is that agreed?

Members *indicated agreement*.

The Convener: Ken, are you happy?

Mr Macintosh: The Executive confirms that there is no intention to list the commission as a tribunal.

The Convener: Where does it say that?

Mr Macintosh: Paragraph 12 of the Executive response.

Murray Tosh: Paragraph 244 of our legal brief clarifies that that is a policy matter for the lead committee to consider.

The Convener: On section 33, "Giving of notices etc under part 1", we asked the Executive why, in section 33(2)(a)(v), it is considered that subordinate legislation is more appropriate for

setting out detailed provisions. The Executive response has elaborated on its reasons for taking the delegated powers in question. Are members happy with the Executive's response and that the case has been made for taking the delegated powers?

Members *indicated agreement*.

The Convener: On sections 36(4) and 37(1), we asked the Executive to provide further details of the intended content of the instruments under the powers. You will see that the Executive now intends to legislate by way of primary rather than secondary legislation in respect of those matters.

Murray Tosh: We can welcome that. As we consider the amendments, we will see whether we wish to abandon the suggestion that we use the super-affirmative procedure. If the amendments are acceptable, we might feel that that is enough.

The Convener: On section 45, "Register of advisers: advice and assistance", we asked the Executive to provide further details of the intended content of instruments under the powers in section 45(6). We have seen the response. Are we content that the case has been made for taking the delegated powers?

Members *indicated agreement*.

The Convener: On section 45(9), which inserts in the Legal Aid (Scotland) Act 1986 new schedule 1A, "Further provision in relation to the register of advisers", we asked the Executive to comment on the adviser code being subject to parliamentary procedure. Are we happy with the response from the Executive?

Members: Yes.

The Convener: It is suggested that the Executive has made a compelling case for the power as drafted, which is to be welcomed.

Murray Tosh: I do not think that we would ever agree with that. A "yes" was all that was necessary, convener.

The Convener: We asked the Executive two questions about paragraph 2(7) of schedule 1, which relates to the new Scottish legal complaints commission. First, we asked the Executive to provide further clarification of its intended use of the power and to provide further explanation of the policy behind it, as well as asking why it considers subordinate legislation to be appropriate here.

We have received the Executive's response. It intends to lodge amendments at stage 2 that will set fixed parameters to prevent the power in paragraph 2(7) from being used to achieve extreme results. I am sure that we are happy about that. We will keep an eye on the situation.

Mr Maxwell: I am pleased about that. There was a long debate on this area of the bill with the Executive officials. This is the first that I have heard about the Executive agreeing with some of the comments of this committee and the Justice 2 Committee. That is welcome.

The Convener: That is good. Secondly, we asked the Executive to explain why there is to be no requirement for prior consultation before an order altering the number of members of the new commission is made. The question is whether we are happy with the Executive's response.

Murray Tosh: We should just draw the lead committee's attention to the matter. It seems a bit of a thin argument to say that, as altering the number of members has budgetary implications and there is consultation on budgetary issues, that constitutes consultation on the substantive issue. We should perhaps let the lead committee pursue that point.

The Convener: Okay. Is that agreed?

Members *indicated agreement.*

The Convener: Paragraph 17 of schedule 1 covers "Directions as to exercise of functions". We wanted further information on the power in subparagraph (1) to issue directions to the commission on how it should exercise its functions. The Executive is considering whether the power could be refined any further to put it beyond doubt that ministers will not intervene in operational matters or in individual decisions or complaints. As with the previous matter, we should perhaps just monitor developments at stage 2. We could simply send the Executive response to the lead committee and tell that committee that we are keeping an eye on the matter.

Murray Tosh: We should flag up our concerns about the matter. We are keeping an eye on it, but we should pass on to the lead committee some of our thinking on the issue.

The Convener: We could reiterate our concerns about the matter and we will therefore monitor it at stage 2.

Mr Macintosh: There are other examples. The Parliament retained the power to give directions to the Scottish parliamentary standards commissioner. The situation is not unprecedented.

Mr Maxwell: Indeed, but this is one of the biggest problems that the Justice 2 Committee faces. There are two opinions. One, from the Executive, says that the power is compliant with the European convention on human rights; another says that it is not ECHR compliant. It is about the connection between ministers and the new commission. It is extremely important that we send what detail we have to the lead committee

and that we pay attention to any changes that may or may not be forthcoming at stage 2.

Murray Tosh: The Executive is considering whether the power could be refined any further to put it beyond doubt that ministers will not intervene in operational matters or individual decisions or complaints. That is to the good, but could we invite the Executive to communicate with us further once it has clarified its thinking?

The Convener: Yes. That would be a good idea. Is that agreed?

Members *indicated agreement.*

Executive Responses

Registered Social Landlords (Purposes or Objects) (Scotland) Order 2006 (SSI 2006/211)

11:43

The Convener: We asked the Executive why the order contains a definition of

"disposed of on shared equity terms",

but not a definition of "shared equity terms".

The Executive has said that the former definition illustrates the meaning of the latter. However, the legal advisers still think that "shared equity terms" should have been defined.

Mr Macintosh: We should report the order in those terms.

The Convener: Yes. As you said on the previous such occasion, clarity is always the best thing when it comes to matters of shared equity. Is that agreed?

Members *indicated agreement.*

The Convener: We will report the order on the grounds of defective drafting and we will make our suggestion as discussed.

Croft House Grant (Scotland) Regulations 2006 (SSI 2006/214)

The Convener: It is suggested that we draw the attention of the lead committee and the Parliament to the regulations in relation to a number of points that were raised.

First, on point 1, defective drafting of the citation of the enabling powers renders the instrument ex facie of doubtful competence procedurally. However, in practice, the validity of the instrument is not likely to be affected. Secondly, there is a failure to follow proper legislative practice on point 2. However, that does not affect the validity of the instrument. Thirdly, its meaning could be clearer on points 3, 6 and 9. Fourthly, defective drafting has been acknowledged by the Executive on point 4. Fifthly, further information was requested from and supplied by the Executive on points 5 and 8. Sixthly, there are doubts about whether the instrument is intra vires on point 7. That has been acknowledged by the Executive.

11:45

Mr Maxwell: In the list in the legal brief, there are two paragraphs called (d). The list goes (a), (b), (c), (d), (d), (e). The list should go up to (f).

The Convener: I am sorry about that. We got all the papers a bit late.

Mr Maxwell: The list should go up to (f), not (e).

The Convener: We will check to ensure that we have covered all the points that need to be made.

Do we agree to follow the suggested course of action?

Members *indicated agreement.*

Charities Accounts (Scotland) Regulations 2006 (SSI 2006/218)

The Convener: The committee raised two points on the regulations with the Executive. First, we asked why no indication was given either in a footnote or in the explanatory note of where copies of the publications that are referred to could be obtained. The Executive has acknowledged that the information might usefully have been included in the explanatory note.

Secondly, the Executive has confirmed that regulation 3(7) is intended to prevent a charity from having more than two financial years exceeding 12 months in any five-year period. It has acknowledged that the drafting is ambiguous and that, technically, it could allow a charity to have four financial years exceeding 12 months in a five-year period. However, it takes the view that a charity would be highly unlikely to do so in practice.

It has been suggested that we should report the instrument on the grounds of failure to comply with proper legislative drafting on point 1 and defective drafting on point 2. Do we agree to do so?

Mr Maxwell: I think that we should do so. It is disappointing that the Executive has made no commitment to resolve the matter. Usually, in cases such as this, the Executive at least says that it will amend the instrument at the next available opportunity.

The Convener: Unfortunately, there is not enough time for us to write to the Executive with a recommendation that such an undertaking be given.

Mr Maxwell: That does not prevent us from writing to the Executive to ask why that commitment has not been given. That would seem to be a sensible thing to do.

The Convener: Is that agreed?

Members *indicated agreement.*

Draft Instrument Subject to Approval

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 (draft)

11:48

The Convener: No points arise on the regulations.

Instruments Subject to Annulment

Ceramic Articles in Contact with Food (Scotland) Regulations 2006 (SSI 2006/230)

11:48

The Convener: No points arise on the regulations.

TSE (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/231)

The Convener: The regulations breach the 21-day rule. Are we content with the Executive's explanation for that?

Members *indicated agreement.*

The Convener: We may wish to raise a point with the Executive in relation to regulation 19(b) and a reference that is made to sections in the Animal Health Act 1981. Are we content to ask the Executive about that point, as well as about some minor points?

Members *indicated agreement.*

Mr Maxwell: There are rather a lot of minor points.

The Convener: There are. We will include that point in our letter.

Advice and Assistance (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/233)

Criminal Legal Aid (Summary Justice Pilot Courts and Bail Conditions) (Scotland) Regulations 2006 (SSI 2006/234)

The Convener: No points arise on the regulations.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 7) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/235)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2005 Partial Revocation Order 2006 (SSI 2006/236)

11:50

The Convener: No points arise on the orders.

Instruments Not Laid Before the Parliament

Standards in Scotland's Schools etc Act 2000 (Commencement No 8 and Savings) Order 2006 (SSI 2006/232)

11:50

The Convener: No points arise on the order.

Avian Influenza (H5N1 in Wild Birds) (Scotland) Amendment Order 2006 (SSI 2006/237)

The Convener: Members will recall that the committee made a number of comments on the previous order and that, as a result, an amending order was to be laid; that is the order that we have before us. However, a number of points have arisen in relation to the order. They appear in the legal brief—

Gordon Jackson: Are they the ones that are listed on page 55?

The Convener: Yes.

Gordon Jackson: Just ask all the questions on the list.

The Convener: Do we agree to ask the Executive questions (a) to (f)?

Members *indicated agreement.*

The Convener: We can ask about a number of minor points as well.

Mr Maxwell: Perhaps our legal advisers could tell us whether there are more problems with the amended order than there were with the original order.

The Convener: I think that there are fewer, but it is a close-run thing.

Murray Tosh: We look forward to the next one.

The Convener: Last time, we said that this was a particularly sensitive area and that we therefore hoped that the Executive would get it right.

Mr Maxwell: Better luck next time.

The Convener: Yes.

11:51

Meeting continued in private until 12:20.

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