

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 5 September 2006

Session 2

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## SUBORDINATE LEGISLATION COMMITTEE

### 23<sup>rd</sup> 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)

Ms Maureen Watt (North East Scotland) (SNP)

\*attended

#### THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)

Ms Maureen Watt (North East Scotland) (SNP)

#### CLERK TO THE COMMITTEE

David McLaren

#### ASSISTANT CLERK

Jake Thomas

#### LOCATION

Committee Room 2

## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 5 September 2006*

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

### Delegated Powers Scrutiny

#### Adult Support and Protection (Scotland) Bill: Stage 1

**The Deputy Convener (Gordon Jackson):** I welcome everyone to the 23<sup>rd</sup> meeting in 2006 of the Subordinate Legislation Committee. Apologies have been received from Sylvia Jackson and Jamie Stone. We have been joined by Maureen Watt, who clearly has a taste for excitement. If she would like to join in our discussion, she should give me a nod—that is not a problem.

Members will recall vividly that we considered the Adult Support and Protection (Scotland) Bill on 27 June and that we wrote to the Executive on a number of points. Members should have in their papers copies of the responses.

On section 3, “Adults at risk”, we were concerned about the apparently unlimited power to modify the definition of adults at risk. We asked the Executive to provide further justification for the power and to indicate how it thought that it might be used and whether there ought to be a consultation requirement in the bill.

The Executive has said that, in time, practice may highlight gaps in the definition of “adults at risk” and that ministers would wish to deal with those without resorting to primary legislation. It has also been made clear to us that there is no intention to use the power to restrict the definition. We have not been provided with specific instances in which the power would be used, although I can understand that, and we have not received an answer to our question about the consultation requirement. Are members happy that the case for delegating the power has been made?

**Mr Kenneth Macintosh (Eastwood) (Lab):** The Executive repeats the argument that it makes in the explanatory notes to the bill and in the policy memorandum. It is still open to question whether it is desirable for the core definition in the bill to be amendable. We should draw our doubts about the power to the attention of the lead committee. If it is agreed to in its current form, changes to the definition should be subject to consultation and to

the affirmative procedure, at the very least. I have outstanding doubts about the power. The Executive has repeated the argument that it made initially, but it is difficult to foresee the exact circumstances in which it would need to use the power. I am open to persuasion either way, but I have doubts about whether it is necessary to include the power in the bill.

**The Deputy Convener:** The Executive has not given us an example, so it is difficult to see how the power would be used. However, I take some comfort from the statement that it will not restrict the definition.

**Murray Tosh (West of Scotland) (Con):** I agree with Ken Macintosh that the Executive's response is deeply unconvincing. If there had been any indication that difficulties with the definition in the Adults with Incapacity (Scotland) Act 2000 had become apparent during the implementation of the act, presumably the Executive would have highlighted those to support its case here. The fact that there have been no difficulties—or none that the Executive is prepared to tell us about—suggests that the case for the power is particularly weak.

On the other hand, if the intention is never to change the definition in such a way as to restrict it, as the Executive's response indicates, the Executive may be prepared for the bill to be amended to restrict the scope of the power. If the power is never used or is used only in a direction that is harmless and that is subject to consultation, it will be less damaging. In that case, the Executive's reasons for seeking the power would be perplexing, but that is a matter not for us but for the lead committee. Our role is to highlight to the lead committee how the power might be made acceptable.

**The Deputy Convener:** I have the impression that the committee does not really see the need for the power and that it leaves us ill at ease. We should report that to the lead committee and say that, at the very least, any change should be subject to the affirmative procedure, that the scope of the new power should be restricted so that it can be used only in the way in which the Executive describes and that there should be a consultation process before it is used. We should set out our views specifically to the lead committee.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I agree, but what you have outlined is a fallback position. In my view, instead of any change being subject to consultation, the Executive should not have the power. According to the legal brief, the current definition includes “disability” and “infirmity” and it is impossible to figure out what would not fall into those categories. The Executive has failed absolutely to give us even a hint of what it thinks

might fall outwith those categories. I do not see the need for the power. The example that it gives from the Protection of Children (Scotland) Act 2003 is not analogous to the issue that we are discussing. The Executive has failed completely to explain why we should support the power.

**The Deputy Convener:** You have expressed your views clearly on the record. I said that the committee was unhappy with the power and did not really see the need for it, but that if it was introduced certain safeguards should be built in. I phrased that as a fallback position. Are members content for us to express that view to the lead committee?

*Members indicated agreement.*

**The Deputy Convener:** Sections 55(1) and 56(2) insert sections into the 2000 act. We have no problem with the substance of the provisions, but there is a drafting error. The Executive will clarify the ambiguity that we have identified. We will report the matter to the lead committee and keep our eye on it to ensure that the necessary change is made.

Section 61(1)(d) deals with guardianship orders. We noted that the power is potentially sensitive but is subject only to the negative procedure. We asked the Executive to consider restricting the power in the bill and to include a statutory requirement for consultation with the Mental Welfare Commission. Both recommendations have been accepted. Amendments will be lodged and we will report on and monitor those.

Section 64(1)(c) deals with adjustments between councils in relation to social services and includes another drafting error. We will report on and monitor the matter to ensure that the necessary change is made. We received a satisfactory answer on three of the four matters on which we reported.

### **Transport and Works (Scotland) Bill: Stage 1**

**The Deputy Convener:** I remind members that the purpose of the bill is to remove the need for private bills for the purpose of enabling transport-related developments by conferring on ministers appropriate order-making powers. Anyone who has served on a private bill committee will say hurrah to that general proposition. The bill reproduces for Scotland part 1 of the Transport and Works Act 1992. The wording in sections 1 and 2 of the bill follows the provisions of the 1992 act very closely.

Before we discuss individual sections of the bill, we must deal with a general matter. Section 27(6) includes a sweeping power that relates to incidental and supplementary provisions and that

could have an effect on the way in which every power in the bill is exercised. Do members wish to comment on the power, which is worded in a very wide-ranging way? Our legal adviser, Margaret Macdonald, tells me that the provision is not included in the equivalent United Kingdom statute.

**Mr Macintosh:** This is the section that includes

“provision amending, repealing or revoking any enactment”.

An enactment is defined as the bill or any provision under it. The power is slightly worrying. At a previous meeting, we had a general discussion about our unease about the wide interpretation that can be applied to the words supplementary and supplemental. In this case, the provision is very specific—it indicates that the power can be used to amend anything in the bill. At the very least, we should ask the Executive why it thinks that the power is necessary. After we have received a response, we can discuss the matter further.

**The Deputy Convener:** In principle, this is the same sort of argument that we have been having repeatedly. Like all Executives, this Executive likes to have powers such as the one that we are discussing. However, this may be more than the usual argument about the definition of supplemental. We may want the Executive to provide real justification for needing the enactment to be repealable, in theory, by a statutory instrument.

**Murray Tosh:** Is there an element of retrospection in this? Would this power apply to private transport bills that have previously been enacted?

**Margaret Macdonald (Legal Adviser):** Yes.

**Murray Tosh:** It would. Therefore, the Waverley Railway (Scotland) Act 2006, the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 could all be amended, revoked or repealed by the Transport and Works (Scotland) Bill when it is enacted. I think that that perhaps explains the Executive's desire to have the power in section 27(6), but I do not think that that is necessarily a convincing argument as to why it should have that power.

In a debate that we had on one of the Edinburgh tram bills—my apologies to those stalwart souls who served on the committee but I do not remember which one it was—there was a suggestion that one of the tram acts might be only partially implemented. Further, there was a dispute during the course of the Waverley Railway (Scotland) Bill about attached conditions that the people responsible for the funding, who might include the Executive, could find burdensome in the fullness of time. There are areas where the powers are enabling, so the Executive does not

really need the section 27(6) power because an enabling power does not have to be enacted. A private bill does not need to be repealed if it is not implemented. It simply gathers dust, I imagine, unless there are issues about removing it specifically in order to lift things such as blight and potential compulsory purchase orders. There is a possible argument there for the relevance of the section 27(6) power. However, I would be more concerned about the possibility that we were handing ministers the power to amend by instrument something that the Parliament had expressly included at the point of passage.

**The Deputy Convener:** I certainly do not want to sound as if I have any legal expertise on this matter, but I do not think—and I am happy to ask the Executive about this—that the Executive could use the power in section 27(6), for example, to repeal the Waverley Railway (Scotland) Act 2006. Clearly, the power is for making changes—

**Murray Tosh:** The power could amend the conditions attached to the 2006 act.

**The Deputy Convener:** I read it as referring to things that could be done to change the Transport and Works (Scotland) Bill that might coincidentally or consequentially mean amendments and revoking elsewhere. Any act usually affects lots of other acts. I think that it is about the power affecting other acts as it makes changes to this one, rather than the Executive simply coming along and saying, “As from tomorrow, the Waverley act has gone away.” Is that not right?

**Murray Tosh:** I am not suggesting that the Executive will do that; I am suggesting that issues that have arisen in the course of previous private transport bills may have persuaded the Executive that it wants a degree of flexibility. I am arguing that I think that that is dangerous because, as the debates on those previous bills have shown, there have been areas in which the Parliament has had a different view from that of the promoters and the Executive and has attached conditions—which the Executive accepted in the case of the Waverley Railway (Scotland) Bill.

The Executive might feel that previous debates raised issues that focused its mind on the section 27(6) power, but that should work the same way for us. We should be very careful about giving the Executive substantial powers that could, as in the example given, result in an important part of a bill being vitiated, if that is the word. I am not saying that that is the Executive's intention; I am saying that that illustrates the potential of the section 27(6) power to give the Executive powers that would be very sweeping indeed. I think that before we could be happy with that we would want to know how the Executive envisages the power being implemented and what conditions would attach to it. It may be that we would feel that the

wording of the power and the hedging in of it on the face of the bill is not adequate to protect the rights of Parliament.

**The Deputy Convener:** We can deal with the matter in two ways. First, we can ask the Executive to comment on the power. Presumably, if we do that we can refer it to the *Official Report* of this discussion, so that it can see laid out in detail what your concerns are. Secondly, we can get the Executive officials to sit in front of us and speak to us. You can express your concerns and they can explain what precisely the section 27(6) power can and cannot do and what it is meant for, in their view. That would allow us to have a dialogue, in case we get an answer back in writing next week that raises more questions than answers. If you feel strongly enough about the matter, we will get the officials to come and sit at the table. Any thoughts?

**Mr Maxwell:** It is more of a question really. You commented, convener, that the section 27(6) power would have just a coincidental, knock-on effect on other bills, but that is not quite how I read the bill.

**The Deputy Convener:** I may be wrong.

10:45

**Mr Maxwell:** Section 2(3)(a) states that an order under section 1 may

“apply, modify or exclude any enactment which relates to any matter as to which an order could be made under that section”.

**The Deputy Convener:** If we have doubts about how such powers would affect other acts, I have no problem about getting the Executive officials to come and talk to us.

**Mr Maxwell:** I think that that might be worth while.

**Mr Adam Ingram (South of Scotland) (SNP):** I think that we should do that, convener.

**The Deputy Convener:** I have no difficulty whatsoever with that. I have been on this committee forever and, as I said, we used to do that quite regularly years ago.

**Mr Ingram:** We could knock this matter backwards and forwards, but I think that the section 27(6) power is obviously the key concern or power in the bill that we need to address. The fact that the power is not in the equivalent UK bill to my mind suggests that we need to explore with the Executive officials why it is in the Transport and Works (Scotland) Bill. If it is to do with the kind of experience that Murray Tosh has detailed to us, that is all the more reason for having a dialogue with the officials. [*Interruption.*]

**The Deputy Convener:** Could you all check your mobiles or pagers? Somebody is causing us sound problems and for once it is not me.

**Mr Macintosh:** I have nothing against bringing the Executive officials along. If the situation is as Murray Tosh suggested, we certainly need to consider the matter in depth. I do not have fears that the bill would give the Executive such wide powers, but I am still concerned about exactly the range of powers that the bill would give. I assumed that it would be able to reform incidental and supplementary provisions within an act; I did not realise that it would be able to make policy changes. If it could do so, that is even more reason to consider it.

We are interested in the Transport and Works (Scotland) Bill because many of the issues in private transport bills take a huge amount of parliamentary time to discuss. They can be relatively uncontroversial matters, but can involve a lot of detail. What we are trying to do is to put through a bill that would allow such detail to be dealt with by the Executive in a non-parliamentary way. Obviously, we are also trying to keep some sort of parliamentary control. However, that is the debate—that is what I am worried about. The point of the bill is to take a lot of powers away from the Parliament and give them to the Executive and that involves a huge amount of trust. We want to ensure that we have got that part of the bill right.

Before we get the Executive officials along, which would be fine, I would not mind seeing a more detailed written explanation first. However, the bill is only at stage 1, so we have a long way to go.

**The Deputy Convener:** The officials will be able to see from this discussion what our concerns are. I would hope that they would give us a briefing on what their position is before they came to a meeting, in order that we might then discuss it with them.

**Murray Tosh:** If we are doing it that way, convener—I am not unhappy with that—let me flag up a further issue, which is the kind of ratchet effect of expanding the section 27(6) power. It is a particularly wide power and it seems that every time we look at this supplemental etcetera power, the scope for it to do more seems to grow.

**The Deputy Convener:** I call it the Topsy power.

**Murray Tosh:** The Topsy power if you like, convener—that is eloquently put. However, Topsy grew of course without any particular strategy or vision, as I understand the metaphor. In this particular case, I wonder whether the Executive is just pushing the door further and further ajar. One of my concerns about the power is the implication for its expansion in future bills. It may be that the

power is specific to the type of legislation that the Transport and Works (Scotland) Bill is, given that it is focused on the implementation of specific projects. There may be arguments that such bills should be amendable and that projects may go on and off the agenda and that the Executive would not therefore try to use a section 27(6)-type power in the same way in other legislation. However, I think that that might be something that we would like to see addressed in the Executive's response.

**The Deputy Convener:** We have a note of all that. I am told that our session with officials is likely to be in a fortnight's time, not next week.

**David McLaren (Clerk):** We now consider bills on a fortnightly cycle, when that is possible.

**The Deputy Convener:** So we expect officials to appear before us in two weeks' time.

Section 1 of the bill, "Orders as to transport systems and inland waterways", deals with the power to make orders on the construction or operation of specified transport systems. The affirmative procedure will be used for orders that relate to developments that are of national significance, but orders that concern developments that are not of national significance will not be subject to parliamentary procedure. Ministers can exercise discretion in that regard.

With regard to the content of an order, section 27(9) places a limit on the penalties that can be imposed for an offence that is created under any order that is made under section 1. Although we would usually disapprove of a power that allows offences to be created by subordinate legislation, it is suggested that that would be impractical in this case. Are we content that, in principle, the restriction in section 27(9) provides sufficient control on the exercise of the power to which section 1 relates?

**Members indicated agreement.**

**The Deputy Convener:** Section 2(3) contains wide powers to amend primary legislation. That might seem okay, but we can discuss the issue—which Stewart Maxwell has already mentioned—when the officials come before us. The power to make incidental or supplemental provisions that is contained in section 27(6) extends the powers in section 2. We will discuss all that with the officials.

I mentioned that some orders relate to developments that are of national significance, which are defined in section 13(1)(a). That definition must be read along with the Town and Country Planning (Scotland) Act 1997 and the Planning etc (Scotland) Bill, which is being considered by the Parliament. Orders that are made under section 13 will not come into force unless they receive parliamentary approval under the affirmative procedure. I ask Margaret Macdonald to explain what that means.



**Margaret Macdonald:** After being made, such an order will have to receive parliamentary approval. The procedure is unusual.

**The Deputy Convener:** Are we content with that?

*Members indicated agreement.*

**The Deputy Convener:** There are two other points on which we will seek clarification from the Executive: the first relates to orders that authorise the carrying out of works of national significance and the interpretation of the word “procedure” and the second concerns sections 13(6) and 13(1)(b) and the exercise of ministerial powers. We will also ask about the potential loophole that exists in section 12(14).

Are we content that, apart from the orders that will be subject to the procedure that is provided for in section 13, orders that are made under section 1 will not be subject to any parliamentary procedure?

*Members indicated agreement.*

**The Deputy Convener:** We have identified those areas that we want to discuss with officials.

Under section 4, “Applications”, rules that relate to the form of an application will be subject to affirmative resolution in the first instance and negative resolution thereafter, except when they amend the text of an act, when they will be subject to affirmative resolution. That will provide more scrutiny than is provided for under the Transport and Works Act 1992. Are we content with that?

*Members indicated agreement.*

**The Deputy Convener:** We might want to find out why the Executive thinks that the power in section 4(4)(a) is necessary for information that is supplied by ministers.

There is no statutory obligation to consult on the rules, but we do not think that that is necessary in this case.

Section 6, “Orders made otherwise than on application”, confers wide powers on ministers. Although some of its provisions are mirrored in the 1992 act, the one in section 6(1)(c) does not seem to have any equivalent, so we should ask the Executive how it intends to use it.

Section 7, “Model provisions”, makes no provision for guidance to be issued in any particular form or for it to be subject to any parliamentary procedure. There are similar powers in the 1992 act, which must be exercisable in the form of a statutory instrument that is not subject to parliamentary procedure. The incorporation of model provisions in an SI at least ensures their publication. Should section 7 provide for the incorporation of model provisions in a statutory

instrument? Do members agree to ask the Executive to consider doing that?

*Members indicated agreement.*

**The Deputy Convener:** We will also ask the Executive to clarify its intentions regarding the status of the proposed guidance to ensure that everything will be published properly.

Subsection (1) of section 8, “Objections”, will provide ministers with the power to make rules on objections to an application for an order. The rules that govern the issue will be subject to the affirmative procedure in the first instance and the negative procedure thereafter. Are members content with that?

*Members indicated agreement.*

**The Deputy Convener:** We will ask the Executive about its intentions in relation to the exercise of powers under section 8.

Section 10, “Procedure at inquiries and hearings”, will give ministers the power to make rules to regulate the proceedings of an inquiry or hearing. The rules will be subject to the affirmative procedure in the first instance and the negative procedure thereafter. Are members content with that?

*Members indicated agreement.*

**The Deputy Convener:** The procedure that would apply to the rules is set out in section 210 of the Local Government (Scotland) Act 1973. As no procedure is prescribed in the bill, such regulations would not be laid before the Parliament, but would be scrutinised by the Subordinate Legislation Committee. I think that that is okay.

**Murray Tosh:** Before we move on to section 12, I draw attention to the observation in the legal brief that the Executive did not comment on the delegation of legislative power with which section 10 deals, either in the delegated powers memorandum or in the bill’s accompanying documents. We are so used to such little gaps that we tend just to pass over them, but perhaps we should flag up the fact that we like to discuss such general matters with the Executive. The DPM and the documents that accompany bills should address all the issues that arise and should never leave us in the position in which we can identify one that has been ignored. By dealing with all such matters in the memorandum and a bill’s accompanying documents, the Executive can ensure that its explanations are on the record so that everyone who might be affected by the bill, as well as the Subordinate Legislation Committee and the lead committee, understands it. In general, it is not acceptable for the Executive not to address issues that clearly exist.

**The Deputy Convener:** Would you like us to fire a little shot?

**Murray Tosh:** I am not saying that we should raise the issue specifically in the context of our consideration of the Transport and Works (Scotland) Bill, although—

**The Deputy Convener:** We should mention it.

**Murray Tosh:** If we are to ask the Executive to clarify a number of points, we could ask it to explain why it did not comment on the matter that I have identified. However, there is a bigger issue, which we should ask the Executive to address.

**The Deputy Convener:** We will make that point in the context of our present inquiries.

The power in section 12, “Publicity for making or refusal of order”, is subject to the affirmative procedure in the first instance and the negative procedure thereafter. That seems to be okay.

The bill provides for the power in section 14, “Consents etc under other enactments”, to be subject to the affirmative procedure in the first instance and the negative procedure thereafter. I suggest that we ask the Executive to explain what it is proposed would be covered by section 14(5)(b) for which section 27(6)(b) would not provide sufficient vires.

Section 18 concerns access to land. As members of the relevant committees know, powers of entry and issues relating to appeals and compensation are sensitive matters. It is proposed that an order that is made under section 18(1)(a) should be subject to the affirmative procedure in the first instance and the negative procedure thereafter. Such provisions may be relevant when we come to discuss with officials the sweeping powers that section 27(6) contains, because under those powers all such provisions could be changed. Although we do not lack in contentment in this case, it might be one of the sections that we think about when it comes to our discussion in a fortnight.

Section 18(1)(b) raises the issue that we addressed in the previous section. There is an argument that it is less appropriate to leave matters such as rights of appeal and compensation to the discretion of ministers to prescribe than to incorporate them in the bill and that perhaps they should be specified in the bill. Are we content with the power being delegated, or when we discuss matters should we discuss this as something that might be better in the bill?

11:00

**Murray Tosh:** I was not not content, but since you raise the matter as an issue that we might discuss, why do we not do so?

**The Deputy Convener:** I do not want to bring officials to the committee to discuss every detail, but on the other hand when they are here we might discuss matters with them that we would not bring them here to discuss.

Sections 23 and 24 deal with amendments to the Roads (Scotland) Act 1984 and the Harbours Act 1964 respectively.

**Murray Tosh:** I will start at the beginning this time. The first comment made in our legal brief is that the delegated powers memorandum offers no comments on those sections, but both of them are adjudged to make significant modifications to powers in the Roads (Scotland) Act 1984 and the Harbours Act 1964. It again raises the question as to why, if significant issues are raised by the legislation, the memorandum does not flag that up for the committee and for its other users. This is another case in point that we might raise in the specific but also add to the general concern about the quality and scope of the memorandum.

**The Deputy Convener:** I take that point, but this is about provisions that are intended to align the procedures relating to all orders dealing with transport matters. Everything is to be the same across the board. It introduces, in relation to certain instruments, procedures similar to those prescribed in section 13. We will ask the Executive to clarify a couple of points that have been raised in relation to amendments made by section 23 to the Roads (Scotland) Act 1984.

Section 25 deals with amendment of the Pilotage Act 1987. Procedures relating to the holding of inquiries are left to be dealt with under the Tribunals and Inquiries Act 1992 and no special rule-making power for this purpose is included in the amendments to the 1987 act. Should we ask the Executive to clarify the matter further?

**Murray Tosh:** Yes. We should also note again in passing that the delegated powers memorandum does not address the matter. Although it seems to be more procedural than the more substantive earlier examples, it is still a case in point.

**Mr Maxwell:** The point has been made about the DPM not mentioning one power after another. Rule 9.4A of standing orders seems to be fairly clear that the DPM should mention the powers and explain the various aspects of them. It looks on the face of it that those errors—if I can put it that way—are a breach of standing orders in addition to making it very difficult for us to look at the various powers. Perhaps when the officials come along they can explain why there is no mention in the DPM of those various powers, given what is stated in standing orders.

**The Deputy Convener:** That is a fair point. We will put them on notice.

Section 26 deals with amendment of the Transport (Scotland) Act 2001. A slight drafting ambiguity arises, which we will clarify with the Executive.

Section 27 relates to further provision as regards rules, regulations and orders. We will talk about the matter with the Executive when the officials arrive. We have gone over the issue in some detail.

Section 29 is on the short title and commencement. The section provides for the bill to come into force by commencement order in the normal way. The order will not be subject to Parliamentary procedure.

Members will note that a commencement order under section 29 could include supplementary provisions that amend primary legislation but would not be subject to parliamentary scrutiny. We come back to the section 27 argument. We would need to keep this section in mind as part of the linkage into what we will discuss with officials when they come.

A further difficulty with section 29 is that not only will an order under the section not be subject to scrutiny but, as the section is currently drafted, the order will not be made as a statutory instrument and therefore will not be subject to scrutiny even by the committee. Should we ask the Executive about that? There is also a point about commencement on royal assent and whether it should be the day after royal assent. I feel like bursting into "What a Difference a Day Makes".

**Mr Maxwell:** Do not let us stop you.

**The Deputy Convener:** I will try not to do that.

**Murray Tosh:** Under standing orders it is expected that you give notice, but since you are convening the meeting you could waive that requirement.

**The Deputy Convener:** I could do what I like.

## Executive Responses

### Fire (Scotland) Act 2005 (Consequential Modifications and Savings) Order 2006 (draft)

11:05

**The Deputy Convener:** Agenda item 3 is on Executive responses. As a result of our comments, the order has been withdrawn and relaid. We will consider the new order later but we need to dispose of this one first. We need to report on it. We will report on all the things that we thought were wrong with it. We asked the Executive to explain the difference in effect between paragraph (a) and paragraph (b) of article 3. The Executive states that there is no difference. We will tell Parliament about that on the grounds either that it could be clearer or that it does not follow proper legislative practice. The Executive has accepted that there is a minor drafting error.

**Murray Tosh:** Which of the two options that you read out do you opt for?

**The Deputy Convener:** I thought that we were going to say both.

**Murray Tosh:** That is very inclusive of you.

**The Deputy Convener:** We could say that the meaning could be clearer and that at the very least the order does not represent good legislative practice.

**Murray Tosh:** I did not realise that the "or" was a conjunctive and/or type "or". I had assumed in my naivety that those were alternatives and that we should select one, but I am happy to opt for both.

**The Deputy Convener:** Good.

## **Draft Instruments Subject to Approval**

### **Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2006 (draft)**

11:07

**The Deputy Convener:** No points arise on the draft order.

### **Construction Contracts (Scotland) Exclusion Amendment Order 2006 (draft)**

**The Deputy Convener:** We should perhaps ask the Executive to explain the drafting of the amendment to article 4(2)(c)(iii) of the draft order in the light of the reference in that article to agreements that were made before 1 May 1998. Will we ask that question?

**Members** *indicated agreement.*

### **Fire (Scotland) Act 2005 (Consequential Modifications and Savings) Order 2006 (draft)**

**The Deputy Convener:** Earlier today we considered the original order, which was withdrawn. This is the relaid version of the draft order, which addresses our concerns about the original. No points arise on the order.

### **Transfer of Functions to the South-West of Scotland Transport Partnership Order 2006 (draft)**

### **Transfer of Functions to the Shetland Transport Partnership Order 2006 (draft)**

**The Deputy Convener:** No points arise on the draft orders.

## **Instruments Subject to Annulment**

### **Adults with Incapacity (Removal of Regenerative Tissue for Transplantation) (Form of Certificate) (Scotland) (No 2) Regulations 2006 (SSI 2006/368)**

11:08

**The Deputy Convener:** No substantive points arise on the regulations, although members will note that they replace the Adults with Incapacity (Removal of Regenerative Tissue for Transplantation) (Form of Certificate) (Scotland) Regulations 2006 (SSI 2006/343), on which we previously raised points that were agreed to by the Executive. We can informally raise a minor point with the Executive, which is that the regulations breach the 21-day rule, although that seems to be okay in this case.

**Members** *indicated agreement.*

### **Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) (No 2) Order 2006 (SSI 2006/383)**

**The Deputy Convener:** No points arise on the order. There has been another breach of the 21-day rule, the reasons for which seem to be acceptable. Is that okay?

**Members** *indicated agreement.*

### **Designation of Institutions of Higher Education (Scotland) Amendment Order 2006 (SSI 2006/398)**

**The Deputy Convener:** SSI 2006/398 corrects an error in the Designation of Institutions of Higher Education (Scotland) Order 2006 (SSI 2006/279) in relation to the Robert Gordon University. There has in this case also been a breach of the 21-day rule. Members may also wish to note that instruments that we have considered in relation to the Robert Gordon University were part of a package that we have received piecemeal, which has not helped our legal advisers to see precisely what is happening.

We have no points to raise on the order, but we will tell the Executive that we are not overcheery about the way in which the whole package has been presented. We will suggest that it would be better in the future for the legal advisers to receive such packages of instruments together so that they can see the whole picture and how the instruments all relate. A little word of request or censure can be submitted on the order.

**Avian Influenza (Preventive Measures)  
(Scotland) Amendment Regulations 2006  
(SSI 2006/399)**

**The Deputy Convener:** There are no points to raise on the regulations. The breach of the 21-day rule was simply an oversight. I do not think that we will report any concern about that—everybody does it.

**Council Tax (Exempt Dwellings) (Scotland)  
Amendment Order 2006 (SSI 2006/402)**

**The Deputy Convener:** There is a minor point on the order, which can be made by informal letter.

**The Robert Gordon University (Scotland)  
Amendment Order of Council 2006  
(SSI 2006/404)**

**The Deputy Convener:** The amendment order of council seeks to restore the functions of the governing body of the Robert Gordon University, which were removed by a previous Scottish statutory instrument. That order came into force on 21 June, but the present order comes into force on 21 July. Do we need to ask the Executive to explain the effect of that gap, or do we consider the matter to be water under the bridge?

**Murray Tosh:** It might be water under the bridge in a sense, but it is curious. The point might conceivably arise again, so let us ask what the justification for the gap is.

**The Deputy Convener:** We will ask for an explanation as to why the place was left ungoverned—and ungovernable.

**Murray Tosh:** Absolutely. There might have been things that were done during that interlude that are, in effect, under a cloud because of the lack of the relevant powers. As I find the whole thing baffling, we might as well get the one thing that I do understand explained.

**The Deputy Convener:** If there is a gap, it might forever remain a problem: there might not be any retrospective powers. It is to be hoped that nobody does anything in Aberdeen in the first three weeks in July—which is possible, for all I know.

**Murray Tosh:** It is a bit like the old story about Berwick still being at war with Russia. I gather that that is not true, but it illustrates the difficulty of not tying the loose ends together properly.

**The Deputy Convener:** Okay.

**Products of Animal Origin (Third Country  
Imports) (Scotland) Amendment (No 2)  
Regulations 2006 (SSI 2006/419)**

**The Deputy Convener:** No points arise on the regulations. There is another acceptable breach of the 21-day rule. It is one of a sequence: it always seems to be okay in such cases.

**Human Tissue (Scotland) Act 2006  
(Human Organ Transplants Act 1989  
Transitional and Savings Provisions)  
Order 2006 (SSI 2006/420)**

**The Deputy Convener:** There are no points on the order apart from the breach of the 21-day rule.

**TSE (Scotland) Amendment (No 3)  
Regulations 2006 (SSI 2006/430)**

**The Deputy Convener:** We might ask the Executive to explain, with reference to the amendment of regulation 33 of the principal regulations that are made by regulation 3, paragraphs (a), (b) and (c), of the present regulations, whether new subparagraph (c) of regulation 33(2) is intended as an alternative to subparagraph (a) or subparagraph (b), or to both. That sounds like a good question to me.

**Murray Tosh:** It is a pity that we do not have somebody here to whom we could have put that question without notice.

**The Deputy Convener:** There has also been another breach of the 21-day rule, but that is okay.

**Road User Charging Schemes (Keeping of  
Accounts and Relevant Expenses)  
(Scotland) Regulations 2005 Revocation  
Regulations 2006 (SSI 2006/431)**

**The Deputy Convener:** There are no points on the regulations. They will revoke another instrument, which we thought was defective.

**National Health Service  
(Travelling Expenses and Remission of  
Charges) (Scotland) Amendment (No 3)  
Regulations 2006 (SSI 2006/440)**

**The Deputy Convener:** We might ask the Executive why the new regulations could not have been made earlier and why there was, therefore, such a short time between the making, laying and bringing into force of the regulations. Secondly, we could ask why regulation 2(1) refers to schedule 1 to the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No 2) Regulations 2003 (SSI 2003/460) when that instrument does not appear to have a schedule that is so numbered. Thirdly, what plans, if any, does the Executive have to consolidate the series

of instruments of which the regulations form part? The other questions are not unimportant—although we will no doubt find that they are simply a matter of errors—but that third one, about consolidation, is probably quite serious.

**Mr Maxwell:** The Executive's reason for the regulations' breach of the 21-day rule was that it was not aware of the English regulations, or that it was waiting for matters to be resolved in England before bringing in our regulations. That is fair enough—I can accept that. However, the legal brief makes it clear that

"the English regulations were made on 8 June".

**The Deputy Convener:** Is that a mistake?

**Mr Maxwell:** It says "8 June."

**Mr Macintosh:** The legal brief also mentions 5 August.

**Mr Maxwell:** The brief says that

"the Committee will also note that although the English Regulations were made on 8 June".

**Mr Macintosh:** Paragraph 234 says "made on 5 August".

**Mr Maxwell:** Could we have an explanation as to which date is relevant?

**Margaret Macdonald:** It is 5 August. That is what it should have said.

**The Deputy Convener:** It was just a mistake.

## **Instruments Not Laid Before the Parliament**

**Perth and Kinross (Electoral Arrangements) Order 2006 (SSI 2006/370)**

**Moray (Electoral Arrangements) Order 2006 (SSI 2006/372)**

**Inverclyde (Electoral Arrangements) Order 2006 (SSI 2006/373)**

**East Dunbartonshire (Electoral Arrangements) Order 2006 (SSI/2006/374)**

**Dundee City (Electoral Arrangements) Order 2006 (SSI 2006/375)**

**Stirling (Electoral Arrangements) Order 2006 (SSI 2006/376)**

**South Lanarkshire (Electoral Arrangements) Order 2006 (SSI 2006/377)**

**Argyll and Bute (Electoral Arrangements) Order 2006 (SSI 2006/378)**

**East Renfrewshire (Electoral Arrangements) Order 2006 (SSI 2006/391)**

**Falkirk (Electoral Arrangements) Order 2006 (SSI 2006/392)**

**Angus (Electoral Arrangements) Order 2006 (SSI 2006/393)**

**Orkney Islands (Electoral Arrangements) Order 2006 (SSI 2006/394)**

**Aberdeenshire (Electoral Arrangements) Order 2006 (SSI 2006/416)**

**North Ayrshire (Electoral Arrangements) Order 2006 (SSI 2006/427)**

**East Ayrshire (Electoral Arrangements) Order 2006 (SSI 2006/428)**

**South Ayrshire (Electoral Arrangements) Order 2006 (SSI 2006/429)**

**Dumfries and Galloway (Electoral Arrangements) Order 2006 (SSI 2006/434)**

11:15

**The Deputy Convener:** We have the Perth and Kinross (Electoral Arrangements) Order 2006 (SSI 2006/370), followed by umpteen orders for other parts of Scotland. There are 17 of them, in fact, and no points arise on any of them.

**Serious Organised Crime and Police Act 2005 (Commencement No 7) Order 2006 (SSI 2006/381)**

**Private Security Industry Act 2001 (Commencement No 1) (Scotland) Order 2006 (SSI 2006/382)**

**The Deputy Convener:** No points have been identified on the orders.

**Housing (Scotland) Act 2006 (Commencement No 3) Order 2006 (SSI 2006/395)**

**The Deputy Convener:** We should draw the order to the attention of Parliament on the ground of unduly limited use of the powers, as is acknowledged by the Executive, which is moving to correct the matter.

**Act of Sederunt (Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility Rules) 2006 (SSI 2006/397)**

**The Deputy Convener:** No substantive points arise on the act of sederunt. There is a minor point that can be raised informally with the Court of Session.

**Act of Sederunt (Ordinary Cause and Summary Application Rules) Amendment (Miscellaneous) 2006 (SSI 2006/410)**

**The Deputy Convener:** No points arise on the act of sederunt.

**Act of Sederunt (Child Care and Maintenance Rules 1997) (Amendment) (Adoption and Children Act 2002) 2006 (SSI 2006/411)**

**The Deputy Convener:** No points arise on the act of sederunt as such. However, something quite concerning did arise. I do not really know what happened. Our legal advisers found some typographical problems with the instrument. When they queried them with the court, they found that the typos were not in the original instrument that was held by the court. The Executive processes rules of court. I would really like to know what happened. I presume that signed originals are

kept somewhere for ever and a day and that what we get are certified true copies.

The actual difference in this case does not matter, but we and our advisers deal with certified true copies. Our whole business—and my whole training—is to take the description “certified true copy” as an act of faith. That is how I have always dealt with things. I do not see how there can be even a minor error. We might think in this modern day of word processors that what comes out as a copy will be identical to the signed original. I find quite disturbing the fact that there can be any differences at all. If the process allows for a minor difference, it could presumably allow for a major difference. That is quite a serious point, albeit that the differences do not matter in the case of the act of sederunt that is before us. It is the existence of a difference that I think is of some concern.

**Mr Maxwell:** It is not of concern just to us, but to every committee of Parliament. If we cannot have faith in the certified true copies with which we all work, that undermines everything.

**The Deputy Convener:** It would be very strange if the original was different. The question about the process and how such changes are allowed to happen is quite serious. We will ask it.

Do we ask it of the Executive, or do we ask the Court of Session to comment? How is it done? Whoever is responsible for acts of sederunt up the road at the court should be aware that we are raising the question of acts of sederunt not actually being true copies.

**David McLaren:** Rules of court are processed by the Executive for the court. We could write to both, or we could ask the Executive to include a response from the court in its response to us.

**The Deputy Convener:** If we are raising the issue with the Executive, the Lord President should, presumably, know that we are doing so.

**Murray Tosh:** Even though the inference is that the fault might lie in the transmission, and that the Executive is to blame for the discrepancies, we should not presume that. We should ask both parties to the process to examine the protocols that apply to how they do their work. Both should satisfy themselves that their part in the procedure is absolutely foolproof.

**The Deputy Convener:** If nothing else, the court should know that the problem has arisen. We are making it clear that there is not a problem with the instrument; it is the fact that there is a difference that is odd.

**Police, Public Order and Criminal Justice  
(Scotland) Act 2006 (Commencement No  
1) Order 2006 (SSI 2006/432)**

*Meeting closed at 11:19.*

**Act of Adjournal (Criminal Procedure  
Rules Amendment No 4) (Miscellaneous)  
2006 (SSI 2006/436)**

**Act of Sederunt (Summary Applications,  
Statutory Applications and Appeals etc  
Rules) Amendment (Miscellaneous) 2006  
(SSI 2006/437)**

**The Deputy Convener:** No points arise on the instruments.

That, with regret, will have to do us until 12 September.



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