SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 September 2006

Session 2

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CONTENTS

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SUBORDINATE LEGISLATION COMMITTEE

25th 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 GAVE EVIDENCE:

Andrew Brown (Scottish Executive Legal and Parliamentary Services)
Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 19 September 2006

[THE DEPUTY CONVENER *opened the meeting at 10:33*]

Delegated Powers Scrutiny

Transport and Works (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): Good morning. This is the committee's 25th meeting this year. Sylvia Jackson has apologised that she cannot be with us.

For agenda item 1, we consider first the Transport and Works (Scotland) Bill at stage 1. When we considered the bill a fortnight ago, we raised many questions, including three issues that were of particular interest to us, and we invited officials to join us today. As often happens, we have been provided with a helpful written response that deals with much, but perhaps not all, of what we wanted to discuss. In any event, we are delighted to have with us Frazer Henderson, who leads the bill team, as well as Andrew Brown and Catherine Wilson, who are both solicitors in the Scottish Executive.

The first of the three issues relates to section 27(6), which contains what might be called the usual power to make supplemental et cetera provisions. However, section 27(6) includes—which we think is unusual—specific provision to amend the terms of the bill itself. All members will have seen the Executive's written response. The Executive has agreed to lodge amendments to sections 27(3) and 27(6) in the light of our comments. I do not know whether that ends our discussion on the issue or whether members have further questions to ask.

Mr Kenneth Macintosh (Eastwood) (Lab): I thank the Executive for producing the explanation and the helpful suggested amendments, but I still have a question about section 27(6). As we discussed previously, the purpose of the bill is to improve parliamentary procedure by removing some detailed bills from the current, rather cumbersome process. However, there is a theoretical possibility that the power in section 27(6) could be used to amend or even to repeal in its entirety an act of the Parliament. For example, the power would in theory allow a future Executive substantially to amend or even to repeal the Waverley Railway (Scotland) Act 2006 without any reference to Parliament.

The Deputy Convener: Sorry, I think that we wanted to ask that question later.

Mr Macintosh: Am I on the wrong question?

The Deputy Convener: That question is about whether the power will allow the Executive to amend previous acts, but I do not want us to confuse the issues. At this stage, we want to put the point about whether the power will allow the Executive to amend the bill itself once it is enacted. I am sorry, Ken.

Mr Macintosh: No, do not worry.

Murray Tosh (West of Scotland) (Con): Paragraph 14 of the legal brief states that the Executive intends to lodge

"an amendment at stage 2 to narrow section 27(6) so that it does not allow the powers to be used to modify the Act following on from the Bill itself."

If the point that Ken Macintosh has made will be covered by that amendment, I wonder whether that is still a pertinent point.

The Deputy Convener: Help us.

Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department): We are happy to give an explanation in response to Mr Macintosh's query.

Yes, private acts will be able to be amended by an order, made under section 1, that applies section 2(3)(b). However, it is important to realise that such an amendment must be

"necessary or expedient in consequence of any provision of the order"

that is made under section 1. Similarly, section 27(6) is not a free-standing power as the exercise of that power by instrument must be incidental or supplementary.

Paragraph 22 of our written response provides some examples of situations in which we think that the power might be used. Mr Macintosh mentioned the Waverley Railway (Scotland) Act 2006, but I do not want to comment in particular about that act as that will be a policy decision for future ministers. However, the explanations that we have provided in subparagraphs 1, 2 and 3 of paragraph 22 of our response should allay any concerns about how the Executive intends to exercise this power.

The Deputy Convener: I am sorry, Ken. In a sense, Ken Macintosh was quite right that the two issues are connected. We will just deal with the whole thing as one issue.

Mr Macintosh: The explanations in the written response are helpful, but my understanding of the issue is that, in essence, the Executive would not have to go back to Parliament to amend a bill. Am I right or wrong in thinking that no parliamentary procedure would be required?

Andrew Brown (Scottish Executive Legal and Parliamentary Services): It is correct that an order under section 1 is not subject to the affirmative procedure unless it attracts section 13. The affirmative procedure will apply to orders for projects in the NPF and when ministers decide as a matter of policy that a particular order should be subject to the affirmative procedure.

The Deputy Convener: What is the NPF?

Andrew Brown: The NPF is the national planning framework.

Murray Tosh: I appreciate that, as the written response clarifies, the power in section 27(6) is not a free-standing power but must relate to section 1 of the bill. However, section 1 essentially empowers ministers to make orders about the operation of a "transport system". The transport system in question might be a specific piece of infrastructure or it might be the whole transport system. Therefore, it seems quite possible that, as long as the order included a cross-reference to section 1, ministers would be entitled to say, "I am pursuing this in the interests of the transport system, so it is pertinent to use section 27(6)."

I appreciate that you cannot talk about the specific policy options because those are matters for ministers. As an example, however, ministers could decide, during the implementation of the Borders railway line, having presumably received representations from the promoter, that the amount of money available did not permit construction of the station and loop at Stow or that they could not implement the whole project and that it should be implemented in phases. Both those matters were explicitly determined by Parliament when it passed the bill. In those circumstances, it still seems possible that ministers could cross-refer section 27(6) to section 1 and say, "Because we have this power, we are passing this order without parliamentary procedure." There might be an unholy row in the Parliament about that, but, nonetheless, it still seems possible that ministers could do that under the powers that are being taken.

Andrew Brown: Exercise of the power, however, is in consequence of or supplemental to other provisions in the order. If we brought forward a section 1 order about another railway and, on top of that, we sought to repeal the Waverley Railway (Scotland) Act 2006, which had no connection with that, it seems to me that that would go beyond what section 27(6) allows us to do, because the necessary connection with the order that the provision was supplementing would not be there.

An order to repeal the Waverley Railway (Scotland) Act 2006 would have to supplement something in an order that had something to do with the Waverley line and it would have to be argued that it was appropriate to make the provision in connection with that.

Murray Tosh: Given that there would be no procedure, all that we would get is a report from our legal adviser that noted what the minister had done. We would then write to you to question the vires and there would be an elaborate defence of it. There would be no parliamentary redress unless somebody decided to seek judicial review of something that the minister had done.

I am not saying that ministers are going to do that, but it is because we are anxious about the widening of the power that we are trying to narrow it down and to understand better the practical limitations on its use. I do not think that we are worried about the way in which you are defending it, but we are concerned that it could be used subsequently to do things that, possibly, neither you nor we anticipate. If the opportunities are there, we want to know what the defences are.

The Deputy Convener: It is probably worth saying that you have to understand our mindset. We are not particularly interested in the politics. Frazer Henderson explained what the intention is, but we are not really worried about the intention either. We are worried about the power and the possibilities of its use. We always work on the basis that ministers do not have evil intentions and that they work in good faith. Our concern is not about how you intend to use the power, but about how it could be used. It is our job to ensure that the power is not such that it could undermine the Parliament.

I think that Murray Tosh is saying that the power in section 1 is very wide. It allows Scottish ministers to make orders relating to

"matters connected with … a railway".

Frazer Henderson used the word "expedient". I find that word scary. One could put a lot of stuff inside the word "expedient". Someone could say that it is now expedient not to build the Waverley railway, or part of it. What is to prevent ministers from using the power in such a way, which would have serious consequences? Of course, I leave aside the question whether all hell would break loose elsewhere.

Andrew Brown: As you said, there are controls on how ministers could use the power. As I tried to explain, its use is supplemental not to the width of section 1 but to what is actually included in the

order. Otherwise, it is hard to see how the provision could be regarded as supplementary to the remainder of the order. The same applies to the power in section 2(3), which states that an order made under section 1 may

"make such amendments, repeals and revocations of enactments of local application as appear to the Scottish Ministers to be necessary or expedient in consequence of any provision of the order or otherwise in connection with the order."

The first control is that, if the amendment, repeal or revocation has no connection with the order, it will be outwith the power. As you also said, if ministers act beyond their powers, people can challenge that in the courts.

10:45

Mr Stewart Maxwell (West of Scotland) (SNP): You have said a couple of times that the issue is not just about section 1 and that any provision under section 27(6) would have to be connected to the other provisions in the order. What is to stop ministers making an order designed to allow them to do that? You said that, in any order on the Waverley railway, the ministers could just stick in changes. As the convener said, we are trying to understand the limitations of the power.

Andrew Brown: To satisfy the vires, the ministers will have to be able to show that the provision that they are making is somehow supplemental to, a consequence of or in connection with other provisions in the order. If the provision fails all those tests—

Mr Maxwell: Perhaps we are not being clear. What is to stop the minister from laying an order that is to do with the Waverley railway—to use your example—and then, as Murray Tosh outlined, using that order to get rid of one of the loops or change the number of stations or do whatever else they wanted to do?

The Deputy Convener: Basically, what is to stop ministers from using the powers in the bill to reverse anything in any private or other act that is to do with transport?

Andrew Brown: I struggle to see how, hypothetically, ministers could produce an order on the Waverley line that led to the scheme being revoked in total. I accept that, hypothetically, ministers could go into some of the detail. We have given illustrations of that in paragraph 22 of our response. Ministers might well need to take such action. For example, if another railway line was to be connected to the Waverley line, ministers might have to do something like that.

Murray Tosh: I understand that, if something arises that was unanticipated in the order to implement a rail project, the Executive will want to be able to modify that order to take account of that. That will be about removing obstacles, dealing with contingencies and covering issues that were not anticipated in the original order—that is the supplemental stuff that we understand. However, you have just agreed that, hypothetically, the power could be used to make changes. We are concerned that it will be possible for something to be done that would tackle not something unanticipated, but something that Parliament had included deliberately in a project. You might argue that, in reality, the practical consequences are that the ministers would not dare to do that and that legal sanctions exist. However, if possible, we want to build in a parliamentary or legislative sanction.

In essence, we want to know whether the Executive can frame the amendment to limit the exercise of ministerial power that you say you will make in such a way that will limit the power to matters that we think of as genuinely supplemental. I know that the bigger changes may be hypothetical and, possibly, quirky, but they are still possible.

Andrew Brown: You raise several points. Our response gives illustrations of situations in which it might be necessary to revisit an earlier private act.

Murray Tosh: You can add examples to that list—the examples are only examples.

Andrew Brown: Yes, they are examples. You will understand that, to connect another railway line, it might be necessary to adjust the terms of an earlier act. We seem to be getting on to whether parliamentary control is appropriate, which is a policy matter on which we cannot really comment. It is for ministers to defend the position on whether there should be parliamentary scrutiny of the orders.

The Deputy Convener: Of course you cannot comment on whether there should be parliamentary scrutiny, but you can tell us whether there will be parliamentary scrutiny, by which I mean whether it will be possible to exercise the power legally without parliamentary scrutiny. I agree that whether the power is a good or bad thing is not your business. However, you should be able to tell us precisely what the power is.

Andrew Brown: Except when section 13 applies—it will require the affirmative procedure for certain orders under section 1—the orders will not be subject to any parliamentary procedure.

Mr Macintosh: I just want to clarify the issue again. Let us assume that a future Executive wanted to produce an order, the purpose of which was not to amend the Waverley Railway (Scotland) Act 2006, but specifically to get rid of the whole act. Will that technically be possible?

Andrew Brown: I struggle to see how we could do that.

Mr Macintosh: So you do not think that it would be technically possible to do that. Okay. How about an order that amended the Waverley Railway (Scotland) Act 2006 to introduce a new line joining on while getting rid of the station at Stow or not paying compensation to somebody? Would that be possible?

Andrew Brown: That would be possible if you could show that it was appropriate to do that to supplement other provisions or in consequence of them. If another railway line was to join on at Stow, where a station would be in the way, I could see that it might be possible to satisfy that test.

Murray Tosh: If it could be shown that, in the interests of the operation of the railway network of the east of Scotland as a whole, it was now expedient not to have a halt at Stow, because it would disrupt the workings of the timetable, it would be perfectly possible to include that in an order.

Andrew Brown: That would need to be expedient in connection with existing provisions.

Murray Tosh: Yes, but if the order is—

Andrew Brown: In other words, it could not just be expedient in its own right—there would have to be a link.

Murray Tosh: If the order related to some other part of railway infrastructure and it became expedient in that context to make amendments to the Borders railway line project, would that be allowable or legally competent?

Frazer Henderson: Hypothetically, yes. It would still have to be shown that it was in consequence of what the original order sought to achieve.

Murray Tosh: Would it be reasonable and possible to have some form of parliamentary scrutiny built in, which guaranteed that Parliament had some say in such an order? Setting all the political ramifications aside, could Parliament have some sort of procedural involvement? That is what we are after. We understand what you are trying to do, but we are interested in what the amendment will lay down as the power. We are not unhappy with the power, but there are circumstances, albeit hypothetical, where the power might be used very widely, with consequences in which Parliament would be interested. We think that we are stakeholders in this process, to use the jargon.

Frazer Henderson: For projects of national significance, which are covered under section 13 of the bill, there is clearly parliamentary oversight under the affirmative procedure. I note what you say about those projects that are not of national significance that might give rise to supplemental activity. The best that I can offer at this meeting is to say that we will need to reflect on that concern and go back to the minister about it.

Mr Maxwell: You mentioned section 13, on projects of national significance. Is that not determined by the ministers themselves? Effectively, they have control over whether or not a project is of national significance.

Frazer Henderson: Yes. The whole issue of national significance is now going through Parliament in relation to the content of the national planning framework under the Planning etc (Scotland) Bill. It has not yet been determined who will influence that. Under that bill as introduced, I believe that the national planning framework will go before Parliament. Parliament will have an opportunity to comment on and make some input into the NPF. I understand that it is the extent of that comment and input that is under scrutiny. You are right to say that it has not yet been determined what a nationally significant project is. It is likely that it will fall to the Executive to determine which projects fall into that category.

The Deputy Convener: I know that you will take the issue away with you, and I think that we are almost finished with this, but I presume that some kind of controls could be applied to a section 13 order—which is just a kind of section 1 order. I know that you will have to think about this, but would it be possible for some sort of parliamentary scrutiny to apply to any such order?

Frazer Henderson: I do not think that I can go any further than the answer that I gave previously: we need to reflect on the matter and have a discussion with the minister about it.

Mr Maxwell: I do not know whether I have made my concern clear. We have been talking about the Waverley railway line, which is a good example. There was a lot of debate about whether the full project would be completed and about whether it might stop part of the way along. Much of that was made clear by Parliament when the Waverley Railway (Scotland) Bill was passed. My concern is that an order could be used effectively to change a decision that Parliament had reached following what was quite heated debate, both in committee and in the chamber. That is where my concern lies; all the other stuff about changing things and adding lines is perfectly reasonable.

Murray Tosh: I may have something to add to your reflection, Mr Henderson, unless you can give me a direct answer. I want to ask about the use of the affirmative procedure under section 13 for projects of national significance. The projects that we have discussed—the Borders railway line and the airport rail link bills—are likely to be projects of national significance.

Once an order has been agreed to and the framework put in place to implement a project of national significance, will any order amending the previous intention—any supplemental order—be considered to require the affirmative procedure?

Frazer Henderson: Generally, the answer would be no.

Murray Tosh: So section 13 is less of a protection in the context that we are talking about than it will be for the initial authorising and implementing orders.

The Deputy Convener: Do you have a final comment, Kenneth?

Mr Macintosh: I want to clarify where I stand. I am not particularly worried about future national strategic planning, as Parliament will express its views. However developments are set by the Executive, Parliament will be able to express its will in some way. All future developments of national importance that are amended will be subject to some sort of parliamentary procedure.

The only bills that we are talking about are those that the Transport and Works (Scotland) Bill is designed to address. It will change the cumbersome process that currently involves primary legislation being passed by the Parliament, so that large projects are no longer treated in that manner. Examples include the Waverley Railway (Scotland) Act 2006 and the current Airdrie-Bathgate Railway and Linked Improvements Bill, and their number is limited. I admit that this is hypothetical, but once those private bills have been passed by Parliament and become acts, the Executive can in theory amend them without any parliamentary procedure. That is my concern. Everything else seems to have been addressed, apart from the situation of those acts. Would the Executive consider introducing some form of parliamentary procedure to cover the possibility of those acts being amended in future?

The Deputy Convener: That is what Frazer Henderson said that he would think about.

Frazer Henderson: I refer to my earlier answer that we will reflect on that.

The Deputy Convener: All that we can do is report our concerns, not—for the avoidance of doubt—that we have any reason to believe that horrible things are about to happen or are being contemplated. We are being theoretical, but wisely so, I hope. We will report our concerns about the power's breadth, width or depth—whatever the word is—to the lead committee, watch with interest developments and possible amendments at stage 2, and then revisit it. Okay?

Members *indicated agreement*.

The Deputy Convener: The other matter was the lack of information in the delegated powers memorandum on delegated powers under sections 10, 12 and 25.

I refer members to rule 9.4A of the standing orders, which basically says that the delegated powers memorandum should set out various matters in relation to each provision of the bill that

"contains any provision conferring power to make subordinate legislation".

The Executive response is that the bill refers to section 210 of the Local Government (Scotland) Act 1973, which contains the delegated powers, and that as the powers are in that act rather than in the bill, the bill cannot be described as having powers to make subordinate legislation. The Executive says that the power is in the old act, so rule 9.4A does not apply. I have my own views on that, but I will let members ask questions first.

11:00

Mr Maxwell: For a number of reasons, I thought the Executive's response curious and an interesting interpretation of rule 9.4A. The main reason for that is that there is a lack of consistency in what the Executive is doing. Previous DPMs have had an explanation of subordinate legislation that is contained in an earlier act, but such an explanation is missing from the DPM for the Transport and Works (Scotland) Bill. In its written response, the Executive argues that it is right for the explanation to be missing; it says that it should not have to explain subordinate legislation under a previous act. However, that has been done in the past. I am not saying to the witnesses that they are individually responsible; I mean that in previous DPMs the Executive has explained points from earlier acts. I am curious to know why, for this bill, the Executive has given this explanation for why the reference to subordinate legislation is missing from the DPM.

Frazer Henderson: The explanation in the Executive response is based on my experience of the bills with which I was engaged last year. We adopted the same approach for the bills for which I was responsible last year as we have for the Transport and Works (Scotland) Bill. We have simply followed that approach of not providing explanations in relation to previous acts through into the DPM for this bill. We took that approach to be consistent.

I have not had a look at enough DPMs to form a view on the Executive's practice as a whole, but I note what Mr Maxwell says about them. Having seen all of them, he is saying that we are at variance with the rest of the Executive in that regard.

The Deputy Convener: It seems to me that what you are doing is possibly even outside the letter of the law. I find the Executive's explanation a little disingenuous. Clearly, the bill refers to the Local Government (Scotland) Act 1973, but when the Executive eventually makes subordinate legislation under the 1973 act in relation to section 9 inquiries under the bill as enacted, it will have to cite the 1973 act as the source of the subordinate legislation, which may be only part of the source or part of a chain of sources. I do not think that the Executive will make subordinate legislation and refer to nothing but section 210 of the 1973 act.

Someone looking at section 210 of the 1973 act would not know that it had anything to do with an inquiry under section 9 of the bill. For an SSI for a section 9 inquiry to make sense, I assume that it would need to refer not only to section 210 of the 1973 act but to the eventual transport and works (Scotland) act, otherwise people will not see the link and how section 210 fits in. However one looks at it, in effect the SSI will be made under this bill. It might have another source as well, but I cannot for the life of me see why it would not also be, in a meaningful sense, an SSI under section 10 of this bill. If the bill did not contain section 10, there would be no power to make an SSI under section 210 of the 1973 act.

I might be wrong in that, because I profess no expertise in such matters—I am purely an amateur—but if I am not wrong, the explanation that is being offered seems to be a bit outside the spirit of the law, even if it is not outside the letter, which I think it might be. The Executive's response seems to be a way of tempering the spirit of the legislation.

Andrew Brown: I will take those points in reverse order. On your reference to the spirit of the law, I think that all we can do is take your comments away, note them for future reference the next time each of us is involved in a bill and learn from them.

On the letter of the law, I would not expect an SSI made under section 210 of the 1973 act to cite the Transport and Works (Scotland) Bill as enacted as an enabling power. I had envisaged that the SSI would work by proscribing—if I remember correctly—daily sums for the costs for an inquiry reporter, which would require only one SSI. Members will know that it is common for section 210 of the 1973 act to be applied in that way—it has been applied to any number of acts.

The Deputy Convener: You might well be right.

Andrew Brown: In other words, there will not be a separate SSI for each piece of legislation; there will be just one SSI made under section 210 of the 1973 act. That is how I had envisaged the SSI working.

The Deputy Convener: With no reference to the Transport and Works (Scotland) Bill as enacted at all.

Andrew Brown: I would not envisage the eventual act being cited as an enabling power. I could envisage it being helpful to include a footnote with a reference to the act, but without having checked I suspect that there are so many references to section 210 that it would be an awfully long footnote.

The Deputy Convener: I find it difficult to understand how someone—assuming that an anorak somewhere was looking—would know what power there is to apply section 210 of the Local Government (Scotland) Act 1973 to inquiries under the new transport and works (Scotland) act. The power to do so is found in section 10 of the bill. You say that you would not put a reference to the new act into the SSI; I would have thought that you would have to.

Murray Tosh: That points to the importance of the committee pursuing the route of amending standing orders so that Parliament can have better control of the situation. I do not dispute that what we are being told is correct, but we find that interpretation to be outwith the spirit of the legislation. If the Executive does not consider itself to be bound by that spirit, we will have to make the letter of the law a bit more explicit. Obviously it is within our power to do that and we do not need to comment any further. We can refer the matter to the Procedures Committee and ask for a review of the relevant standing order.

The Deputy Convener: We will because, at the very least, the fact that some departments think that it is appropriate to include a reference to section 210 of the Local Government (Scotland) Act 1973 in the DPM and that others do what our witnesses have been doing shows a lack of consistency in how things are done. If the spirit of the legislation was obtempered, we would not need to worry whether it was within the letter of the law or not; we could ignore that legal argument for now until another example comes along.

I do not think we can take the discussion further. Do the witnesses have anything to add?

Frazer Henderson: No. I have noted what members have said and, although I do not want to use the word "reflect", that is what I will do. I know what the committee is saying.

Murray Tosh: Mr Henderson has undertaken to consider the issue again in the context of any further legislation. Further DPMs will be issued before the process for amending standing orders has wound its way. We have laid down a marker for what the committee expects: it is useful if all the delegated powers are addressed, not least because then we can see any procedural

changes, or changes in the use of the powers, from what we might have expected under previous legislation that we have not considered, such as the 1973 act.

The Deputy Convener: That deals with the specific questions that we wanted to ask the witnesses.

We have several other questions on the bill. Would it be too much to ask you to wait for five minutes while we go through them, in case we need to ask something, although I do not expect there to be anything further? You will see how we usually deal with bills.

On section 1, "Orders as to transport systems and inland waterways", we asked the Executive to clarify the word "procedure" in relation to section 13(6). The Executive has agreed to lodge an amendment at stage 2 to clarify that. Are we content with that?

Members *indicated agreement*.

The Deputy Convener: We asked whether section 13(6) would prevent ministers from exercising powers under section 13(1)(b). Again, we have received an undertaking to lodge a stage 2 amendment so that section 13(1)(b) is not ruled out for an amending, re-enacting or revoking instrument should ministers wish such an instrument to be subject to a direction under that provision. Are we happy with that?

Members *indicated agreement*.

The Deputy Convener: We also queried the wording of section 12(14), and we have been promised that a clarifying amendment will be lodged at stage 2. That will make us even more content.

On section 4, "Applications", the committee queried the drafting of sections 4(4)(a) and 4(7)(a), because it appeared to give power to ministers to give directions to themselves with which they had to comply. The Executive has said that that is not appropriate and it will remove section 4(7)(a). I take it that that is okay.

Members *indicated agreement*.

The Deputy Convener: On section 6, "Orders made otherwise than on application", we asked the Executive how it intends section 6(1)(c) to be used. Members have seen the Executive's response and reference to the role of Transport Scotland in promoting national transport developments in particular.

On section 7, "Model provisions", the committee asked the Executive whether the model provisions should be included in an SSI, and to clarify its intentions for the status of the guidance. Members have seen the response that the guidance will be advisory and promoters will not be obliged to adopt the model provisions. The Executive is now considering whether it would be helpful to include in the bill a duty on ministers to publish guidance. Are we content with that, or do we want to recommend that the model provisions be in the form of an SSI, so that they can be published?

Mr Macintosh: The point is that they should be available. It does not matter whether they are published in the form of an SSI or as guidance.

Murray Tosh: Can we be assured that the provisions will be published if there is no SSI?

The Deputy Convener: I knew that the officials would come in handy.

Frazer Henderson: We will lodge an amendment to ensure that the provisions are published.

The Deputy Convener: On section 8, "Objections", we asked the Executive to clarify its intentions regarding the exercise of powers under the section. Members have seen its response: it has provided draft illustrative rules to the lead committee. Are we content with that?

Members *indicated agreement*.

The Deputy Convener: We have dealt with section 10 and made clear our position on the lack of a reference to it in the DPM.

Murray Tosh: We made reference to the Tribunals and Inquiries Act 1992.

The Deputy Convener: We will come back to that later.

On section 14, "Consents etc. under other enactments", we asked the Executive to explain what section 14(5)(a) would cover for which section 27(6)(b) would not provide sufficient vires. Members have seen the response. Are we content to note that?

Members *indicated agreement*.

The Deputy Convener: On section 18, "Access to land", we asked the Executive to comment on the interaction of the provision with the powers under section 27(6), which have already been considered. The Executive will re-examine the provision and we will monitor that at stage 2.

On section 23, "Amendment of Roads (Scotland) Act 1984", and section 24, "Amendment of Harbours Act 1964", we asked the Executive whether the fact that the amendment that section 23 makes to the 1984 act does not appear to have a provision equivalent to section 13(6) is deliberate. It is indeed deliberate. Are we content with that, or do we want the Executive to look again at the drafting of the amendment, to ensure that the policy is accurate?

Mr Macintosh: The legal brief suggests that we make that suggestion to the Executive. You could write to the Executive along those lines.

The Deputy Convener: We will deal with the matter by letter.

We also asked the Executive to comment on whether section 144 of the 1984 act should include a reference to section 143A for consistency. The Executive will amend the provision in that regard. We will watch to ensure that that happens at stage 2.

On section 25, "Amendment of Pilotage Act 1987", we asked why procedures relating to the holding of inquiries under the 1987 act are left to be dealt with under the Tribunals and Inquiries Act 1992, as that seems to be inconsistent with the approach in section 10 for part 1 of the bill. Are we content with the explanation that has been given?

Members *indicated agreement*.

The Deputy Convener: On section 26, "Amendment of Transport (Scotland) Act 2001", we drew to the Executive's attention a drafting ambiguity. Members will have seen that the Executive does not consider that such an ambiguity arises in relation to the term "Act". We have made our point and have received an answer. There is not much that we can do about the matter.

Mr Maxwell: It would have been simpler for the Executive to have accepted our suggestion. There would then be absolutely no doubt or ambiguity about whether reference is being made to a United Kingdom act or an act of the Scottish Parliament. As the committee papers point out, it is a matter for the Executive.

The Deputy Convener: Would the Executive officials like to comment?

Andrew Brown: I have reflected on the drafting and spoken to the parliamentary counsel about it.

The Deputy Convener: Are you content with it?

Andrew Brown: Yes.

The Deputy Convener: At the end of the day, it is your business.

On section 29, "Short title and commencement", we noted that the commencement power could include supplementary provisions that amend primary legislation but which would not be subject to parliamentary scrutiny. The Executive responded that it will amend the bill to ensure that the use of the power to amend primary legislation is subject to the affirmative procedure. Are members happy with the response?

Members *indicated agreement*.

11:15

The Deputy Convener: We will keep a close eye on all the amendments that are lodged at stage 2.

In addition, we questioned the Executive about the commencement of section 27 and about the use in section 29(2) of the wording, "on Royal Assent". The Executive responded that it will amend section 29(2) to refer to the "day after Royal Assent". We will keep an eye on that.

When will stage 2 start?

Frazer Henderson: It will start in mid-December and continue until mid-January.

The Deputy Convener: That concludes our consideration of the bill. I thank the officials for attending. We do not often ask officials to attend our meetings, but we had concerns about the bill. We are grateful for your assistance.

Schools (Health Promotion and Nutrition) (Scotland) Bill: Stage 1

The Deputy Convener: Item 2 is the Schools (Health Promotion and Nutrition) (Scotland) Bill. That reminds me of the Jamie Oliver programme on the telly last night, which was splendid.

Murray Tosh: Despite his principal guest.

The Deputy Convener: It was an excellent programme.

The bill contains two substantive powers to make subordinate legislation and confers powers on the Scottish ministers to issue guidance. Under the provisions in section 3, proposed new section 56A(1) of the Education (Scotland) Act 1980 would confer on the Scottish ministers the power to specify in regulations nutritional requirements for food and drink supplied in local education authority and grant-aided schools. The Executive's rationale for that delegated power seems sensible. Regulations made in the first exercise of the power would be subject to the affirmative procedure; subsequent regulations would be subject to the negative procedure.

Although the Executive intends to make regulations that apply to local authority and grant-aided schools, it would be open to the Executive not to do so. However, I cannot imagine why it would not do so. Should we ask the Executive to consider amending the provision to clarify that the two first sets of regulations, which would apply to the different types of school, would be subject to the affirmative procedure?

Murray Tosh: That seems sensible.

The Deputy Convener: Yes, it does. I take it that members are happy that subsequent regulations would be subject to the negative

procedure. Do members have other comments on the provisions?

Mr Maxwell: I accept that the first sets of regulations would probably be the most contentious and generate the most debate. However, further regulations could be equally contentious. Over the years, we have witnessed many changes in advice on nutrition and diet—the advice flip-flops from one position to the opposite position.

The Deputy Convener: In theory that is correct. However, I would have thought that the first sets of regulations would set nutritional standards and most subsequent changes would be fine tuning. I think that the procedure is okay.

Murray Tosh: On my copy of the legal brief, which is in my briefcase in my office, I wrote a note to remind myself to ask whether it would be possible to make provision for an open procedure, whereby the Executive could use the affirmative procedure if at some stage—say 10 years down the line—it proposed a major reclassification or wanted to feed in a significant new approach to nutritional assessment.

The Deputy Convener: You are suggesting a system that relies on the Executive's good faith. We would say, "Okay; we trust you with a procedure in which subsequent regulations are subject to the negative procedure, but when you rejig the whole approach, will you use the affirmative procedure?"

Murray Tosh: Yes. The Executive might make many tiny changes that it would be burdensome to subject to the affirmative procedure. However, if it wanted to make significant changes there would probably be consultation and debate before any regulations were made, so the matter would almost select itself as being one for which the affirmative procedure was appropriate. Perhaps we should ask the Executive to give itself the discretion to use the affirmative procedure.

The Deputy Convener: Is the suggestion that the Executive should give itself the power to use the affirmative procedure, but that we should trust it to know when to use that power?

Mr Maxwell: Yes.

The Deputy Convener: I am told that we can do that. That strikes the balance rather well and we shall suggest it.

Mr Macintosh: I agree. I think that that is one of the recommendations that arise from our inquiry into the regulatory framework; it would be good to put it into practice.

I am not sure whether I agree with the idea that we should suggest that the bill should be amended to allow for the affirmative procedure to be used for both of the first sets of regulations. Although the provisions would have to be applied to different types of school, I imagine that the two sets of regulations would be the same. In other words, it is nutritional content that would be consulted on.

The Deputy Convener: We are asking the Executive only to make it clear that, were there to be two first sets of regulations—if the Executive were to choose to deal with them separately—both would be subject to the affirmative procedure. As you say, there might not be two.

Mr Macintosh: Would we wish to have two sets of regulations under the affirmative procedure? Unless we were to set nutritional standards for state schools that were different from those for grant-maintained schools, which would be a strange thing to do, I imagine that the two sets of regulations would be the same. It is important that the first set of regulations on nutritional standards goes through the affirmative procedure. However, that procedure is quite cumbersome. A parallel set, which is what you are talking about, would have to go through Parliament for procedural reasons. However, I imagine that there would be little variation in content, so we would not want to use the affirmative procedure; otherwise, we might open up the possibility of having two different sets of nutritional standards. We need to use the affirmative procedure only for the first set of regulations, because that is the one that matters.

The Deputy Convener: I might be wrong, but I think that there is only one grant-aided school left.

Mr Macintosh: The regulations will apply not just to grant-aided schools but to public schools.

The Deputy Convener: The legal brief says that the regulations

"will apply to both public schools and grant-aided schools".

However, there is only one grant-aided school left.

Mr Macintosh: There is also St Mary's music school. Does that qualify as grant aided?

The Deputy Convener: I think that Jordanhill is the only grant-aided school in Scotland.

Mr Macintosh: That could be the case. Donaldson's college for the deaf and about six special schools are also funded by the Executive. The answer is that I do not know. If there is only one such school, that is even more reason not to put a set of regulations for that one school through Parliament using the affirmative procedure. It should be a direct copy of the original set of regulations—it should be a parallel measure.

The Deputy Convener: We are not anticipating that there will be two sets, but if the Executive were to lay two sets simultaneously—

Murray Tosh: Are we not simply raising the issue with the Executive at this stage? Why not raise all those issues and see what the response is?

The Deputy Convener: We will share our discussion with the Executive and ask what it thinks. We can make a recommendation when we get a response.

The short title and commencement provisions are okay. Two provisions confer power on ministers to issue guidance. Nothing much seems wrong with those.

Executive Responses

Fire Safety (Scotland) Regulations 2006 (SSI 2006/456)

11:23

The Deputy Convener: We asked two questions in relation to regulations 15(2) and 24(2)(b), and members will have seen the Executive response. Are members content to draw the regulations to the attention of the lead committee and Parliament on the ground of defective drafting in regulation 15(2) and because the meaning could be clearer in regulation 24(2)(b)?

Members *indicated agreement*.

Fire (Scotland) Act 2005 (Consequential Modifications and Savings) (No 2) Order 2006 (SSI 2006/457)

The Deputy Convener: We asked the Executive to provide an explanation of the background to the drafting of article 3. Members will have seen the response. Are members content to draw the attention of the lead committee and Parliament to the order on the grounds that its meaning could be clearer but also—in fairness—to the full and helpful explanation provided by the Executive?

Members *indicated agreement*.

Scottish Schools (Parental Involvement) Act 2006 (Commencement No 1) Order 2006 (SSI 2006/454)

The Deputy Convener: We asked the Executive to explain the vires for making the commencement order in the form of an SSI and we have seen the response. Shall we draw the order to the attention of the Parliament on the basis that there are procedural doubts about the making of the order as an SSI but that those doubts do not appear to have any adverse effect on the commencement of the provisions specified in the order?

Members *indicated agreement*.

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

The Deputy Convener: We come now to an act of sederunt to do with child care. We seem to have upset someone—and not for the first time, I have to say. We wrote to the Lord President of the Court of Session and to the Executive because

copies of the instrument that were submitted to the committee were not true copies of the original signed version.

The Executive says, "Mea culpa"; it accepts that the error was its fault. The Lord President's office says that the error did not happen at the Court of Session and has somehow managed to read into what we said a criticism and something that raises a question mark over the integrity of the court. The response from the Lord President's office slightly suggests that we have been a bit unfair.

What can I say? I suppose we should write back to say that nothing in our letter or in the *Official Report* was meant to suggest such a question mark. I do not know whether we should add this, but we could also say that we do not really see how anyone could have thought that that was what we were suggesting. We were saying that we thought that, in all probability, the error had happened at the Executive. However, it would be a good idea to write to the court, if only to say that such things sometimes happen at the Executive.

Mr Maxwell: That was a good summary of our discussion. I am surprised by the reaction.

Murray Tosh: These are people who make judgments and who interpret words and nuances.

The Deputy Convener: To use a time-honoured phrase, I couldn't possibly comment. A long time ago, I used to work there occasionally.

Mr Macintosh: I do not think that we have the letter from the Court of Session. Has it been circulated?

The Deputy Convener: I am sorry, I thought that everyone had seen it.

Mr Macintosh: My only concern is that, if people are being that precious, I am not sure whether we should write back.

Murray Tosh: We could send an extract from the *Official Report*, together with a compliments slip.

The Deputy Convener: I will quote what the legal secretary to the Lord President wrote:

> "I am surprised and dismayed that the suggestion is now being made that a certified copy of the instrument submitted to the Parliament was not a true copy of the original. I am also extremely concerned that the impression might have been given by some of the comments by members of the Committee in public that this Office may somehow have provided the Parliament with certified copies of instruments which were not true copies. If correct, that would be a matter of the utmost seriousness and would raise questions as to the personal integrity and professionalism of the staff of this Office"—

to which my response is, "We never said any such thing."

Murray Tosh: I recollect clearly that we operated entirely on the assumption that the error had occurred at the Executive. However, we thought that we ought to draw the matter to the Lord President's attention because—applying an appropriate judicial standard—we thought it might not be correct to damn the Executive without our being aware of all the evidence.

The Deputy Convener: We will send the court the *Official Report*, which will make our position clear. We certainly did not intend to question the court's integrity.

Murray Tosh: We are dismayed by the dismay.

Mr Maxwell: It sounds as if the writer of the letter has read the *Official Report* and has misinterpreted it. I therefore think that it would be appropriate for us to write a letter.

The Deputy Convener: We will write to make it clear that we were not questioning anyone's integrity and that we are a little surprised at the court's response.

Mr Maxwell: And dismayed.

The Deputy Convener: I think that we will move on. However, we will draw the attention of Parliament to what has happened and we will express our concerns. Also, now that the Executive has said that the error was its responsibility, we will tell the Executive that we are concerned about that.

Executive Correspondence

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

11:29

The Deputy Convener: We wrote to the Executive about our concern that a number of instruments had been laid in a piecemeal fashion—or, as my brief says, "a piecemal fashion"—in connection with the winding up and reconstitution of the Robert Gordon University. The Executive's response explains the complexity of the project, which meant that a number of interrelated instruments had to be produced. The response also explains that the instruments were made and laid at different times because of the requirements of various acts. I think that we would probably accept that explanation.

Members *indicated agreement*.

The Deputy Convener: While we are on the subject, we have received a response from the Executive in relation to the query that we raised last week about the gap in provision of governance. The Executive tells us that no difficulties arose during the period concerned and that arrangements and decisions were ratified once governance was restored. We are delighted to know that all is well in the world of the Robert Gordon University.

Draft Instrument Subject to Approval

Animal Health and Welfare (Scotland) Act 2006 (Consequential Provisions) Order 2006 (draft)

11:30

The Deputy Convener: We might ask the Executive to explain the vires for paragraph 11 of schedule 1, given that the subject matter of the Animals (Scientific Procedures) Act 1986 is reserved under section B7 of part II of schedule 5 to the Scotland Act 1998. Do members agree to do so?

Members *indicated agreement.*

The Deputy Convener: Do we wish to seek confirmation from the Executive that the sections of the Animal Health and Welfare (Scotland) Act 2006 to which the draft order relates will be brought into force on or before the coming into force of the draft order?

Members *indicated agreement.*

Instruments Subject to Annulment

Academic Awards and Distinctions (The Robert Gordon University) (Scotland) Order of Council 2006 (SSI 2006/452)

11:30

The Deputy Convener: While it is encouraging to know that, after all the work that has been done, the university intends to give out academic awards, no points arise.

Food (Emergency Control) (Scotland) Revocation Regulations 2006 (SSI 2006/459)

The Deputy Convener: No points arise on the regulations.

Robert Gordon University (Transfer and Closure) (Scotland) Order 2006 (SSI 2006/461)

The Deputy Convener: We might ask the Executive whether any transitional provisions are necessary in relation to matters on-going at the date of transfer to the reconstituted university. Do we agree so to do?

Members *indicated agreement.*

Water Services and Sewerage Services Licences (Scotland) Order 2006 (SSI 2006/464)

The Deputy Convener: A couple of informal points arise in relation to the order.

Environmental Noise (Scotland) Regulations 2006 (SSI 2006/465)

The Deputy Convener: Do we wish to ask the Executive to explain the late implementation of the European Union directive, which should have taken place by 18 July 2004?

Members *indicated agreement.*

The Deputy Convener: In passing, I should mention that, in the European and External Relations Committee, Jim Wallace has conducted a thorough inquiry into the issue of how such things are implemented by SSIs all over Europe. Apparently, some countries are not too bothered whether they implement things or not. Although we might sometimes be late, I can say that we are not the worst.

Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2006 (SSI 2006/466)

The Deputy Convener: No points arise on the order.

Race Relations Act 1976 (Statutory Duties) (Scotland) Amendment Order 2006 (SSI 2006/467)

The Deputy Convener: Do we agree to ask the Executive to confirm that, where necessary, the bodies that are referred to in the order have been added to the list of bodies in schedule 1A to the Race Relations Act 1976?

Members *indicated agreement.*

Local Government Pension Scheme (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/468)

The Deputy Convener: A couple of issues arise in relation to the regulations.

Do we agree to write to the Executive informally on a drafting point in relation to the explanatory note?

Members *indicated agreement.*

The Deputy Convener: As this is the fifth substantive amendment of the principal regulations, do we agree to ask the Executive whether it has any plans for consolidation?

Members *indicated agreement.*

The Deputy Convener: We always do that; it serves as a wee reminder.

Instruments Not Laid Before the Parliament

Midlothian (Electoral Arrangements) Order 2006 (SSI 2006/460)

The Deputy Convener: No points arise on the order.

In accordance with our decision last week, we now move into private session.

11:33

Meeting continued in private until 11:51.

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