SUBORDINATE LEGISLATION COMMITTEE

Tuesday 7 November 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
30th 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)
*Euan Robson (Roxburgh and Berwickshire) (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:

Mairi Gibson (Legal Adviser)
Margaret Macdonald (Legal Adviser)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 7 November 2006

[THE DEPUTY CONVENER *opened the meeting at 10:32*]

Delegated Powers Scrutiny

Protection of Vulnerable Groups (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): This is the Subordinate Legislation Committee's 30th meeting of 2006. Sylvia Jackson is at a funeral and she apologises for not being here.

Agenda item 1 is the Protection of Vulnerable Groups (Scotland) Bill at stage 1. Two weeks ago, we asked the Executive several questions. The Executive has acknowledged a number of inaccuracies in the delegated powers memorandum and I suppose that we should report to the lead committee and the Parliament our general concerns about that.

We were content with the powers and procedures in sections 3 to 5, which concern references by organisations, agencies and businesses, but we were concerned that the drafting was ambiguous. It was unclear whether the references to "prescribed information" were uses of a noun or regulation-making powers. It was confirmed to us that, throughout the bill, such references are distinct regulation-making powers. Consequently, the Executive does not consider any amendment to those provisions necessary. Will we just note the Executive's response?

Mr Kenneth Macintosh (Eastwood) (Lab): There was some confusion. The good point is that the Executive has made it clear to us that such a reference creates a regulation-making power. If the delegated powers memorandum had been fuller, that point would have been clearer to us initially. However, the Executive has confirmed its intention, so in future if users of the legislation are doubtful about how to read the provision, they may refer to the parliamentary progress of the bill, which will make the position clear.

Murray Tosh (West of Scotland) (Con): I do not disagree with Ken Macintosh. However, it might be worth writing back to Executive officials, to point out gently that the term "prescribed" is used in two senses in the bill, as it says in our legal brief, and to note that the points that the committee made in its previous correspondence were well founded. We could wrap those comments up in a welcome for the clarification that was provided, while suggesting that more care be taken in future.

The Deputy Convener: Okay. We move on to section 6, "Reference relating to matters occurring before provisions come into force". We were content with the power and the procedure in section 6, but we had difficulty understanding the provision's purpose and asked the Executive to explain its rationale. The Executive explained that section 6 will make it explicit that employers and employment organisations have a specific statutory power—not a duty—to make referrals in respect of matters that took place prior to the bill being commenced. Are members content to note that response?

Members *indicated agreement*.

The Deputy Convener: I welcome Mr Robson. I withdraw my facetious comment that he could not stand the excitement of the Subordinate Legislation Committee after his first week as a member.

Euan Robson (Roxburgh and Berwickshire) (LD): I apologise for being late.

The Deputy Convener: On section 7, "Reference by court", we asked the Executive to clarify the use of the term "prescribed information". We have discussed that point.

On section 8, "Reference by certain other persons", we asked the Executive whether the power in section 8(2) will be sufficient for the stated purpose and to clarify the drafting of the provision. The Executive agreed that the power will not be broad enough to allow the removal of or alterations to references to the bodies listed and could be used only to add new bodies to the list. However, the Executive takes the view that no further power is needed, because any changes to the names of the listed bodies could be made only by primary legislation, and changes to this bill could be made by consequential amendment under that legislation. We will tell the lead committee about the Executive's response.

The committee thought that section 14, "Automatic listing" would allow the Scottish ministers to specify criteria for automatic inclusion on either the adults' list or the children's list. The powers in section 14 leave a considerable degree of discretion to ministers, so we asked how the Executive intends to exercise them. The Executive explained that it intends to use the powers, for example, to respond to amendments or innovations in criminal offences or to specify criteria that would lead to automatic inclusion on one or both lists. The powers would be subject to

the affirmative procedure. Are members content with that?

Members *indicated agreement*.

The Deputy Convener: We also asked for clarification of the term "specified description" in section 14(4)(b). The Executive said that section 14(4) does no more than give an example of criteria that may be specified by order under section 14(3) and cannot therefore be referring to anything else. The drafting of section 14(4) is not entirely clear, but it reflects similar drafting in the United Kingdom Safeguarding Vulnerable Groups Bill. Perhaps we should just note the Executive's response.

On section 17, "Information relevant to listing decisions", we asked the Executive whether it is satisfied that the power in section 17(5)(f) is sufficient for all the purposes outlined in the DPM and to clarify the drafting of the provision. The Executive indicated that the final sentences in paragraphs 29 and 30 of the DPM are incorrect and apologised for the errors.

The Executive agreed that the power at section 17(5)(f) is not limited to regulatory bodies. It is not clear that a finding in fact would be strictly construed and would not be extended to cover more informal findings than those outlined in the bill. Are members content that an order made in exercise of the power would be subject to the negative procedure?

Members *indicated agreement*.

Murray Tosh: Paragraph 31 of the legal brief mentions the difficulties that arise when a bill's accompanying documents appear to be inconsistent with the delegated powers memorandum. Do we need to say something to the Executive about that?

The Deputy Convener: Did we not begin by saying that we would make a point about the overall inadequacy of the DPM?

Murray Tosh: I had understood that to be a general comment.

The Deputy Convener: We can add particular examples to our general comment. If members want to highlight specific issues, we will do that in the general letter.

Murray Tosh: Okay. Thank you.

The Deputy Convener: Similar issues arose on section 19, "Information held by public bodies etc", and we sought clarification. Again, the DPM is incorrect. Any person who is added to the list in section 19(3) can be required to provide only information that they hold

"which Ministers think might be relevant".

The power is subject to the negative procedure.

We asked the Executive to explain why the power provided by section 25, "Application for removal from list", was subject to the negative rather than the affirmative procedure. Are we happy with the Executive's answer, which was pretty detailed?

Members *indicated agreement*.

The Deputy Convener: The same technical issues that we have discussed in relation to earlier sections arose in relation to section 29, "Notice of listing etc". We asked the Executive why the guidance that is mentioned in sections 29(4) and 29(5) is not to be made as an SSI and how it will be publicised. The Executive's response is that the guidance will be issued to the relevant organisations and that it will be publicly available. Is that fair enough?

Members *indicated agreement*.

The Deputy Convener: On section 31, "Offences against children and protected adults", we asked how the Executive intended that the power to modify the list of offences would be used. The power will be subject to the affirmative procedure. Are we content with the explanation that we have had?

Members *indicated agreement*.

The Deputy Convener: We noted that the DPM provides no indication of how the power that is contained in section 32, "Duty to notify certain changes", might be used. We have received the clarification that we sought.

I take it that all the answers to our requests for clarification appear in the committee's report on the bill, so that people can read them.

Ruth Cooper (Clerk): That is right.

The Deputy Convener: On section 46, "Vetting information", we asked the Executive to explain what was meant by the phrase "prescribed details" in section 46(1)(a). In reply, the Executive has drawn our attention to the definition of "prescribed" in section 96(1), from which the use of the term in section 46(1)(a) is excluded. As a result, there is no distinct power to make regulations under section 46(1)(a). However, the meaning of the term is still unclear, and because of the placing of the words in brackets it is not apparent whether they modify "central records" or "prescribed details".

We noted that failure to comply with an obligation that was imposed by regulations under the power in section 46 would carry no sanction and we asked the Executive whether that was the intention. We were told that the prescribed information will be limited to information that is held by public bodies, which are dealt with under administrative law. I suppose that that is fair

enough, but it does not entirely explain the discrepancy with other provisions in the bill that apply to public bodies, which carry criminal sanctions. However, to be fair that might be a policy matter rather than a drafting issue. Shall we draw the attention of the lead committee and the Parliament to those matters?

Members *indicated agreement*.

The Deputy Convener: We have already dealt with the issue that arose in relation to section 54, "Disclosure restrictions".

On section 60, "Power to use fingerprints to check applicant's identity", we asked the Executive why, if it is the intention that fingerprints should be taken at a police station, that should be set out in subordinate legislation rather than in the bill. The Executive's response was that, although its intention is that fingerprints should be taken at a police station, it is thought that secondary legislation is more appropriate for specifying detailed arrangements such as exact locations. Technological advancements may make it possible to take fingerprints at a place other than a police station. The proposed power will ensure that future arrangements can be detailed without further primary legislation being necessary.

I am trying to think where technology might allow fingerprints to be taken in the future.

10:45

Mr Stewart Maxwell (West of Scotland) (SNP): Mobile electronic readers could be used. It is possibly intended to introduce them so that an officer can read people's prints on the street or somewhere else. Perhaps that is what the Executive is thinking of.

The Deputy Convener: That is helpful. I had visions of someone having their print taken at the post office—before buying a lottery ticket.

Murray Tosh: That is being abolished.

The Deputy Convener: Anyway, we will draw the matter to everybody's attention. That will be useful for anyone who wants to know about it.

Section 76, "Code of practice about child protection information", obliges ministers to publish a code of practice on which they must consult before its publication. It does not need to be laid before the Parliament, but we took the view that it perhaps ought to be. The Executive has said that we are right about that, and it will lodge a stage 2 amendment so that the code, as an instrument, is laid before the Parliament. We thank the Executive for that.

Section 80, "Relevant persons", gives ministers the power to add to a list of bodies and persons. The same point was raised with regard to a similar power that we discussed earlier in relation to sections 8, 17 and 19. The Executive makes the usual apology about the DPM. We will include that in what we tell the Parliament.

We asked the Executive three questions about section 81, "Enforcement etc". First, we asked what additional purpose is served by section 81(1)(b). The Executive says that it will remove that duplication by amendment at stage 2. We thank it for that. Secondly, we asked the Executive to provide further information about a provision to ensure that relevant persons comply with their duties under part 3. The Executive has given us that information. Thirdly, we asked the Executive to clarify the reference in section 81(2) to "any enactment" and asked whether that term is intended to cover the bill itself. Do we agree with the Executive that the power to amend the bill itself is necessary?

Mr Macintosh: We have had on-going discussions about that.

The Deputy Convener: I know. It is a common issue.

Mr Macintosh: We have expressed our concern before. I do not feel particularly strongly about this case, however. We should address the issue in a general way. The Executive makes a sensible argument about the provision but, if we are worried about the long-term trend of the Executive taking more powers to amend primary legislation, we ought to address that in a general way. The specifics are not a problem in this instance, however.

The Deputy Convener: This might not be the best target for our argument. We have been down this path so often.

Mr Macintosh: I think that we should accept the provision in this case.

The Deputy Convener: So we should accept it this time.

Everybody is looking at me blankly.

Murray Tosh: I think that I missed the meeting when we dealt with this matter before.

The Deputy Convener: I do not mean to imply that we have had a constant problem with supplementary and consequential powers in lots of bills that can amend the eventual act itself. In this case, the provision might be for genuinely consequential purposes, perhaps tidying up certain things because of changes.

Murray Tosh: I do not think that we have ever felt uncomfortable about it. As Euan Robson put it previously, people must think of covering their backs when they draft legislation in case they have made some omission. The provision captures the spirit of the bill. It is when the

Executive uses a power to expand or broaden powers in ways that they had not initially intended or revealed—and in ways that we, the lead committee and the Parliament did not anticipate—that we have difficulties. I am not sure whether this provision falls foul of that criterion.

The Deputy Convener: We are talking about powers to modify "any enactment", including this bill. Custodial sentences could arise from the bill, so there might be a slight cause for concern. On this occasion, perhaps we can accept that the provisions would be purely consequential.

Murray Tosh: If there are custodial sentences, should we not examine the bill more closely?

The Deputy Convener: I am sorry. I am getting totally confused—my memory is wrong about this, and I am listening to things without fully understanding them. We did not have the problem with the Vulnerable Groups (Scotland) Bill; it was with another bill. I apologise. It is a pity that we cannot take the last few minutes out, as I was talking mince for most of it. Anyway, moving swiftly on.

Murray Tosh: It was very high-grade mince though, convener.

The Deputy Convener: Let us move on to another section; I might work out what I am talking about. On section 87, "Transfer of Disclosure Scotland staff etc", we asked the Executive to confirm why there is no provision requiring prior consultation with staff before making an order under the power. The Executive explains that, as it is to be a relatively small transfer of staff who work in a discrete area for one employer and that there is already consultation with the staff, a statutory duty to consult would add yet another consultation that it is felt would be unnecessary. Are we content with that response?

Mr Macintosh: Yes, that is reassuring.

The Deputy Convener: A further point is made. It is about section 87(2), which confers powers to make an order specifying particular persons. We have not been happy in the past about whether it is right to include in a Scottish statutory instrument lists of names of individuals, because SSIs are published on the web. Do members have any views?

Murray Tosh: Would it not be possible to specify individuals by some form of definition or classification rather than by name?

The Deputy Convener: I do not know.

Murray Tosh: I suggest it as a matter of general principle rather than as specific to the bill because it might be too late to change the bill. Should it not be practice to avoid including lists of names? The Executive gets very cross if civil servants are identified or named except in specific circumstances, so should not people who are covered by such instruments be similarly anonymous?

The Deputy Convener: We criticised the inclusion of lists of names when it happened before.

Murray Tosh: Shall we add it to our list of points to raise with the Executive at some future point?

The Deputy Convener: We will make it clear to the lead committee that we raised that point. We could reflect it in our report on the bill.

Mr Macintosh: Did we discuss section 87(2) and naming individuals at the last meeting? I do not remember.

Mr Maxwell: I remember it.

Ruth Cooper: We discussed it a fortnight ago.

The Deputy Convener: Section 94, "Meaning of protected adult", defines the term and confers power on ministers to amend the definition as they see fit. We noted that the power goes beyond simply updating the lists in the bill and we asked the Executive to clarify how it envisaged the power being used. We received the usual answer—that the Executive wants flexibility, flexibility, flexibility, although it does not consider that the power to modify is a blanket power.

It might be possible to amend section 94(2) to make it clear that the power should be limited as the Executive suggests. We could at least suggest that to the lead committee for stage 2 consideration of the bill.

On section 96, "General interpretation", we asked the Executive why the term "care service provider" is left entirely to delegated legislation, and why there is no indication in the bill of the type of provider envisaged, or a list of providers with a power to amend by order.

The Executive tells us that "care service provider" refers to a person providing a care service as defined in the Regulation of Care (Scotland) Act 2001. The power is intended to allow ministers to narrow down the organisations defined in the 2001 act to those more relevant to the protection of children.

We did not feel strongly about the power when we last considered it and now that we have received a response, we might think that the negative procedure is appropriate.

We noted that, somewhat unusually, the power in section 97, "Ancillary provisions", extends to amending the provisions of the bill and we asked the Executive to explain its rationale for that. The Executive explained that the power can be used to amend the bill.

We noted that the power is subject to the affirmative procedure, but only when it amends the text of an act. We asked the Executive to comment on the fact that an instrument could be made under the power that has a substantial effect on primary legislation without actually making textual amendment to that legislation. In such circumstances, the instrument would be subject only to the negative procedure. In its response, the Executive agrees that the choice of how to exercise the ancillary power will affect the procedure. The status of primary legislation means that changes to it are, as in this case, commonly made subject to the greater level of scrutiny that the affirmative procedure provides.

Does that explanation satisfy us?

Murray Tosh: Are we now considering the section to which our earlier discussion related, when you concluded that you had been talking mince?

The Deputy Convener: I prefer not to be reminded of that.

Murray Tosh: I think that the issue turned out to relate to an entirely different bill.

The Deputy Convener: No, the issue is that the same wording happens to appear twice—in two different sections—in the bill. It is rather odd that almost the same wording also appears in section 81, "Enforcement etc", in a different context. However, section 97 is a much more general provision that applies to the whole bill. The same topic seems to be dealt with twice, but it is dealt with in a particular context in section 81.

Are we content with the provision?

Euan Robson: The difficulty is that what, for want of a better phrase, might be described as the protection of vulnerable adults is a developing area of public policy. On a generous view, the Executive has incorporated a mechanism for making necessary changes to reinforce points about protection in general. However, I am not clear that the power is acceptable. On such a sensitive area with wider policy concerns, further debate is needed. Given that the Executive has already said that it will amend at stage 2 some of the terminology in the bill as introduced, I am uncomfortable about a power that would allow, for example, the Executive to revert to an earlier position that had been amended at stage 2. Do you follow my convoluted argument?

The Deputy Convener: I do. The answer to that point is that the power extends only to what is described as

"supplementary, incidental or consequential provision".

As I said to Murray Tosh, we have had this debate often before.

Mr Maxwell: As we have already found, it is difficult to define what walls surround such provisions, given that they seem to be moveable and dependent on the bill that we are discussing. I think that Euan Robson makes a fair point.

The Deputy Convener: He makes a fair point, but I do not think that we will change the Executive's position.

Mr Maxwell: That may be so, but that should not change the committee's view on its discomfort with such powers, given the possibility of how they could be used.

The Deputy Convener: The difficulty that arises is that some provision is required to deal with purely supplementary and consequential matters. If a supplementary and genuinely incidental provision occasionally needs to change the words in an enactment, the Executive needs the power to do that. As with every power that Government needs, people can always say that it is open—I use this word loosely—to abuse. To be honest, I think that we cannot do much about the power.

Murray Tosh: You are possibly right, but I was struck by the comment in our legal brief that states:

"it is clear that what is permissible under the power is very elastic".

The briefing from our legal advisers also mentions that the Joint Committee on Statutory Instruments has recently raised similar questions at Westminster.

An increasingly recurrent theme is that provisions that are necessary and acceptable seem to be intertwined with those that are challenging, elastic and developing. This constitutional innovation could transform the whole process without any real parliamentary involvement, public debate or debate among legal people and academics. Such changes could just happen.

One of the things that we will doubtless do at some stage is to draw up some kind of legacy paper for the next committee, and that might be an area that we would wish to highlight for the new committee. I would not like to suggest that there would be time to do anything in the next session of Parliament after the amendment of the subordinate legislation bill or the replacement of the transitional order—that might take another four years—but if our successor committee has time to do any investigative work, examining that issue might be something that we would want to recommend, based on our experience and on the trouble that it has caused us. It might be useful for the new committee to consider the issue, not alone but in collaboration with colleagues at

Westminster, who are experiencing a similar constitutional transformation.

11:00

The Deputy Convener: Indeed. My only response to that is that I do not think that we have any examples of that power being taken and then being used to amend the existing initial legislation in a way that is outwith what we consider the bounds of reasonableness. Of course, that does not mean that such a thing will never happen, but we do not have an example of its ever having happened. However, it is good that you have raised the point, and we can leave it to our legacy paper. It might be worth discussing the issue with Westminster.

Murray Tosh: That can be pointed out in the legacy paper. It would be a pity to leave the matter until we actually had an example of such an instance.

The Deputy Convener: I agree. I just do not know how one could take the power that would be needed without using the sort of words that we have discussed, but that is an argument for another day.

We now come to schedule 2, part 3, paragraph 14, on further education institutions. We asked for further clarification of the drafting in relation to the phrase,

"and any other body added to that schedule as Ministers may by order specify",

and the policy intention of the provision. The Executive accepts that there may be some ambiguity in relation to modifications to the schedule, and it will lodge a clarifying amendment. We shall welcome that response and wait for the amendment.

Schedule 2, part 5, paragraph 26 is on the power to amend the schedule. We thought that this was a significant power, as the power given to ministers is unlimited, so we wanted a little statement of intention. The Executive agrees that the power is wide and could be used to extend or to limit the scope of regulated work, but it does not agree that the power is unlimited, because it must have sufficient similarity with the existing contents of schedule 2.

Are members content that the balance between primary and secondary legislation has been struck? Are we content with the power and the procedure, which is affirmative? Perhaps it is not so different from what we have been discussing.

Mr Macintosh: Although the Executive states that any amendments made using the power would have to have similarity with the current contents of schedule 2, our own legal advisers have pointed out in paragraph 98 of the legal brief that there is no stipulation that limits the power in that way. If we have time to question the Executive about that, we might wish to ask why it believes that use of the power has to be interpreted in that way. We could also draw that to the attention of the lead committee.

The Deputy Convener: I do not quite understand. All that the bill says is that

"Ministers may by order modify this schedule as they think appropriate."

Is the Executive saying that there is a rule of law that it can put in an amendment to a schedule only that which is in keeping with the existing schedule? I have no technical knowledge of the matter. One assumes that there is a limit, and that ministers could not simply amend schedule 5 to whatever act stating that we will declare war on Iran. One assumes that they cannot just do that, but I do not know why they cannot just do that. The answer, of course, is that that is not within the purposes of whatever act. The Executive is saying that the sort of amendment that you are concerned about would not be within the purposes clearly defined in the schedule. I do not know the answer.

Mr Macintosh: We are not unhappy with the Executive's intent, but we are slightly concerned about the width of the power.

Mr Maxwell: We are also concerned that the Executive has failed to give us a solid argument to back up its reasons for taking that power.

The Deputy Convener: Do you want to go back and ask what authority the Executive has to say that the power is limited in that way?

Mr Maxwell: Yes. We should ask the question.

The Deputy Convener: We cannot ask the question now; we can report that we are not clear. The Executive says that the power is limited but we and our advisers are not clear about the basis for that assertion. On the surface, it does not look that limited to us. Do we agree to report in that way?

Members *indicated agreement.*

The Deputy Convener: The same thing arises in relation to paragraph 15 of schedule 3 to the bill.

Planning etc (Scotland) Bill: as amended at Stage 2

The Deputy Convener: Under the rules, we had until last Friday to get from the Executive a revised or supplementary DPM. Members will be unsurprised to learn that we received it late on Friday, which is why the briefing for the bill was issued to members only yesterday.

In March 2006, we considered the bill at stage 1. It is due to be dealt with in the chamber all day

Wednesday and Thursday next week. What does that mean in terms of what we can now do? Presumably, if we raise questions, we can insist on receiving answers by the time we meet again next Tuesday. That would allow us to lodge amendments at stage 3—if we were advised to do so and had a beef. I am not saying that we will have a beef, of course.

Murray Tosh: It would be possible to lodge only manuscript amendments at that stage. The Presiding Officer might have some difficulty if policy issues, rather than genuine manuscript amendments, were raised.

The Deputy Convener: Indeed, but we would not be dealing with policy issues.

Murray Tosh: Yes, but a manuscript amendment is usually just a technical or minor supplemental or consequential change in other people's amendments. If we were raising an issue, it would be to do with policy on a procedure.

The Deputy Convener: Indeed, but we would have the answer. What else could we do? We do not get the updated DPM until Friday, we meet on Tuesday, we do not get an answer back until the following Tuesday—we do not have any other method of dealing with the issue if it turns out that there is an issue that needs to be dealt with. There is no fault in the fact that any amendment would not be lodged in time—you cannot lodge an amendment if you do not know what needs to be amended.

Murray Tosh: That is right. I raised some of the questions that we were awaiting answers to, but as I did not get the briefing until this morning I finished reading it only during the earlier part of this meeting and I have not had time to relate the briefing to the bill to see whether the concerns that I had about some of the sections have been addressed. Even if we manage to work our way through to asking proper questions and the Executive gets answers to us in a short period of time, I do not think that there is, realistically, time for me to get amendments in before Friday—if I wished to do so, which, given my position, is doubtful.

It is unsatisfactory, given that it has taken eight or nine years for the bill to get to this stage, that this part of the process should end up as a hell of a clatter in the last fortnight, which has meant that people do not have time to do their jobs properly.

The Deputy Convener: I am told by the clerk that amendments have to be in by Thursday, which makes it worse.

I agree that, given that we have a responsibility to examine certain aspects of the bill and to lodge amendments if we are advised to do so, it is a bit of a nonsense that we will have no time in which to do so if we do not ask for special permission to do so by means of manuscript amendments at the tail end of the process. We should complain. Do you agree?

Murray Tosh: Yes. It might also be appropriate for us to refer this example to the Procedures Committee. I do not know whether it is currently examining time limits, but I know that it does so from time to time. It might be useful for that committee to have this example on file so that it can be referred to next time the issue is scrutinised.

The Deputy Convener: Let us try to get through the provisions. If members need to take time to read anything as we go through them, that is fine; we will not rush this process. When we finish, we might find that nothing is concerning us. Perhaps we should find out whether anything worries us before we find out what to do about our worries.

Murray Tosh: No worries, convener.

The Deputy Convener: On section 2, new section 7(1)(d) and (2)(a) of the Town and Country Planning (Scotland) Act 1997 concerns the form and content of the strategic development plan. These provisions were considered by the committee at stage 1. New section 7(1)(d) was amended at stage 2.

We recommended that the first set of regulations be subject to affirmative procedure and that subsequent exercise of the power be subject to negative procedure. The Executive has accepted that recommendation and the appropriate amendment has been made. Are we content with the amendment?

Members *indicated agreement.*

The Deputy Convener: Section 2 also introduces new section 12 of the 1997 act, which concerns the examination of the proposed strategic development plan. We recommended that the Executive reconsider the drafting of new section 12(3) to clarify it, but nothing has happened.

Do we ask the Executive to clarify why it has not done anything?

Murray Tosh: This is the point that I was making. We have, in this area, an apparent ambiguity. One part of the legislation appears to specify the procedures that are to be followed in a public inquiry, but another part appears to allow the reporter who is in charge of the inquiry to determine the procedures and the shape of the inquiry.

It would have been useful if the Executive had sent us a proper response that clarified the issue absolutely. Given that we are not happy with the situation, it would be useful to go back to the

Executive to ask for clarification before we proceed. In the absence of clarification, it might be appropriate for us to lodge an amendment or to flag the issue up to someone on the lead committee so that they can lodge an amendment, but there is not enough time to get an answer.

I am quite frankly surprised that the Executive has not responded to our question, either to accept that there is ambiguity or to clarify why we are wrong and there is no ambiguity.

The Deputy Convener: Could someone explain the ambiguity to me?

Murray Tosh: I would need to go through the documents and examine the bill again to answer you accurately but, as I recall our discussion in March, the ambiguity arises from the fact that new section 12 sets out the circumstances in which ministers will appoint a person to examine the plan and the processes that are to be followed during the examination but, elsewhere—I do not have a reference for it at the moment—the reporter in charge of the examination seems to have the right to determine the shape, form and processes of the inquiry.

The Deputy Convener: Yes. New section 12 says:

"The Scottish Ministers may make regulations as to … costs … procedures … and … what is to be assessed"

but it also says that

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

Murray Tosh: I think that the same point arises later in the bill in relation to what would effectively be like appeals: the processes would be specified, but the reporter would have the option of determining what the processes would be. How those two elements sit together is not at all clear.

The Deputy Convener: The Executive can say that it will pay for the assessment and state what procedures are to be followed and then say that the person will decide the procedures, such as whether it will be done in public or in private and whether the evidence will be oral or written.

Murray Tosh: Yes, and whether it is to be an interrogative, courtroom-style process or a panel meeting or some other customer-friendly arrangement. At the moment, the processes are highly legalistic and adversarial. The Executive is trying to soften them in a variety of ways, to encourage better participation. There is going to be much more flexibility, except it is going to be prescribed.

I do not see any way out of this.

The Deputy Convener: Originally, the Executive said that it would set out the procedures in regulations—I do not really understand this, either—and the person who conducted the assessment would have a choice from those procedures.

In our stage 1 report on the bill, we noted that the Executive had written that the reporter

"cannot invent new procedures but can select an appropriate procedure from those provided for in the regulations".

Murray Tosh: A drop-down menu.

11:15

The Deputy Convener: They can have public or private hearings and take written or oral evidence, but they cannot hang people up by their fingers—although they would not do that anyway. There are limits to the reporter's powers. I am being slightly facetious, but I am serious about trying to establish that there are a limited number of possible procedures and that common sense will be applied. If ministers set out the procedures and the reporter picks the procedure that he will follow, how will the two interrelate? It does not make sense.

Murray Tosh: It is possible that the system will work in practice, that reporters will be perfectly happy with the options that are open to them and that conflict or ambiguity will never arise but, having raised the issue, we are entitled to some kind of response that clarifies it.

Euan Robson: There was some debate on the matter in the Communities Committee. I do not remember there being difficulty with it. The key phrase is "form of examination". It seems to suggest that there is a limit to what the person who conducts the examination is allowed to do, but that the procedures they follow once they have determined the form of the examination are set down in regulations.

The Deputy Convener: It is coming back to me as I read the papers. In March, we accepted that the provision was okay but recommended that the wording be made clearer. We told the Executive that we followed roughly what it was saying but that it would be better if the provision were clearer. Nothing has happened, which may mean that the Executive has said, "Och, it is just those people from Sub Leg again—ignore them," or that, after thinking about how it could word the provision better, it decided that it could not and that changing the provision would make it more confusing. It may be worth asking whether any thought was given to the matter.

Murray Tosh: It might, if there were time for us to do that, get a response, assimilate it and act in accordance with the answer. Our problem is that, realistically, there is not time for us to do that. Convener, both you and Mr Robson are

speculating about what the Executive might have meant and trying to rationalise things for the Executive. You have done a good job, but we should have received a letter from someone at the Executive that rationalised things for us, so that you did not need to do it.

The Deputy Convener: I am guessing, not rationalising. We can either ask the Executive whether thought was given to the matter or we can shut the papers and go away, saying that there is no point in our dealing with the bill. That is a temptation—I am trying to stop a rush to the door in response to that suggestion.

Murray Tosh: By all means, let us ask, but in practice—

The Deputy Convener: I note that it is pointed out that if there are problems we can get the officials in next Tuesday. I say that with the caveat that I will not be here then. We should bear that option in mind when we have completed consideration of the bill—if we think that there are enough issues that we need to raise.

Murray Tosh: We will think about that at the end.

The Deputy Convener: We will say to the Executive that back in March the boundary between the powers of ministers and the powers of the reporter was not clear and ask why nothing has happened since. Is that because the Executive decided that the boundary is clear, or did it simply forget about the issue? Is that agreed?

Members *indicated agreement*.

The Deputy Convener: At stage 1 we were content with proposed new section 18, "Preparation and publication of proposed local development plan", but it has been amended by the deletion of existing subsections, for which new subsections—some of which include new delegated powers—have been substituted. As the provisions introduce a complex process, it is reasonable that the delegated powers relating to manner of publication and notice should be appropriate.

The power in proposed new subsection (3B) is potentially more significant, as it enables regulations to prescribe what modifications trigger the second round of notification. The revised DPM implies that major modifications will be prescribed, but we should ask the Executive to confirm which modifications are likely to be prescribed. That is our second question. If we keep in mind an idea of how many questions we have, that might help us to decide how best to deal with the matter between now and next Tuesday.

Proposed new section 19 is on "Examination of proposed local development plan". At stage 1, we recommended that the Executive reconsider the drafting of proposed new section 19(5) and clarify it, but nothing has happened. Again, we should ask whether the Executive thought about it and decided not to change it or did not think about it at all.

Murray Tosh: This is the point I referred to earlier. I said, in error, that it might arise in relation to conventional planning appeals, but it might arise in relation to proposed new section 19. The issues are the same as those that arise in relation to new section 12.

The Deputy Convener: Proposed new section 19(10)(a)(i) concerns the prescribing of grounds for rejecting the examiner's modifications. At stage 1, we asked why the bill does not contain criteria and a power to amend them from time to time. We recommended that, if such an approach were adopted, the power should be subject to the affirmative procedure.

No amendment has been made to the power and no further explanation or justification of it has been offered.

Murray Tosh: From recollection, we felt that the provision represents a significant accretion of power to the Executive, which at the moment cannot require local authorities to incorporate into plans the findings of public local land inquiries. We felt that the Executive should explain why it was taking the power. As our briefing note states, and as the convener said, we have not received an answer. It is a significant matter and our concerns remain live, so we should ask the Executive about it.

The Deputy Convener: At the risk of repeating myself, this highlights the problem. The committee made certain proposals at stage 1. We could have gone to all the stage 2 meetings if we had had the time and inclination, but the next time we see the bill is two days before the stage 3 amendments are due in. That is crazy.

Euan Robson: Are we talking about paragraphs 117 to 120 on pages 18 and 19 of the legal briefing?

Mr Macintosh: No. The point is covered in paragraphs 123 to 126.

I am looking back at the helpful notes from the previous meeting. Proposed new section 19(10)(a)(i) is about the grounds on which local authorities can ignore a reporter's recommendations. At the moment, local authorities can ignore the reporter's recommendations as a matter of policy. We may or may not accept that the Executive should be able to limit that, but that is what the bill would do. The Executive has described the criteria that might apply. We suggested that it would be helpful to

include the criteria in the bill and to amend them using subordinate legislation. The Executive has used that approach in other sections, but in this case it has not included a list and it will leave the criteria to subordinate legislation.

The Deputy Convener: We raised that issue but never heard any more.

Murray Tosh: There may be a sound reason for the Executive retaining the whole corpus of guidance or direction in subordinate legislation, but it seemed to us that, as the concept of creating such restrictions on local authority decision making is a significant shift, there was an argument for including some criteria, some justification and some rationale in the bill so that the regulations would have to relate to an intention of Parliament.

At the moment, that will not happen unless the bill is amended next week. It appears that ministers will have the power to prescribe virtually any action or response from local authorities. A number of local authorities will find that challenging, in the light of the way in which local plan inquiry recommendations have been handled before. There should be discussion of the issue so that we can have some clarity.

Mr Macintosh: Another concern was that if the Executive is going to leave provisions to secondary legislation, those provisions should be subject to the affirmative procedure, not the negative procedure.

The Deputy Convener: We said that using the affirmative procedure was the very least that should happen.

When did stage 2 of the Planning etc (Scotland) Bill finish?

Ruth Cooper: I would have to check. Under standing orders, the Executive has approximately three weeks from the end of stage 2 in which to produce an amended DPM for this committee.

The Deputy Convener: I am going off at a tangent but, while we are on this subject, I want to think about what will happen in future. Should there be a way in which we can consider issues more quickly after stage 2 has finished, even if we do not have the DPM? The DPM is worse than useless half the time anyway. If we could consider issues immediately after stage 2, at the beginning of the three-week period, we would be able to check whether things that we had asked for at stage 2 had or had not been done. That would give us loads of time, relatively speaking, to call in officials and decide whether to raise the issues again at stage 3.

Murray Tosh: I suspect that we would also have to pick up on all the changes that might create new subordinate legislation issues. I wonder what the resourcing and staffing implications would be of shadowing every bill at every committee, week by week, in an effort to spot new implications for this committee. It is the Executive's job, through the DPM, to highlight changes to us.

The Deputy Convener: I accept that. What I am suggesting may be impractical, but with a bill as complex and important as the Planning etc (Scotland) Bill, if the committee had information three weeks before stage 3 about what had happened at stage 2—forget the DPM—we would have loads of time to say, "We asked you to change that and you haven't. Come and tell us why." We could then make decisions on amendments for stage 3. If we do not consider the issues until much later, we are knackered. To use a technical term.

Ruth Cooper: The delegated powers memorandum sets out for the committee not only the detail of what has been amended but the Executive's rationale. I wonder whether something is falling through a gap. The DPM is not a direct response to the committee's report on a bill, so the committee will not know from it whether matters have been picked up. I wonder whether a response from the Executive, in addition to the DPM, would plug some of the gap, so that the committee would at least have a heads-up on issues that have not been covered by the DPM and have not been amended or responded to. The committee might want to take a view on that.

The Deputy Convener: I am still thinking about the future and about our legacy. We have a bill that has huge subordinate legislation provisions but the Subordinate Legislation Committee gets to look at the final position only when it is too late to do anything about it. There may be another way of doing things.

Mr Maxwell: As Ruth Cooper suggested, we are looking for a direct response to our report rather than for an amended DPM. Such a response would be more helpful to us, and the Executive might be able to provide at least a partial response much earlier than it can provide an amended DPM.

Mr Macintosh: At the moment, we have to interpret the amended DPM; we do not have an answer to the points we have raised.

Mr Maxwell: Perhaps we should write to the Executive on that very point.

The Deputy Convener: For the future, we will have to think about how the Procedures Committee could deal with this.

Murray Tosh: I think that that would require a change to standing orders, but it would be perfectly possible to invite the Executive to institute a new practice without its being validated

by standing orders, simply because doing so would be courteous. Standing orders could be tackled in due course, perhaps after considering experience on a string of bills to find out whether a substantive case for change exists. It might be argued that this bill on its own merits such an innovation.

11:30

The Deputy Convener: It is as good an example as we will get.

We agreed to reconsider new section 22, "Supplementary guidance", because the Executive was considering the balance between planning authority discretion and ministerial intervention. New section 22(9) responds in part to our concern, so we may be content with that. [*Interruption.*] I apologise—we are not content.

Murray Tosh: I am not clear about something—perhaps the legal adviser can advise me on it. When reference is made to statutory guidance, is that limited strictly to procedural issues, or do Scottish planning policies and planning advice notes fall within the definition of statutory guidance?

Mairi Gibson (Legal Adviser): Under new section 22(2)(b), other matters may be prescribed for inclusion in the statutory guidance. They might be wider than procedural matters.

Murray Tosh: Local authorities are all permanently caught up in the plan process. They all roll plans forward all the time; they do not do that in relation to specific dates. On any given date, 32 local authorities will have their local plans at one stage or another. When a new policy is issued, local authorities want to respond to it but, in many cases, they cannot do so for years. The target is that the plan process should last five years, but it is often longer than that. If an authority has a newly finalised and adopted local plan and new guidance is issued, it will probably be five years before it can incorporate the new policy that the Executive has recommended.

Euan Robson: No.

Murray Tosh: In practice, many councils introduce supplementary guidance to incorporate new policies into their local plans. Paragraph 130 of our briefing says that local authority guidance

"must not cover the same ground as statutory guidance",

so the bill might restrict local councils' ability to use the supplementary guidance route to incorporate new policy more quickly into their local plans. I would have thought that that was of some concern, although that might be more for the lead committee than for us. However, the point arises from the definition that we have been given, so it is pertinent to our remit. If the statutory guidance can never include a statement of policy and the policy question is immaterial, my concerns are groundless, but it would have been nice to have a week to ask about that and find out whether a problem exists.

Euan Robson: Mr Tosh makes an important point, but it is founded on the premise that the existing performance—for want of a better description—of planning authorities in producing plans will continue. A key component of the bill is that although five-year plans should be established, a revision process should be considered at an interim point of two years.

In the situation that Mr Tosh describes, it is correct that the bill would restrict an elongated timetable, but if the timetable were drawn more narrowly and a quicker revision process were undertaken, the concern that he raises might diminish.

Murray Tosh *indicated disagreement.*

Euan Robson: I think that the concern would diminish, but perhaps I have missed the point that Mr Tosh makes.

Murray Tosh: I understand the point that Euan Robson makes, which is correct. However, powers of alteration and revision already exist.

My point is that even though councils are able to alter a statutory structure or local plan, in practice, they find that sufficiently time-consuming to the extent that they introduce supplementary guidance in certain circumstances to allow them to write new policy guidance from the Executive into existing policy much more quickly. That is important to them, because it allows them immediately to start obtaining the benefits of what might be new practice. For example, a number of local authorities that do not have provision in their local plan to seek 25 per cent contributions from private housing developers for affordable housing use contain that within their supplementary planning guidance. They have to have some broad enabling statement in the local plan to validate that, but, if they can, they put it into supplementary guidance, which gives them a policy platform for seeking those outcomes before alteration. Alteration itself can take a couple of years.

My concern is that the provision removes a degree of flexibility that councils currently have to amend their local plans. My concern might be entirely misplaced, but, realistically, we do not have the opportunity to flag that up and get a proper answer from officials before the point in the process at which we can try to make a change.

The Deputy Convener: I will not pretend to understand that absolutely, because I do not have that expertise. I am sure that we can ask the

question and that Ruth Cooper knows enough to be able to do that.

On proposed new section 23D of the 1997 act, which is on the power to specify a "key agency", we asked whether any characteristics of key bodies could be put in the bill, on which basis we would accept the use of the negative procedure. That suggestion was ignored, but the power might still be acceptable. Are members content?

Members *indicated agreement*.

The Deputy Convener: Section 4 inserts into the 1997 act proposed new section 26A, "Hierarchy of developments". In the absence of an adequate explanation from the Executive, we recommended that the first set of regulations made under the power should be subject to the affirmative procedure and that the negative procedure should be used thereafter. That suggestion was not accepted—we will of course ask why not. That is another example of a question that we should have asked weeks before stage 3, so that we could decide whether we wanted to lodge an amendment to provide for the use of the affirmative procedure.

Section 5 inserts into the 1997 act proposed new section 27A, "Notification of initiation of development". The provision imposes a duty on a person to notify the planning authority of the date when work is to start. There is a new power to enable regulations subject to the negative procedure to prescribe further matters that are to be notified.

I suppose that we would normally ask the Executive what matters it intends to prescribe under the power and for what purpose. It might be a bit late, but we could still ask.

Murray Tosh: We should ask those questions.

The Deputy Convener: Absolutely.

Section 5 inserts into the 1997 act proposed new section 27C, "Display of notice while development is carried out", which contains a new power. Section 27C(1) imposes a duty on a person carrying out a development to display a notice for the duration of the work. Regulations subject to the negative procedure may prescribe the class of development to which the duty applies and the information that the notice is to contain. That seems sensible. The new power is to tell people more about what is happening in their street. Is that all right?

Members *indicated agreement*.

The Deputy Convener: Section 15, "Manner in which applications for planning permission are dealt with etc", amends section 43 of the 1997 act. We were concerned that there had been no justification for the use of the negative procedure and no explanation of why the prescription of classes of development would be sub-delegated to directions and not subject to parliamentary procedure. Nothing happened to the section at stage 2 and there is no mention of our concerns in the DPM. We will ask again.

Section 16 inserts into the 1997 act proposed new section 43A, "Local developments: schemes of delegation". At stage 1, we were concerned by the apparent downgrading of decision making to an official and asked for further explanation of compatibility with the European convention on human rights. We thought that we needed to see the draft regulations and recommended the use of the affirmative procedure.

Section 16 has been amended at stage 2 by the addition of matters that are to be covered in regulations—that is something at least. However, the regulations will be subject to the negative procedure. If we ask why they are still to be subject to the negative procedure and get a good answer, we could leave it, but if we get an answer that we think is bad we could lodge an amendment to provide for the use of the affirmative procedure. We will ask the question, regardless of whether it is too late.

Proposed new sections 136A and 145A of the 1997 act, which fix penalties under section 23A of the bill, contain new powers. Proposed new section 136A enables planning authorities to issue fixed-penalty notices where a developer fails to comply with an enforcement notice. Ministers may prescribe the amount of the penalty under regulations subject to the negative procedure. Proposed new section 145A sets out the same provision with regard to breach of condition notices.

Although in principle this use of delegated powers appears to be appropriate, there is no restriction on the amount that may be prescribed. As a result, the power is not restricted to such changes. Moreover, the DPM contains no explanation of what limits should apply.

Murray Tosh: In those circumstances, would we not expect the affirmative procedure to be used?

The Deputy Convener: That is what I was about to say. One would think that in the absence of any restriction on the amount the affirmative procedure would be appropriate. Even though they apply to developers rather than to the wee man in the street, such open-ended powers should be subject to the affirmative procedure. Should we not say so?

Murray Tosh: We should certainly ask the question.

The Deputy Convener: Okay. We will also ask the Executive about what it intends to do with

regard to setting minimum and maximum amounts.

Although we were content with the powers in respect of the business improvement district proposals in section 36, section 36(2) has been extended to make provision for consultation on BID proposals. Those powers are subject to the negative procedure. Similarly, the powers set out in section 36(3) have been extended. I do not see anything wrong with those moves; if anything, they are something of an improvement.

On section 36A, "Entitlement to vote in ballot", a new power set out in section 36A(2) provides that those drawing up BID proposals must draft a statement on eligible persons who are entitled to vote. Moreover, section 36A(8) sets out a regulation-making power, subject to the negative procedure, to make provision to alter who will be an eligible person under section 36A(5). I am told that that is a Henry VIII power that could permit variation in the definition of domestic tenants or owners who are eligible to vote in a ballot. Again, even at this late stage, the DPM provides no justification for the use of such a power.

I take it that we will ask the Executive whether the power to alter will be extended to subsections (6) and (7) of section 36A and that we will seek its views on whether the negative procedure is appropriate in this case. After all, we would always ask such questions about similar provisions—the point is that we usually do not ask them only two days before the deadline for lodging stage 3 amendments.

Murray Tosh: It seems particularly unfortunate that such a new power is not covered in the DPM.

The Deputy Convener: Absolutely.

Murray Tosh: It is bad enough when something like that happens at the outset but, in those circumstances, we at least have the opportunity to say to the Executive, "Hey—there's a gap here".

The Deputy Convener: Our legitimate grumble is not only that we have received no notification of the changes that were made at stage 2 but that in some cases we are starting from scratch with only a couple of days to go.

Section 37, "Approval in ballot", has been amended, with the addition of subsections (8A) and (8B). Section 37(8A) enables different definitions to be made and section 37(8B) enables regulations to delegate functions. The DPM explains that the powers are needed to cover situations in which ratepayers and tenants are required to pay a levy or to determine how the rateable value element of voting will be distributed. This wide-ranging power will enable the variation of proportions of votes that can approve proposals in different situations.

We should certainly ask the Executive about how the power will be used but, frankly, I do not think that anyone will be able to get their mind around such a provision in the time that is available.

Murray Tosh: I think that the general question is worth asking, because I presume that the Executive has got its mind around the provision and should be able to provide us with a comprehensive explanation by next week.

The Deputy Convener: Absolutely.

On section 39, "Power of veto", we were concerned at stage 1 that the criteria for that power did not appear in the bill. The Executive said that it would reconsider the drafting and the section has now been significantly recast to spell out the criteria in the bill. I thank the Executive for that.

The criteria are subject to section 39(2C), which confers a regulation-making power enabling the circumstances in section 39(2B) to be changed or added to. That is technically a Henry VIII power, but as the Executive has done something that we asked for, we may be content with that.

11:45

Murray Tosh: In principle, we would be happy that, having asked for criteria to be spelled out in the bill, we have now them. However, this raises the same question as was raised in relation to proposed new section 19(10)(a)(i), when we also asked for criteria but did not receive an answer.

The Deputy Convener: We did not get any answer at all.

On section 43, "Regulations about ballots", we were content with the power at stage 1. Section 43(2)(b) has been amended. It originally said:

"as to the non-domestic ratepayers entitled to vote in a ballot".

It has been amended to read:

"as to the persons entitled to vote in a ballot held for the purposes of section 42(2)".

We had better ask for some explanation about how that provision interacts with other sections.

Murray Tosh: Is that about non-domestic ratepayers?

The Deputy Convener: Yes.

Section 46A, "National Scenic Areas", inserts proposed new section 263A into the 1997 act. Proposed new section 263A(9) confers a power to make regulations as to the form of directions, the manner of describing a national scenic area, the publicity to be given to any such directions and other procedural matters. The power is subject to

the negative procedure. It is a new power but probably not one that we would have objected to anyway.

Section 48 is on "Further amendment of the principal Act". Section 48(13)(za) inserts proposed new subsection 2A into section 275 of the 1997 act. This is a new power to make incidental provision. Section 48(13)(e) concerns procedure as regards regulation. Those are consequential changes.

Murray Tosh: I am not sure, because paragraph 202 of the legal brief flags up a significant and substantial point on the use of Westminster legislation. The point is that a similar use might be made of the power in the Planning etc (Scotland) Bill, so there are concerns about the scope of the power that is being asked for.

The Deputy Convener: Proposed new section 275(2A) puts a consequential provision, which we get all the time, into the 1997 act. In other words, it is putting into the 1997 act all the stuff that is being put into other legislation. It is the same point that we raise constantly.

Murray Tosh: Yes, but I am simply trying to apply to the discussion the point that legal advisers made for us in paragraph 202. I felt that they were trying to flag up something significant, although it was not entirely clear what inference we should take from that part of the legal briefing.

Mairi Gibson: The intention was to draw the committee's attention to an extreme use of a similar power.

Murray Tosh: So the point is that the power in the bill is similar to one where an extreme use has been made in practice.

Margaret Macdonald (Legal Adviser): No.

Murray Tosh: One legal adviser is saying yes, and one is saying no.

The Deputy Convener: That is because we have two lawyers in the one room.

Murray Tosh: We are entitled to a third opinion then. [*Laughter.*]

Mairi Gibson: In my view, the powers are similar. The use in the example was extreme—a retrospective use. I am not suggesting that such a use would be made of the power in the bill. I was just drawing the committee's attention to it.

Murray Tosh: So you were giving us another example, and the supplemental powers do not raise anything that we have not considered earlier. I am happy with that.

The Deputy Convener: What do we do now? We have finished. I have not been counting, but we must have raised about a dozen points.

Murray Tosh: We have raised more points on the bill between stage 2 and stage 3 than we do on many bills in total.

The Deputy Convener: We have now raised between 15 and 20 points. Some are to do with our being ignored for no good reason, some are to do with our not understanding the changes that have been made and some are to do with brand new powers that never appeared at stage 1. That is a lot of substantive material to deal with in a ridiculous timescale.

We have several choices. We could get answers back for next Tuesday and then those who are here next Tuesday could decide which issues, if any, are worthy of a stage 3 amendment. The Executive might say that it will deal with some of them by way of stage 3 amendments if we ask it to do that. Alternatively, we could ask officials to come before the committee. We need to deal with these matters in such a way that we get a clear answer next Tuesday. We cannot go back to the bill because stage 3 starts the following day, on Wednesday. What do members think? Are the issues big enough for that?

Murray Tosh: In the absence of responses in so many areas, it is not really possible to say whether the issues are big enough. I suspect that the relevant officials will crack up next week as they prepare briefings for ministers going into the debates on Wednesday and Thursday to respond to the amendments that have been lodged this week and which will doubtless continue to be lodged until Thursday as everyone tries to work out how on earth they are going to timetable stage 3 of the bill. The obvious thing to do is haul officials in and make them go through the whole thing. However, that might be unreasonable; it might just be about making a point rather than doing anything at this stage that is likely to lead to substantive amendment.

The Deputy Convener: When do we expect to get the written response to our 15 questions?

Ruth Cooper: We will issue the correspondence today and expect a response by Thursday of this week for the committee's meeting next Tuesday.

The Deputy Convener: I presume that that would give us all, including those who are not here on Tuesday, the chance to look at the response and decide whether to invite the convener to lodge any stage 3 amendments. I am not saying that such amendments are particularly likely. I do not want to sound petty but there is a serious principle about the time that we have been given to consider the delegated powers. We might well not do anything at the end of the day.

Mr Maxwell: I agree with Murray Tosh that there is little to be gained by having the officials here next Tuesday. I agree that we should ask the

questions and that we should also write a separate letter on the point that Ruth Cooper raised about there being a separate response to the committee report, rather than an amended DPM that does not answer the points that we raised.

The Deputy Convener: The Procedures Committee or the Subordinate Legislation Committee must think out a procedure in which, when we have a bill such as the Planning etc (Scotland) Bill, we get back into the park quite soon after stage 2 is completed, and not two days before the deadline for lodging stage 3 amendments. There must be some method that allows the Subordinate Legislation Committee back in to consider the bill with three weeks to go. It cannot be about getting the Executive to produce its DPM; the nature of Government means that it can always do things at the last minute. There has to be another mechanism. It will not work for us to say to the Executive, "Do you think that you could be nice to us and give us your DPM three weeks before the stage 3 debate?" It is nothing to do with being nice and everything to do with workload and the nature of Government.

Mr Maxwell: That would not have helped with a lot of the points that we raised because the Executive did not answer a lot of them anyway.

The Deputy Convener: So we need something that says that the DPM needs to come back to the Subordinate Legislation Committee more quickly. Are we agreed?

Members *indicated agreement*.

The Deputy Convener: I am sure that this will come up in half an hour at the Labour group meeting. I will have a whine and I will mention to ministers that the situation is a nonsense.

Murray Tosh: Do you want to send us an official extract from the minutes of that meeting?

The Deputy Convener: Everybody will yawn hugely and say, "The anoraks are revolting again," and that will be it. That is the reality.

Mr Maxwell: We can write to the Executive and the Procedures Committee. That is about as much as we can do.

The Deputy Convener: I have chaired the meeting for an hour and 24 minutes, which must be a record. If we cannot finish in under an hour and a half, my pride will be badly hurt. We will move swiftly on.

Executive Responses

Personal Injuries (NHS Charges) (Amounts) (Scotland) Regulations 2006 (draft)

11:54

The Deputy Convener: We asked the Executive to confirm that the provisions of the Health and Social Care (Community Health and Standards) Act 2003, to which the draft regulations relate, will be commenced substantively before 29 January 2007. The Executive confirmed that they will be commenced on 28 January 2007.

Mr Maxwell: Is that what "substantively" means?

The Deputy Convener: If a day was all you had left to live, it would be a long time.

Are members content to draw the attention of the lead committee to the draft regulations on the basis that we received the information that we sought?

Members *indicated agreement*.

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2006 (SSI 2006/515)

The Deputy Convener: We noted that the increases in solicitors' fees provided for by the regulations were backdated to 1 December 2005. We asked the Executive to explain what power authorises the retrospective effect of the regulations provided for in regulation 2. The Executive appears to have conceded that the regulations are indeed retrospective and that no power in the parent act authorises such retrospection. There is nothing in the parent act to indicate that regulations could provide for the backdating of payments. We must tell the lead committee that the regulations might not be intra vires. I said quite truthfully at last week's meeting that I had no direct conflict of interest in this matter, but if the regulations are found to be intra vires I will also have no friends, which is more worrying.

Murray Tosh: Are all your friends lawyers and solicitors? That is worrying.

The Deputy Convener: If my colleagues discover that the regulations might not be retrospective, my life will not be entirely safe. However, we must do our job and see what happens.

Draft Instrument Subject to Approval

Civic Government (Scotland) Act 1982 (Licensing of Skin Piercing and Tattooing) Amendment Order 2006 (draft)

11:57

The Deputy Convener: I like this one. It is about skin piercing and tattooing, so can I say, "No points arise"?

Euan Robson: I was pleased to learn that ear piercing will not be carried out by anyone who is under the influence of alcohol. That is reassuring.

The Deputy Convener: We will leave aside the fact that a person could have their ears pierced only if they were under the influence of alcohol.

Instruments Subject to Annulment

Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2006 (SSI 2006/521)

Regional Transport Strategies (Health Boards) (Scotland) Order 2006 (SSI 2006/528)

Transmissible Spongiform Encephalopathies (Scotland) Regulations 2006 (SSI 2006/530)

Closures Guidance (Railway Services in Scotland and England) Order 2006 (SI 2006/2837)

11:58

The Deputy Convener: No points arise on SSI 206/521, SSI 2006/528 and SI 2006/2837.

No substantive points arise on SSI 2006/530, but there is a minor drafting error, which we could point out in an informal letter.

Standing Orders

11:58

The Deputy Convener: Members might recall agreeing to send a letter to the Procedures Committee to seek a change to the 20-day rule. I have had a look at the letter, which Sylvia Jackson gave me last week, and members now have an opportunity to consider it. We agreed to make the request because there was another extreme peak in instruments being laid before the summer recess and we thought that there was potential for similar problems to arise before dissolution. Even if the Parliament adopts the recommendations in our inquiry into the regulatory framework in Scotland, new procedures to address the problem could not be in place before 2008. Are members content with the letter? We need to send it today.

Members *indicated agreement*.

The Deputy Convener: The next meeting of the committee will be on Tuesday 14 November. Dr Jackson will preside.

Murray Tosh: We can expect a brief meeting, then.

The Deputy Convener: That is right. We will have none of this hour-and-a-half-long business next week.

Meeting closed at 11:58.

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