

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 6 February 2007

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2007.

Applications for reproduction should be made in writing to the Licensing Division,  
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ  
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate  
Body.

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

---

## CONTENTS

Tuesday 6 February 2007

Col.

<b>DELEGATED POWERS SCRUTINY</b> .....	2273
Budget (Scotland) (No 4) Bill.....	2273
Adult Support and Protection (Scotland) Bill: as amended at Stage 2 .....	2273
Transport and Works (Scotland) Bill: as amended at Stage 2 .....	2275
<b>EXECUTIVE RESPONSES</b> .....	2280
Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities (SE/2007/9) .....	2280
Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2007 (SSI 2007/13) ....	2282
Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (SSI 2007/14) .....	2283
Tweed Regulation Order 2007 (SSI 2007/19) .....	2284
<b>DRAFT INSTRUMENTS SUBJECT TO APPROVAL</b> .....	2288
Mental Health (Safety and Security) (Scotland) Amendment Regulations 2007 (draft) .....	2288
Transfer of Functions, Property, Rights and Liabilities from the Strathclyde Passenger Transport Executive to the Strathclyde Passenger Transport Authority Order 2007 (draft) .....	2288
<b>INSTRUMENTS SUBJECT TO ANNULMENT</b> .....	2289
Adults with Incapacity (Ethics Committee) (Scotland) Amendment Regulations 2007 (SSI 2007/22) .....	2289
Strathclyde Passenger Transport Authority (Constitution, Membership and Transitional and Consequential Provisions) Amendment Order 2007 (SSI 2007/23) .....	2289
Police Grant (Variation) (Scotland) Order 2007 (SSI 2007/24) .....	2289
Sulphur Content of Liquid Fuels (Scotland) Regulations 2007 (SSI 2007/27) .....	2289
Police (Injury Benefit) (Scotland) Revocation Regulations 2007 (SSI 2007/28) .....	2290
Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007 (SSI 2007/32) .....	2290
<b>INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT</b> .....	2292
Local Governance (Scotland) Act 2004 (Commencement No 4) Order 2007 (SSI 2007/25) .....	2292
Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No 2 and Transitional Provisions) Order 2007 (SSI 2007/26) .....	2292
Specified Animal Pathogens Amendment (Scotland) Order 2007 (SSI 2007/30) .....	2292
Scottish Schools (Parental Involvement) Act 2006 (Commencement No 2) Order 2007 (SSI 2007/31) .....	2292

---

# **SUBORDINATE LEGISLATION COMMITTEE**

## **5<sup>th</sup> Meeting 2007, Session 2**

### **CONVENER**

\*Dr Sylvia Jackson (Stirling) (Lab)

### **DEPUTY CONVENER**

\*Mr Kenneth Macintosh (Eastwood) (Lab)

### **COMMITTEE MEMBERS**

\*Janis Hughes (Glasgow Rutherglen) (Lab)

\*Mr Adam Ingram (South of Scotland) (SNP)

\*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 GAVE EVIDENCE:**

Andrew Brown (Scottish Executive Legal and Parliamentary Services)

Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department)

### **CLERK TO THE COMMITTEE**

Ruth Cooper

### **SENIOR ASSISTANT CLERK**

David McLaren

### **ASSISTANT CLERK**

Jake Thomas

### **LOCATION**

Committee Room 5

# Scottish Parliament

## Subordinate Legislation Committee

*Tuesday 6 February 2007*

[THE CONVENER *opened the meeting at 10:31*]

### Delegated Powers Scrutiny

#### Budget (Scotland) (No 4) Bill

**The Convener (Dr Sylvia Jackson):** I welcome members to the fifth meeting in 2007 of the Subordinate Legislation Committee. I have received apologies from Murray Tosh. I think that Adam Ingram is on his way, and we expect other members.

Like previous budget bills, the Budget (Scotland) (No 4) Bill contains one delegated power. Section 7 gives ministers the power to amend the amounts that are specified in section 3, which contains the overall cash authorisations, and to amend schedules 1 to 5, which contain details of the distribution of those amounts. An order would be subject to the affirmative procedure.

Are members content with the power and the procedure?

**Members** *indicated agreement.*

#### Adult Support and Protection (Scotland) Bill: as amended at Stage 2

**The Convener:** Members will recall that, when we considered the bill at stage 1, we asked the Executive for further explanation of the delegated powers in sections 3, 55, 61 and 64. You will be pleased to note that the Executive has lodged amendments to deal with the four issues that we raised. I can go through them one by one if you prefer, but I will not do so if you have no points to make.

**Mr Kenneth Macintosh (Eastwood) (Lab):** We are content that the Executive accepted the points that we raised and acted accordingly.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I concur.

**The Convener:** Several new delegated powers were added to the bill at stage 2.

In part 1, "Protection of adults at risk of harm", section 23A(2) contains the power to prescribe other classes of person who are obliged to notify an adult at risk of the granting, variation or recall of a banning or temporary banning order. The

provision gives the court the power to prescribe a person other than the applicant for the order as one who has the right and duty to deliver the appropriate documentation. Do members agree that that is an administrative matter and that the flexibility in the power seems sensible?

**Members** *indicated agreement.*

**The Convener:** In part 2, "Adults with incapacity", section 53(7) inserts new section 22A into the Adults with Incapacity (Scotland) Act 2000. The power in new section 22A(2)(b) allows ministers to prescribe classes of person who may certify that the revocation of the power of attorney has been undertaken in accordance with the requirements of the act. Again, that is an administrative change. The power is subject to the negative procedure.

Do members have any points?

**Members:** No.

**The Convener:** The next new power is in section 54, "Accounts and funds", which replaces part 3 of the 2000 act and inserts new sections 24A to 33. Again, the new provisions are administrative. They apply powers to a wider range of circumstances and they amend the operation of the scheme rather than its substance. They are subject to the negative procedure.

Do members have any points?

**Members:** No.

**The Convener:** Section 61(2A) simplifies the process of the renewal of guardianship. Again, the provision is essentially administrative. Members will note that there will be consultation with stakeholders before subordinate legislation is made. The power is subject to the negative procedure.

Do members have any points?

**Members:** No.

**The Convener:** I welcome Janis Hughes and Euan Robson.

The next new provision is in section 67B, "Compulsory treatment orders and compulsion orders: cross-border transfer of patients etc". The provision extends the existing regulation-making powers in relation to cross-border transfers. The delegated powers memorandum explains that it is necessary to extend the powers to cover the reception in Scotland of patients who are subject to measures of control that amount to less than detention. The taking of the powers seems justifiable. They are subject to the affirmative procedure.

Do members have any points?

**Members:** No.

**The Convener:** Section 67C, “Cross-border visits: leave of absence”, was introduced by an amendment at stage 2. It makes provision for short cross-border visits for funerals and so on. The power is subject to the affirmative procedure.

Do members have any points?

**Members:** No.

### **Transport and Works (Scotland) Bill: as amended at Stage 2**

**The Convener:** I welcome from the Scottish Executive Frazer Henderson, Andrew Brown and Catherine Wilson. Thank you for coming along.

The committee considered the bill last week and we had several questions about it. We put two questions to the Executive. The first was about section 27, “Further provision as regards rules, regulations and orders”. In relation to section 27(3), we queried whether it is appropriate to confer powers to make subordinate legislation on persons other than ministers. We also asked who might be included.

In its response, the Executive states that it

“has ... no intention of using the power conferred by section 27(6)(aa) to empower the making of subordinate legislation”.

The Executive also

“doubts whether a court would read section 27(6)(aa) as sufficient to authorise provision allowing a third party to make subordinate legislation”.

However, paragraphs 70 and 71 of our legal brief suggest that there are still concerns about the matter.

Do members have any questions for the officials?

**Mr Maxwell:** Our legal brief points out that a similar point arose recently at Westminster. In that case, it was accepted that there were two possible interpretations of the power and that it would be possible for ministers to pass on to others the power to make subordinate legislation. The Government made it clear that that was not its intention and amended the power. Why has the Scottish Executive not done the same thing? Rather than leave any room for dubiety, why not make it explicit that ministers do not have the power to pass on to others the power to create subordinate legislation?

**Frazer Henderson (Scottish Executive Enterprise, Transport and Lifelong Learning Department):** Our written response gives the answer to that. Our view is that the drafting is sufficient to show that there is no means of passing on the power to make subordinate legislation.

**The Convener:** You have given us assurances about this Executive, but what about a future Executive?

**Frazer Henderson:** I would have thought that that would be entirely for the courts to determine, but the legal opinions that we have received are clear and back the position set out in the letter.

**The Convener:** Okay, I just wanted to double check.

If there no other questions on that point, I will move on to the second point, which is the removal of the power to amend the act. We sought clarification of the reference to “any enactment” in section 27(6)(b) and whether that would include the act itself.

The Executive response refers us to paragraphs 53 and 54 of the revised DPM and to a quote from the Minister for Transport in the *Official Report* when he confirmed that the amendment removing section 27(8) ensured that any subordinate legislation that is made under the act cannot be used to modify the act.

Does any member have any questions for the officials?

**Mr Maxwell:** Effectively, this is the same as the first point. Although the reference is not specifically to the act, it refers to “any enactment”, so there is still some doubt about why the Executive does not make it explicit that the act cannot be amended. There would then be no dubiety—the provisions would be straightforward and clear.

**Frazer Henderson:** We set out our position in the letter, but I also draw the committee’s attention to the response that the Aquaculture and Fisheries (Scotland) Bill team provided on 21 November 2006, which touched on a similar point. Its response was more expansive than ours, but the two together give the Executive’s view on why we have reached the position that we have.

**Mr Maxwell:** I would like to follow that up. I have read both responses, but it seems that there is some doubt, although that is not the Executive’s view. Do you accept that there would be no doubt if the position were made explicit in the bill?

**Frazer Henderson:** I would ask one of my legal advisers to come in on that.

**Andrew Brown (Scottish Executive Legal and Parliamentary Services):** Our position is that it would be an unnecessary provision. We would be introducing unnecessary wording into the bill, and there will always be dangers in that.

**Mr Maxwell:** Why is it unnecessary to make it explicit that there is not the power to amend the act?

**Andrew Brown:** We have put clearly on record our view of what the provision means, so the point is that, if any words are added, they are unnecessary.

**The Convener:** Why might that create a difficulty? You seem to be saying that adding a provision might cause problems.

**Andrew Brown:** As an example, I refer to the Executive's response on the Aquaculture and Fisheries (Scotland) Bill, because that goes into it further.

**The Convener:** Okay.

**Mr Maxwell:** I am not clear about that. Rather than refer to correspondence from November, will you explain to us today why including words to provide that secondary legislation that is made under the act could not amend the act would cause some difficulty? Will you explain to us what that difficulty is?

**Frazer Henderson:** I have the letter in front of me, and I will read the relevant part. It said that

"explicitly stating that the power does not extend to amending the parent Act would cast doubt upon the meaning of the numerous provisions in existing"

acts of the Scottish Parliament

"which contain similar wording to that which presently appears in section 35"

of the Aquaculture and Fisheries (Scotland) Bill.

**Mr Maxwell:** So your argument is based on precedent. That is what you have done in the past, so you have to stick to it.

**Frazer Henderson:** Yes, the argument as espoused in the letter on the Aquaculture and Fisheries (Scotland) Bill is as you have stated.

**The Convener:** To be clear, you are saying that, if you made a change in the bill, it would set a precedent.

**Andrew Brown:** Yes, and it might cast doubt on what has been done in other legislation.

**The Convener:** I just wanted to get that clarified.

**Mr Maxwell:** Frankly, I am not sure that that is a good argument. If there is a doubt in a current bill, and if there are doubts about previous legislation, that is not a good argument for continuing down the same path.

**Andrew Brown:** My experience has been that introducing provisions for the avoidance of doubt into legislation and other legal documents sometimes creates other doubt unintentionally. The argument is that the point can easily be put beyond doubt by introducing some wording for the avoidance of doubt, but such provisions can create either uncertainty on the point in question

or other uncertainty, depending on the wording used. Obviously, we have not seen any suggested amendment.

10:45

**The Convener:** Can I clarify that you were firm on the Aquaculture and Fisheries (Scotland) Bill that you had done everything that you needed to do?

**Frazer Henderson:** Yes, that is what the bill team stated in its response.

**The Convener:** I just wanted to confirm that.

**Mr Maxwell:** To be honest, it is not an issue that is worth pursuing. I understand what has been said, and I am not convinced by the arguments. However, I think that, given where we are in the process—we are almost at stage 3—any change would have to be by manuscript amendment.

**The Convener:** Yes, it would.

Do members have any further questions to ask before we make a decision?

**Mr Macintosh:** The Executive's intention is clear. It would be up to the courts to question it, but the Executive is in no doubt. If the drafting fits with what it has done before and is common practice, I do not see any problem with it.

**The Convener:** Janis, do you agree?

**Janis Hughes (Glasgow Rutherglen) (Lab):** Yes.

**The Convener:** Euan, do you agree?

**Euan Robson (Roxburgh and Berwickshire) (LD):** Yes.

**The Convener:** Okay. I thank the officials for coming along today to clarify the matter and to get those points on the record, which was important for us.

The third point is on the delegated powers memorandum. Stewart Maxwell raised a point about whether parts that had been changed could be highlighted. As I understand it, that is part of the procedure, but the memorandum did not appear in that form with us because it was going to print. However, that is what happens, as I understand it.

Am I making it clear or not?

**Mr Maxwell:** I am not absolutely sure that you are, to be honest. However, I read the notes and the fact that the Executive had identified the parts in question, but that is not what we received.

**The Convener:** There was an error.

**Ruth Cooper (Clerk):** We can ensure that Stewart Maxwell gets the correct version. He saw

a working version before it was finalised and put up on the web, and amendments are not highlighted in that version. However, we can respond to his point and ensure that members see the correct version.

**Mr Maxwell:** That would make it easier.

**The Convener:** I agree. It would be a helpful step forward.

We need to make a decision about the two points on which we got reassurance from the officials and about what we report to the Parliament.

You would obviously like to raise concerns, Stewart.

**Mr Maxwell:** I agree with Ken Macintosh in that I do not doubt the Executive's intentions, but I am concerned about the clarity of those two points. However, there does not seem to be support in the committee for a manuscript amendment on the point, so I will not pursue it.

**The Convener:** We can reflect that concern and the fact that we asked the officials to appear to give their assurance on the record as well as in writing.

Is that agreed?

**Members indicated agreement.**

## Executive Responses

### Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities (SE/2007/9)

10:48

**The Convener:** We were concerned that there were minor errors in the draft guidance, despite its withdrawal for correction. We sought assurances from the Executive that the second version does not contain more substantial errors that may affect the lead committee's consideration.

The Executive gave us an assurance on that point, but we have received correspondence from Mr Ferguson, clerk to the city of Glasgow licensing board, which members will have. Our legal advisers have also had a look at Mr Ferguson's submission and they have identified three issues for this committee in addition to what we have already raised with the Executive. Policy issues are also raised in the submission, but they would be better going to the lead committee.

I will outline the three points identified by the legal advisers.

The first point that appears to concern this committee is irresponsible promotions. Paragraph 137 of the guidance appears to be legally inaccurate and seems to permit what the parent act—the Licensing (Scotland) Act 2005—prohibits.

The second issue is personal licences. The guidance states:

“the five licensing objectives apply to the consideration of applications for personal licences as to all other parts of the Act”.

That does not appear to be in line with the parent act.

In addition to the point that has been raised in the submission, there is concern that paragraph 171 of the guidance is incorrect. The conditions for a successful application rather than the application criteria are listed.

The third issue is the control of order. The guidance points to a causal connection in paragraph 207, but it appears that that was not the act's intention. The act allowed for an order to be granted in emergency situations where the disorder is in the vicinity of the licensed premises.

Do members have any additional points to make?

**Mr Macintosh:** We should draw those points to the attention of the Executive, but I am concerned that the time that is available means that our only



recourse may be to draw the points to the attention of the lead committee.

It is worrying that there seems to have been a lack of consultation at an earlier stage, which has allowed possibly avoidable errors to creep in. The Executive may disagree with the points that have been made, but they seem to be well argued. We should write to both the Executive and the lead committee in order to flag up our concerns and ensure that the guidance is not contradictory.

**The Convener:** We have a choice. We can write to the Executive and wait for a reply or we can simply report our concerns to the lead committee, as we have already written to the Executive, which did not find anything additional. What we do is up to members.

**Mr Maxwell:** When we discussed this last week it was clear some further points would inevitably arise, whether minor or major. The submission from Mr Ferguson raises significant rather than minor issues. My memory of the control of order is that it is about vicinity, rather than a causal connection, and I think that most members would be surprised if there had to be a causal connection, which would markedly change how that operated. That is significant, and is perhaps not what the act intended.

I am happy for us to report to the lead committee on the points that have been made, but I do not see any point in going back to the Executive, given that we have already given it a chance to respond and that that was a second go. We could raise the issues with the Executive, but I doubt whether we would get much further forward.

**Euan Robson:** I do not see why we should not write to the Executive, which has ultimate responsibility for these matters. We can discharge our duty simply by saying, "There you are." It will be fine if the Executive responds; if it does not, that will be its problem. However, we should certainly report our concerns to the lead committee.

**Janis Hughes:** I agree with Stewart Maxwell. We have already given the Executive a go. I do not know what would be gained by writing to it again.

**The Convener:** These are important points. I wonder whether we could do a double act. We could write to the Executive to highlight the points to it. At the same time, because we are not yet going to send a final report to the lead committee, the clerks could highlight to it the points that it should be aware of. We could then send a final report to the lead committee next week.

**Mr Maxwell:** How much time do we have left?

**The Convener:** I think that we have another week.

**Ruth Cooper:** The deadline for reporting is 14 February.

**Mr Maxwell:** So there is time for one more crack at the issue.

**The Convener:** Yes.

**Mr Maxwell:** Time is tight, but we could have another crack at it. An Executive response would be helpful, but I think that we will end up doing next week what we could do before then by reporting to the lead committee on the points that have been made.

**The Convener:** We could informally alert the lead committee to the important issues that have been raised. Do members agree?

*Members indicated agreement.*

### **Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2007 (SSI 2007/13)**

**The Convener:** We raised four points on the order with the Executive. Members have seen the Executive's response and will note that the order will be made available free of charge, which is what we asked for.

Are members content to draw the attention of the lead committee and the Parliament to the order on four grounds: a failure to follow proper legislative practice, in so far as it does not include an italic head note that states that the new order will be made available free of charge, and that the explanatory note does not state that the instrument replaces a defective instrument; the failure to follow proper legislative practice or defective drafting in relation to the point on when the order came into force—members may remember that the order should have come in slightly before the other order was revoked—

**Mr Maxwell:** Have you jumped over a point, convener?

**The Convener:** No.

**Mr Maxwell:** Perhaps not. I am sorry—on you go. I thought that you moved from point 1 in the legal brief to point 3.

**The Convener:** The third point is that the form or meaning of the order could have been clearer at article 3(2).

Have I missed out a point? Perhaps I misled members. I mentioned that there were four points, which there are, but I dealt with two together.

**Mr Maxwell:** That explains it.

**The Convener:** With respect to point 3, should we say that there has been defective drafting or a failure to follow legislative practice?

**Mr Macintosh:** A failure to follow legislative practice.

**The Convener:** Okay. That deals with point 3, which was our second main point. Technical things can be made difficult.

**Mr Maxwell:** Where is the third point in the legal brief?

**Mr Macintosh:** Point 3 is covered on page 17.

**Mr Maxwell:** Is that what we are talking about?

**Mr Macintosh:** Yes. We are on to that now.

**The Convener:** Do you want me to find what we are discussing in the legal brief?

**Mr Maxwell:** If I know which paragraph we are discussing, I will know for sure what we are talking about.

**The Convener:** I am looking at the convener's brief, so give me two seconds to find the paragraph in the legal brief.

**Mr Maxwell:** I am sorry, but I have lost the place.

**The Convener:** That is okay. Paragraphs 93 and 94 deal with point 3.

**Mr Maxwell:** Is that what we are discussing?

**The Convener:** We were talking about timing.

**Mr Maxwell:** Yes. The revocation of an instrument was involved. The instrument should have been revoked on the previous day.

**The Convener:** Yes, that was it. Do you remember?

**Mr Maxwell:** Yes, I do. I am sorry.

**The Convener:** No problem.

**Mr Maxwell:** Have we dealt with point 4 in the legal brief?

**The Convener:** Yes. We could draw the attention of the lead committee and the Parliament to the order on the ground that its form or meaning could be clearer at article 3(2).

**Mr Maxwell:** Did you cover that point?

**The Convener:** Yes. Do you want me to go over it?

**Mr Maxwell:** No. I am sorry; I missed what was said.

**The Convener:** That is okay.

### **Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (SSI 2007/14)**

**The Convener:** We asked the Executive to confirm what power in the parent act authorises

the retrospective effect of regulation 2(2). The Executive has confirmed that the regulations have retrospective effect, although only in so far as they apply to specified inclusive fees for work that is done in certain cases. It has also confirmed that the Legal Aid (Scotland) Act 1986 does not contain an express enabling power for the making of retrospective provisions.

Do members want to draw the regulations to the attention of the lead committee and the Parliament, on the ground that they purport to have retrospective effect although the parent act contains no express authority for that?

**Mr Maxwell:** We should raise the matter. Our legal brief mentions the McCall v the Scottish Ministers case, but that is not a good example as it involved reducing, rather than increasing, fees. A completely different effect was involved. People lost out and a European convention of human rights issue was involved. That is very different from what we are dealing with now. I think that we should report the regulations in the way that is suggested in paragraph 109 of the legal brief.

**The Convener:** Is that agreed?

**Members indicated agreement.**

### **Tweed Regulation Order 2007 (SSI 2007/19)**

11:00

**The Convener:** We asked the Executive to explain why it chose to use a combination of powers in the order, not all of which are subject to parliamentary procedure, and why it chose to disregard the requirement in article 36(1) of the principal order—the Scotland Act 1998 (River Tweed) Order 2006 (SI 2006/2913)—regarding the citation of instruments made under that provision.

Members have the Executive's response. What are your conclusions? Are you happy for the committee to report on the ground of failure to follow proper legislative practice?

**Mr Macintosh:** Yes.

**The Convener:** That is about the combination of enabling powers, which are subject to different procedures. Do we want to report the order on the ground of failure to follow proper legislative practice or on that of defective drafting with respect to compliance with article 36(1) of the principal order?

**Mr Macintosh:** Failure to follow proper legislative practice.

**The Convener:** Yes, I think so.

**Euan Robson:** I should refer to my entry in the register of members' interests, as president of an angling association in the area concerned.

I do not see the purpose of reporting the order at all. The purpose of the order and of the combination of powers is to provide a more coherent working framework for people who have to use the legislation in one particular geographical area. However, if we really want to respond on the basis of a failure to follow legislative practice on the first point, that is okay.

On the second point, the answer that has been provided seems perfectly sufficient to overcome any objections that might possibly be levelled at the order. My observation is that the issue that has been raised concerns so fine a detail as to be almost not worth the mention.

**The Convener:** Have you been referring to paragraph 125 of the legal brief?

**Mr Macintosh:** Yes.

**The Convener:** It says:

"We do not therefore think that the absence of the words from the title of the Order perils the legal validity of the order although it is less than satisfactory in drafting terms."

**Euan Robson:** That is but one opinion. I do not think that the matter merits reporting, frankly.

**The Convener:** Okay.

**Euan Robson:** But then I could be in a minority of one.

**Mr Macintosh:** No—I think that what Euan Robson says forms part of a general point about whether other committees understand the references we make when we report to them. I sometimes worry about the tone or language that we use when we raise an issue and mention a "failure to follow proper legislative practice". I agree with Euan Robson about the very minor point that has been raised in this case—although it is correct, in that our legal advisers have pointed out that proper legislative practice would indicate the inclusion in the title of the instrument of certain words that have not been included.

The question is whether reporting to the lead committee along those lines is helpful. We could make a similar point about a number of other things we have considered today. Do lead committees understand what we are advising them? If they read that we are reporting a "failure to follow proper legislative practice", do they understand that that indicates a fairly minor point, not something serious that they must act on?

Now that I have had the issue explained to me, I have no strong feeling about whether we raise it. I agree that it is minor. Committees should not be in any doubt about our advice or how to interpret our

reports. I sometimes worry that another committee will read what we give them and think, "My goodness, this looks serious." How serious do people think "failure to follow proper legislative practice" is?

**The Convener:** It can cover the full range, starting with something fairly minor. We mention our concern if that is appropriate.

**Mr Macintosh:** But it is nearly always about a minor point, is it not? "Defective drafting" is a step up—it is a bit more serious. "Failure to follow proper legislative practice" is used for minor matters. I am not sure whether our colleagues in other committees know that. We almost have a language of our own.

**The Convener:** Perhaps it would do no harm to give a bit of clarification. We could clarify the explanation of the point we are discussing. We could mention that it is a minor point.

**Mr Macintosh:** I suggest that it is something to bear in mind long term, which we could mention in a legacy paper, if we produce one. We use terms such as *ultra vires* and have a scale on which we report issues that arise with Scottish statutory instruments. By way of comparison, a report from Her Majesty's Inspectorate of Education tells readers how to interpret it and explains what fair, unsatisfactory, good and excellent mean. I think that we need to do something similar for SSIs. Either that or we need to moderate our language and use plainer English.

**The Convener:** That is a good point. In relation to the order, the first point is more serious and the second is relatively minor.

**Mr Macintosh:** They are both minor.

**The Convener:** I think that the legal advisers would argue that the first point is not so minor. It is about using two, different, procedures.

**Mr Maxwell:** The first point is a much more valid one to make—although that is not to agree completely with what has been said about the second point. The first point is about different powers with different outcomes. It is about putting two different things in the same place, which I think is unwise and unhelpful, particularly as some of the powers can be affected by parliamentary procedure whereas others cannot. It is very odd to have those powers in the same instrument. That is a substantive point.

The second point, as we have been saying, is more minor. Ken Macintosh's comments are fairly reasonable and valid, but I think that they are for a legacy paper. They are for another committee to think about when it considers how it reports. It is not really a matter for us now, eight weeks before dissolution. We should stick with reporting in the normal way for now.

**The Convener:** As Ken Macintosh said, we can take that on board for later. Are we agreed? We will report the order as has been proposed, on the ground that it does not follow proper legislative practice. I know that Euan Robson said something slightly different, but is the rest of the committee in agreement?

Ruth Cooper wishes to say something about the committee's reports.

**Ruth Cooper:** When it comes to the term "legislative practice" we are governed by standing orders. If the committee decides to report, it has to choose from the terms that are available under standing orders. There have been times when the committee has not wanted to go so far as to report on the matter. In such cases, it has drawn attention to something using correspondence—it has printed its correspondence to the Executive and the Executive's reply and drawn the lead committee's attention to that. That is another option. A report, in which other, more important, matters are raised, could include such correspondence if the committee wished to do things that way.

**The Convener:** I think we will stick with what we have normally done. Is that agreed, for the moment? We will keep that in mind for the future. You have made a good point, Ken.

**Mr Macintosh:** Raising and overstating inconsequential points undermines our case when we raise serious points.

**The Convener:** It does.

**Mr Macintosh:** It is self-defeating.

**The Convener:** Yes. We will have a think about that.

**Mr Maxwell:** I understand what Ken Macintosh is saying: we would not raise a serious point and call it "failure to follow proper legislative practice".

**The Convener:** No—we would call it a matter of great concern.

**Mr Maxwell:** We would not use a phrase such as "defective drafting" to raise a serious point. Ruth Cooper is quite right to mention that we are following the rules that are laid down in standing orders.

**Mr Macintosh:** I think that we are agreed on this.

**Mr Maxwell:** I think that we probably are.

**The Convener:** Okay. Let us move on.

## **Draft Instruments Subject to Approval**

### **Mental Health (Safety and Security) (Scotland) Amendment Regulations 2007 (draft)**

### **Transfer of Functions, Property, Rights and Liabilities from the Strathclyde Passenger Transport Executive to the Strathclyde Passenger Transport Authority Order 2007 (draft)**

11:08

**The Convener:** There are no points to raise on the draft instruments.

## Instruments Subject to Annulment

### Adults with Incapacity (Ethics Committee) (Scotland) Amendment Regulations 2007 (SSI 2007/22)

11:09

**The Convener:** No points arise on the regulations.

### Strathclyde Passenger Transport Authority (Constitution, Membership and Transitional and Consequential Provisions) Amendment Order 2007 (SSI 2007/23)

**The Convener:** Members will note that article 3 of the order reduces the membership of the Strathclyde Passenger Transport Authority from 34 to 20. Under the principal order, members hold office for a period of three years. The principal order provides for the resignation of members and for their removal in certain circumstances, but there does not seem to be anything to cover the membership being reduced by statute. Furthermore, there are no transitional provisions in the order. Shall we ask the Executive how it envisages the reduction in membership will be achieved?

*Members indicated agreement.*

**The Convener:** We will also ask how, in the absence of transitional provisions, surplus members will be chosen and removed from office. There is also a minor point. Article 2 should read "Constitution, Membership" rather than "Consequential, Membership". Do members agree to raise that informally?

*Members indicated agreement.*

### Police Grant (Variation) (Scotland) Order 2007 (SSI 2007/24)

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

### Sulphur Content of Liquid Fuels (Scotland) Regulations 2007 (SSI 2007/27)

**The Convener:** Similar regulations have been made in England and Wales—the text of the Scottish regulations is almost identical. There are a couple of issues for us to consider. First, the English regulations define "new plant" and "existing plant," but the Scottish regulations do not. We might want to ask about that.

**Mr Macintosh:** My attention was drawn to paragraph 145 of our legal brief, which states:

"In the second place the transitional provisions in the Scottish Regulations (regulation 8) provide that applications for permits that have been made under the Regulations that the current Regulations replace but which are not determined by the time the new Regulations come into force are to be treated as applications made under the new Regulations whereas the English Regulations provide that applications under the existing Regulations are to be dealt with under those Regulations (which remain in force for that purpose)."

It is fantastic to use one sentence there. Well done to whoever wrote that.

**The Convener:** I think it was Margaret Macdonald.

Shall we ask the Executive those two questions?

**Mr Macintosh:** Have we asked any questions yet?

**Mr Maxwell:** There is a question about the definition of "new plant" and "existing plant".

**Mr Macintosh:** Yes. We should draw the Executive's attention to that.

**The Convener:** Do you want me to clarify what it is?

**Mr Macintosh:** No.

**The Convener:** You are quite happy. The two questions are in the legal brief. We will raise those with the Executive.

### Police (Injury Benefit) (Scotland) Revocation Regulations 2007 (SSI 2007/28)

**The Convener:** No points arise on the regulations, but members will note that the instrument breaches the 21-day rule.

### Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007 (SSI 2007/32)

**The Convener:** There was a question about the vires of the order, but there have been further discussions between our adviser and the Executive's legal team and it seems that the order does work due to section 117 of the Scotland Act 1998.

**Mr Macintosh:** The question was whether the reference to "Secretary of State" includes the Scottish ministers. We are assured that it does.

**The Convener:** Yes. There are some minor drafting points that we will raise informally.

**Mr Macintosh:** Yes. I think that we all received correspondence on the matter from the Equal Opportunities Commission—

**The Convener:** Did we?

**Mr Macintosh:** Well, I did. Maybe it was just me. The EOC was concerned.

**The Convener:** If you want to pass the correspondence to the clerk, we will all see it at some point.

Are we agreed that the order is okay apart from the minor points?

**Members** *indicated agreement.*

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

### **Local Governance (Scotland) Act 2004 (Commencement No 4) Order 2007 (SSI 2007/25)**

11:14

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

### **Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No 2 and Transitional Provisions) Order 2007 (SSI 2007/26)**

**The Convener:** The order contains powers that are subject to different procedures. Although section 63(2), read with section 61(2), is not subject to any procedure, the act provides that orders under section 62(1)(b) are subject to the negative procedure. The Executive has proceeded on the assumption that the order is—like any other commencement order—not laid before the Parliament and not subject to any procedure.

We should ask the Executive why it was considered necessary to cite section 62(1)(b) as an enabling power in addition to section 63(2) as read with section 61(2) and why, given that that power was cited, the order has not been made in the form of an instrument that is subject to annulment.

**Mr Maxwell:** I am sure we should ask about that.

**The Convener:** Yes. There are also some minor points that we will raise informally.

**Members** *indicated agreement.*

### **Specified Animal Pathogens Amendment (Scotland) Order 2007 (SSI 2007/30)**

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

### **Scottish Schools (Parental Involvement) Act 2006 (Commencement No 2) Order 2007 (SSI 2007/31)**

**The Convener:** No substantive points arise on the order but there are some minor points that we will raise informally.

**Members** *indicated agreement.*

11:15

*Meeting continued in private until 12:12.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Tuesday 13 February 2007**

#### PRICES AND SUBSCRIPTION RATES

##### OFFICIAL REPORT daily editions

*Single copies: £5.00*

*Meetings of the Parliament annual subscriptions: £350.00*

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

##### WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*

*Annual subscriptions: £150.00*

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

#### **Blackwell's Bookshop**

**53 South Bridge  
Edinburgh EH1 1YS  
0131 622 8222**

**Blackwell's Bookshops:**  
243-244 High Holborn  
London WC1 7DZ  
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

**Blackwell's Scottish Parliament Documentation**  
Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

**Telephone orders and inquiries**  
**0131 622 8283 or**  
**0131 622 8258**

**Fax orders**  
**0131 557 8149**

**E-mail orders**  
**business.edinburgh@blackwell.co.uk**

**Subscriptions & Standing Orders**  
**business.edinburgh@blackwell.co.uk**

#### **Scottish Parliament**

**RNID Typetalk calls welcome on**  
**18001 0131 348 5000**  
**Textphone 0845 270 0152**

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

**Accredited Agents**  
(see Yellow Pages)

and through good booksellers