

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 February 2007

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

8th 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 Mott (Scottish Executive Education Department)

Laurence Sullivan (Scottish Executive Legal and Parliamentary Services)

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 27 February 2007

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

The Convener (Dr Sylvia Jackson): This is the eighth meeting in 2007 of the Subordinate Legislation Committee.

Over the past two weeks, we have been given an approximate estimate of the number of Scottish statutory instruments that will come to us before the end of the session. It is something like 149—way over 100, anyway. I wondered if I could get the committee's support for my writing to the Executive about its laying such a large number of instruments in the few weeks that remain before dissolution. Is that agreed?

Members indicated agreement.

The Convener: I have received apologies from Ken Macintosh.

Delegated Powers Scrutiny

Protection of Vulnerable Groups (Scotland) Bill: as amended at Stage 2

10:32

The Convener: I need to give members the timescale for the bill. We have another week to have a look at the bill but, if we are going to lodge stage 3 amendments, it might be better to consider them this week. It might be difficult to do anything about amendments next week, as stage 3 is so close—it is a week on Thursday. If we get what we are looking for, we could withdraw the amendments.

Murray Tosh (West of Scotland) (Con): If you lodged an amendment next week, would it have to be a manuscript amendment?

The Convener: Yes.

Murray Tosh: It is therefore wise to consider any amendments this week.

The Convener: Yes. We spoke about a similar situation the other week in relation to another bill.

We have two Executive officials with us today. I welcome Andrew Mott, the bill team leader, and Laurence Sullivan, who is from the office of the solicitor to the Scottish Executive.

Under section 7, "Reference by court", subsection (A1) places a duty on a convicting court to give "prescribed information" to Scottish ministers. The new power is subject to negative procedure. Are we happy with the power and the procedure?

Members indicated agreement.

The Convener: In section 8, "Reference by certain other persons", subsection (2) lists the bodies that may give prescribed information to ministers about persons carrying out regulated work. Further bodies have been added to that list at stage 2. The power itself remains subject to negative procedure. We were content with that at stage 1. Are we still happy with that?

Members indicated agreement.

The Convener: Section 14, "Automatic listing", contains a duty to prescribe the duration of listing and a minimum period of listing prior to removal. The power to specify criteria is amended by the addition of a further offence. It is subject to affirmative procedure and, again, we were content with that at stage 1.

However, at stage 1 we drew the lead committee's attention to a lack of clarity in the drafting of section 14, in particular the term "specified description". Are we content with the extension to the power and with the procedure, which is affirmative, as I said? On the point about the lack of clarity, do we wish to raise the matter again with the Executive?

Mr Stewart Maxwell (West of Scotland) (SNP): No, I think that the matter is fairly clear now. I do not think that there are any problems with it, and the changes are acceptable.

The Convener: Okay. Is that agreed?

Members indicated agreement.

The Convener: In section 17, "Information relevant to listing decisions", subsection (5)(f) contains a power to specify other bodies that may make relevant findings of fact. The same point arises here as arose at section 8, which we have discussed. It involves an extension to the list of bodies. Are we happy with the power and its being subject to negative procedure?

Members indicated agreement.

The Convener: A similar point arises at section 19, "Information held by public bodies etc", as arose under sections 8 and 17. Under section 19(1), ministers have a power, when considering whether to list a person, to require information from the bodies that are listed in section 19(3). Section 19(3) also empowers ministers to specify other persons who may be required to give information. The list has been expanded to include new bodies.

Secondly, the power in section 19(3) is extended by new section 25A, which makes provision for the determination by ministers of applications for removal from the children's or adults' list. Are members content with the amendment to the power and that it is subject to negative procedure?

Members indicated agreement.

The Convener: Section 25 is headed "Application for removal from list". The power in section 25(3)(a) has been amended to clarify the drafting. It now enables greater flexibility in regulations by specifying the beginning of the minimum period before an application for removal is competent. Are members happy with that power and with the fact that it is subject to negative procedure?

Members indicated agreement.

The Convener: Section 29 is "Notice of listing etc". Subsections (4) and (5), containing the power to issue guidance, have been deleted. The Executive has indicated that it intends to lodge an amendment at stage 3 giving ministers a general power to issue guidance on any aspect of the bill and its operation. Are we content with the deletion?

Members indicated agreement.

The Convener: Section 31, "Relevant offences etc", contains a power to modify the circumstances in which a person is treated as having committed various offences. The power has been amended, as a simplification of drafting, rather than to change to the substance of the power. Are members happy with the power and its being subject to affirmative procedure?

Members indicated agreement.

The Convener: The power in section 37, "Police access to lists", which enabled ministers to prescribe information from the children's and adults' lists to be made available to chief constables, has been deleted. There are two ways of considering the deletion of that power.

I am sorry—I perhaps read that too quickly. I should stress that the whole thing has been deleted. Members will note from their legal brief that there are two ways of considering the issue. One view is that the removal of that power has removed parliamentary scrutiny of what information ministers should pass to the police. Alternatively, we might conclude that the amended provision strikes the correct balance between what is required in the text of the bill and what may be left to ministers' discretion. Do members have any questions on that, or shall I just fire away? Do you have any questions, Stewart?

Mr Maxwell: No. I assume that you will raise with the Executive officials the matters that are noted down before us.

The Convener: Yes. The first question is the obvious one. Could the officials explain what type of information will be held on the list? How do you propose to exercise discretion in disclosing information to the police in practice?

Andrew Mott (Scottish Executive Education Department): The kind of information includes the fact that the person is listed in respect of one or other or both workforces; there is then other information that correlates the identity of the individual, for example their date of birth and address. The fact that the individual is listed is itself the most sensitive piece of information. The bill establishes that the police should have access to that. The other information is really just to confirm identity. That is the thinking behind the change that we made.

The Convener: You do not think that there will be any problems with inconsistencies about what information is being passed on, do you, given that a lot of discretion is being left with ministers?

Laurence Sullivan (Scottish Executive Legal and Parliamentary Services): No. There is a limit on the information that may be held on the list. It would include only an individual's name and address and the type of regulated work that they did. There would not be any other information on the list that could be passed by ministers to chief constables.

The Convener: Are members reassured by that explanation and content simply to note the deletion?

Members indicated agreement.

The Convener: Section 43, "Statement of scheme membership", is a new power that was introduced at stage 2 and is subject to negative procedure. It provides that a statement may contain

"such other information about the individual as may be prescribed".

Are members happy with the new power?

Members indicated agreement.

The Convener: The power in section 46, "Vetting information", was amended at stage 2. At stage 1, in response to our question whether the reference to vetting information was intended to be a distinct regulation-making power, the Executive confirmed that it was not. However, we reported to the lead committee that the drafting remained unclear. The Executive has amended the provision to remove the existing ambiguity and to ensure that it no longer confers any subordinate legislation-making powers. Are members content with the amended version?

Members indicated agreement.

The Convener: Section 60(2), which conferred the power to prescribe circumstances in which fingerprints may be destroyed and persons who may destroy them, was deleted at stage 2 and replaced by an express duty in the bill. Are members content to note the deletion?

Members indicated agreement.

The Convener: Section 67, which was amended at stage 2, confers a power on ministers to prescribe fees in certain matters. New section 67(2)(a) amplifies that power.

The supplementary delegated powers memorandum explains that this minor extension to the power is justified to avoid any doubt over whether ministers can prescribe different fees. However, as our legal brief points out, it is unclear why the provision is necessary. After all, section 99(2)(b), which enables regulations made under the bill to make different provision for different purposes, would have enabled the prescription of varying fees.

Do members want me to ask the obvious question?

Members: Yes.

The Convener: Why is section 99(2)(b) not adequate for the Executive's purposes?

Andrew Mott: We felt that the amendment was necessary to put beyond doubt the point that in charging for a disclosure ministers can take into account an individual's history within the disclosure system and the previous fees that they have been charged. The bill contains a number of different types of disclosure, and we want ministers to have the flexibility to charge different fees for those different types. Moreover, if an individual has paid a higher fee in the past, we might want to give them a discount on the second or third disclosure.

The Convener: If members are happy with that explanation, are we content with the power and the fact that it is subject to negative procedure?

Members indicated agreement.

The Convener: Section 69A, "Consideration of suitability: supplementary", provides a new power that is subject to negative procedure. According to the supplementary DPM, the power is needed to cover contracting out arrangements to allow contractors as well as employers to ask for a disclosure. Are members content?

Members indicated agreement.

The Convener: Sections 73 to 81 formed part 3 of the bill, which was entitled "Sharing child protection information", and were deleted at stage 2. Are members content simply to note the deletion?

Members indicated agreement.

The Convener: Section 85, "Regulations about registration", inserts new section 120ZB into the Police Act 1997. The new section has been amended at stage 2 to reflect a change in terminology. We were content with the power at stage 1; are we still content with it, and the fact that it is subject to negative procedure?

Members indicated agreement.

The Convener: In section 88, "Power to give effect to corresponding legislation in England, Wales and Northern Ireland", subsection (1A) is a new power that has been inserted at stage 2 and is subject to affirmative procedure if it is used to amend the terms of the bill or any other act. Otherwise it is subject to negative procedure.

Members will recall that the power was justified on the ground that the terms of the Safeguarding Vulnerable Groups Act 2006 were not final and that it was therefore difficult for the Executive to ensure that both sets of legislation fitted together. Our legal advisers suggested that we might wish to review the situation at stage 2.

Do members have any further points?

10:45

Murray Tosh: Westminster could simply have sent us a legislative consent memorandum and asked us to legislate on its behalf.

The Convener: Possibly.

Euan Robson (Roxburgh and Berwickshire) (LD): The power will be subject to affirmative procedure if the legislation is being amended, otherwise it will be subject to negative procedure. In what circumstances would it be subject to negative procedure? I can envisage some, but it would be interesting to find out your thoughts on the matter.

Laurence Sullivan: Affirmative procedure will apply if amendments are made not just to this legislation, but to any act. The stage 2 amendments to this provision do not change the power in relation to the Safeguarding Vulnerable Groups Act 2006; they simply extend the power to ensure that it applies in the same way to any future Northern Ireland legislation, in the event that a reconvened Northern Ireland Assembly chose to legislate distinctly in this area. If anything, the provision ensures that the 2006 act, or any future Northern Ireland legislation, is fully implemented. If such a move requires us to amend any existing act, we will apply affirmative procedure; however, if we do not require to make textual amendments to an act, we will seek to apply negative procedure.

Euan Robson: I am trying to think of examples that would not involve amending existing legislation.

Laurence Sullivan: For example, if a section in a future Northern Ireland act barred certain people from working with children, we might have to refer to that section to ensure that they were also barred in Scotland. However, we would not be amending that act.

The Convener: Is that okay, Euan?

Euan Robson: I will need to think about that.

The Convener: Are members generally content with the new power?

Members indicated agreement.

The Convener: Despite our stage 1 recommendations, the power in section 87, "Transfer of Disclosure Scotland staff etc", is unamended. We considered that it was inappropriate for an order to specify individuals by name; after all, it would be a Scottish statutory instrument and it would be published on the internet. We drew to the lead committee's attention our concern that staff could be identified by definition or classification, but the supplementary DPM makes no reference to the point.

I should say that, after we raised the matter, the lead committee included our concerns in its stage 1 report on the bill. As a result, the Executive's response came back not to us, but to the lead committee, and we did not see it until this morning. It has now been circulated to members.

In that response, the Executive says:

"Section 87(2) provides that the staff transfer order may specify particular persons or types of person. The Executive will seek to provide the necessary specification by using the latter option and will only specify particular individuals by name if it is absolutely necessary in order to ensure full legal effect for the staff transfer order. However, this option cannot be ruled out and the Executive does not propose to amend section 87(2)."

Does anyone have any questions for the Executive?

Murray Tosh: We could ask for some examples of circumstances in which such a measure would be "absolutely necessary" to ensure full legal effect. Obviously, we would not ordinarily want individuals to be named but, if a case can be made for doing so, I am sure that the committee will accept it. However, it is a bit difficult to know in the abstract what those circumstances might be.

Laurence Sullivan: Section 87 was not amended at stage 2 and our position is still that we will do everything that we can to describe people without using their names. Some of the complexity is a result of the background to Disclosure Scotland's staffing arrangements. Some people are employed by Strathclyde joint police board but have been seconded to Disclosure Scotland to exercise functions of the Scottish ministers under

the Police (Scotland) Act 1967. We have to cover ourselves for the complexity of those arrangements and to ensure that every one of the 90 individuals that we will be transferring can be covered. We anticipate that we will be able to do that using descriptions of their job titles or functions, but because they will have come from a wide range of home employers, the situation is complex and we cannot remove the possibility that we might have to identify individuals by name. We will strive not to, however.

Murray Tosh: So you think that the provision will apply only in the circumstances of someone who has been seconded or transferred and whose job title is not sufficiently clear for all their terms of employment to be covered adequately by reference to that title.

Laurence Sullivan: When we come to make the order, we will have to go through the backgrounds of each one of the 90 individuals because of the historical complexity of Disclosure Scotland's staffing arrangements. Different provisions might have to be made for different people because of those circumstances.

Murray Tosh: Is it your point, therefore, that you are doing this to protect the employment rights, for example, of the people in question?

Laurence Sullivan: Yes. The aim is to ensure that all those people are transferred into Disclosure Scotland. They have been informed about the transfer and are apparently content at the prospect of being transferred into the core civil service. This is a way of ensuring that we can capture them all within the order.

The Convener: To summarise what Murray Tosh said, if you have to release a name, it would be to protect that individual's pension, for example, or for some other reason. Is that right?

Laurence Sullivan: Yes. It would be done to ensure that their employment and pension rights and so on get transferred to their new job. If the only way to identify an individual is through their name, we would use it to protect their employment rights when they are transferred into the civil service.

Mr Maxwell: I understand the reasoning behind the provision and I support your wanting to ensure that everything goes smoothly, because that is in the best interests of the staff. However, I am still struggling to understand why the order would have to name someone and why it cannot just refer to them by definition or classification. I am trying to think of an example where that would cause a problem. Surely we should be able to describe a particular role without having to name the person. If you could give me a solid example of the problems that you foresee, it might help me to understand.

Andrew Mott: We might be concerned about a scenario where person A is to be transferred and person B is not, for whatever reason, but both A and B are doing a similar job in the organisation, so their job title might be the same. The only way to distinguish between A and B would be to name A in the order. Obviously, we will do everything that we can to avoid that, but we might get to that position.

Mr Maxwell: That is helpful.

The Convener: Yes, thank you. That has clarified the point.

Are we happy with section—I am sorry; I missed Euan Robson signalling that he has something to say.

Euan Robson: Individuals can be distinguished by their different dates of birth, for example, so the order would not have to use the person's name. It could mention the person who was born in or around January 1947, so that the person who was not would not be transferred. I do not understand why you need the name specifically. You could identify individuals without using their names, if you got to that situation.

Andrew Mott: There might be staff identification numbers that could be used, but I am not fully aware of that. We want to avoid distinguishing between people by using their personal characteristics for fear of age discrimination and so on, but if we want to identify particular individuals, we either have to use a name or a unique staff ID number, if there is one. It would be difficult to frame it in any other way.

The Convener: Are you not thinking of using a staff ID?

Laurence Sullivan: Yes. In a way, we cannot answer these questions properly until we have been through the job titles and functions of each of the 90 individuals in Disclosure Scotland, especially with reference to their home employers. We need to be able to fall back on identifying people by their names in case that is absolutely necessary, but we would only do that if we could not find another way of identifying them. It is an ingenious thought that we could say that we were transferring people who were born on a certain day in a certain month of a certain year. It might be possible to do that. However, we need a fallback position to ensure that these people's employment rights are protected, that their transfer is legally absolutely clear and that, if we need to, we can identify them by name.

Euan Robson: I am content with that.

Mr Maxwell: I think that the point has been clarified. It is, however, curious that we should have got to this point and not yet explored whether it is possible to identify the individuals concerned

by their staff number. It seems rather odd that we are this close to stage 3 of the bill, that you, the Executive officials, are in front of the committee, and that you are unable to say that you have explored that possibility. That seems to be slightly curious. I will not put it in any stronger terms, but I would have thought that we could have done that before now.

The Convener: Are there any further comments?

Laurence Sullivan: We know who the 90 individuals are in Disclosure Scotland, but it is because of the complexity of their employment backgrounds, which is tied to the historical circumstances of where they have come from.

Mr Maxwell: Could you not just have asked them if they have an ID number?

Laurence Sullivan: If they come from different employers, they might not have the same system of ID numbering.

Mr Maxwell: I accept that. I do not want to get into a debate about this, but I am trying to make the point that it is slightly curious that you have not yet asked them about that. You are saying that you do not know about their ID number; I am asking why not?

Laurence Sullivan: We have not been through the employment backgrounds of the 90 people yet. That will be part of the implementation of the bill once it has been passed.

The Convener: However, we are taking from this discussion the reassurance that you will consider all avenues so that you do not have to disclose names.

Laurence Sullivan: That would be a last resort.

The Convener: Okay. On that note, we will leave section 87. Are we happy enough with that?

Members indicated agreement.

The Convener: In section 94, "Meaning of 'protected adult'", subsection (1)(d) confers a regulation-making power on ministers to prescribe welfare services. The power is subject to negative procedure. Are we content with the power and the procedure?

Members indicated agreement.

The Convener: Section 94(2) enables ministers to change the meaning of "protected adult" by modifying section 94(1) by order. At stage 1, we asked the Executive to explain how the power will be used and, on the basis of the response, we reported that if the power was to be restricted in the way that was suggested, the drafting of section 94(2) should be amended. However, it has not been amended. The Executive commented that it

is not free to depart radically from the definition in the bill in this regard. Are there any further questions on this one? Are we quite happy with what we have been told?

Members indicated agreement.

The Convener: In section 95, “Meaning of ‘work’”, subsection 9 is a new power that is subject to negative procedure. The supplementary DPM explains that the power is needed to link with other legislation, such as fostering law and so on. Are we happy with that?

Members indicated agreement.

The Convener: In section 96, “General interpretation”, subsection (1) of the bill as introduced defined “care service provider” as a person who provides care services of a type specified by order by ministers. The term “care service provider” has been removed from the bill, so there is no need to define it. Are we content to note the deletion of the power?

Members indicated agreement.

The Convener: The power in part 3 of schedule 2, on establishments, was amended at stage 2 to remove the ambiguity that we identified at stage 1. Are we content with the amended power and that it is subject to negative procedure?

Members indicated agreement.

The Convener: Schedule 4 concerns minor and consequential amendments and repeals. New paragraph 21 inserts three new sections into the Police Act 1997. In relation to new sections 113CA and 113CB of the 1997 act, the supplementary DPM states:

“enhanced criminal record certificates ... will be required in a limited set of circumstances”.

The supplementary DPM explains that delegated powers are required to give ministers the flexibility to respond to developments in Scotland and to make provisions in line with the Safeguarding Vulnerable Groups Act 2006.

Are members content with the power and the fact that it is subject to negative procedure?

Members indicated agreement.

11:00

The Convener: New section 113CC(1) of the 1997 act enables ministers by order to amend new sections 113CA and 113CB

“for the purpose of altering the meaning of suitability information”

in relation to children and protected adults. The power is subject to negative procedure.

Normally, we would expect affirmative procedure

to apply when the text of an act is to be modified. Elsewhere in the bill, powers to modify acts or the provisions in the bill itself are subject to affirmative procedure. Why did you take a different approach in this case?

Laurence Sullivan: We kept within the guideline that you mention, in that powers to amend the provisions in the bill are subject to affirmative procedure. However, the sections that you mentioned are new sections that the bill inserts into the Police Act 1997.

The detail of what new sections 113CA and 113CB do is covered at length elsewhere in the bill. An amendment to the sections would simply alter the meaning of “suitability information” in relation to children or protected adults and enhanced disclosures. In those circumstances, use of negative resolution procedure was appropriate.

Murray Tosh: There is an interesting point in your answer. I appreciated the second part of your answer better than the first. The second part essentially downplayed the significance of the change that you are making. However, the first part of your argument suggested that you accept that you should use affirmative procedure in amending the text of the bill itself, but that, if you amend the text of another piece of law, it is all right to use negative procedure. That seems a bizarre argument. Is it a general statement of Executive practice in determining the appropriate level of procedure?

Laurence Sullivan: No. It was a statement on our approach in, for example, section 88 of the bill. Ministers’ power to amend legislation in consequence of the Safeguarding Vulnerable Groups Act 2006 or Northern Ireland legislation is subject to affirmative procedure. However, we want to ensure that the bill is consistent with the Police Act 1997. The bill inserts new sections in part V of the 1997 act, and it is to maintain consistency that the powers are subject to negative procedure.

Murray Tosh: So you are saying that there is a body of law in the 1997 act that is subject to amendment by negative procedure and you are therefore applying that procedure in this case in the interest of consistency.

Laurence Sullivan: I cannot speak on every power in the 1997 act because our bill relates only to part V of it. It contains a variety of powers that are used for different purposes.

Murray Tosh: And they are subject to negative procedure.

Laurence Sullivan: There is a mixture of negative and affirmative procedure in the 1997 act.

Murray Tosh: Given that both procedures are used in the 1997 act, why did you choose negative procedure in this case?

Laurence Sullivan: As I said before, the generality of what is done by new sections 113CA and 113CB is set out elsewhere in the bill, so any modification of those sections under the power in new section 113CC would be made in the context of provisions in earlier sections.

Murray Tosh: So you gave us too much information.

The Convener: I asked our legal adviser about the matter. Like you, she is not 100 per cent certain about the Police Act 1997, but she thinks that quite a lot of the powers in it are subject to negative procedure.

Laurence Sullivan: Yes. The powers in section 125 of the 1997 act are subject to negative procedure. There are other powers—I think in sections 113C to 113F—that are subject to affirmative procedure.

The Convener: Are there any further questions, or are members content with the power and the procedure?

Murray Tosh: I do not hear any alarm bells ringing, so I think that we can let it go.

Members indicated agreement.

The Convener: Part 5 of schedule 2 contains a power to amend schedule 2. The provision is unamended and is subject to affirmative procedure. Paragraph 26 of schedule 2 states:

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

At stage 1, Stewart Maxwell expressed concern about the width of the power and the lack of legal argument to support it. We reported the matter to the lead committee on the ground that the scope of the power was unclear. We now have the Executive's response. Does Stewart Maxwell have any further points?

Mr Maxwell: It is clear that the Executive is sticking to its guns on the matter. Perhaps the officials could clarify the scope of the power. We were concerned about its breadth, but the Executive states in its response that, although the power is broad, it is clear. I ask the officials to expand on that.

Laurence Sullivan: The bill gives ministers the same power to modify schedule 3. As the committee knows, schedules 2 and 3 are essential to the scheme because they specify what regulated work with children and adults is. The powers in paragraph 26 of schedule 2 and paragraph 15 of schedule 3 apply to those schedules in their entirety, so they are wide modification powers.

A bill that was recently introduced proposes the establishment of a commissioner for older people. It might be thought that such a commissioner and their staff would do regulated work with adults and should therefore be subject to disclosure checks. The power in schedule 3 could be used to include in the scheme such a commissioner and their staff so that their work was covered in the same way as the work of teachers and social workers.

We accept that the power is wide, but it is necessary for the development of the scheme. For example, the moderation of interactive electronic services was not included in the Protection of Children (Scotland) Act 2003, but, given the potential for future technological developments, we want to be able to include other types of work that should be regarded as child care or protected adult care.

It is because the power is wide that we made it subject to affirmative procedure.

Mr Maxwell: That is helpful. Part of the problem at stage 1 was that we were unclear about what was going to happen with the power. That is why I wanted you to put its purpose on the record. It is helpful that it is subject to affirmative procedure.

The Convener: I should have pointed out that the second side of the annex to the Executive's response elaborates on the point.

Part 5 of schedule 3 contains a power to amend schedule 3. We raised the same point that we raised on schedule 2 and we received substantially the same response. Are members content with the clarification and with the fact that the power is subject to affirmative procedure?

Members indicated agreement.

The Convener: Paragraph 26B(b) of schedule 4 deletes a power in the Police Act 1997 to make regulations on the destruction of fingerprints.

Ask members content to note the deletion?

Members indicated agreement.

The Convener: I thank the officials for coming along and for the clarifications that they have given us.

Aquaculture and Fisheries (Scotland) Bill: as amended at Stage 2

The Convener: We considered the bill at our meeting last week.

Section 25C is on the amount and payment of fixed penalties. Members will recall that the Executive officials supported the power to prescribe a scale of fixed penalties. The officials undertook to find out more information and write to us about other examples of such schemes.

We have now received their response, in which they say that the approach adopted was out of step with the approach that the Executive has taken in comparable circumstances in recent legislation. They have given an undertaking that an amendment will be lodged that will provide that the power cannot be used to prescribe amounts above 80 per cent of level 4 on the standard scale, which is currently set at £2,500. Our legal advisers are satisfied that the amendment will cap the amount that can be prescribed. What do members feel about that?

Mr Maxwell: I feel that it is a step forward and I welcome it. We had a lengthy debate with officials on the point last week and I could not understand why they took the view that they did, which is why I wanted them to go away and come back with proof to back up their assertion that what they proposed was reasonable. What has happened is what I suspected would happen, which is that it has transpired that fixed penalties are mostly all dealt with in the same way and that the Executive was suggesting a new or different way of dealing with them. I am glad that it has decided to think again and to lodge an amendment to the bill. I do not understand why it could not have proceeded in that way in the first place because it seems perfectly sensible to set a maximum, as it now proposes to do. I am pleased.

The Convener: Now that we have got back the information that we requested, does everyone agree with how the matter has been resolved? The power will still be subject to negative procedure, but we simply wanted clarity in relation to the setting of a maximum.

Mr Maxwell: We argued that the use of negative procedure was fine.

The Convener: The clerk tells me that we must clarify whether we are content with the powers in sections 25A, 25B(3) and 25B(5), which we did not make clear last week. Are members content with those powers?

Members *indicated agreement.*

Executive Responses

Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007 (draft)

11:11

The Convener: We move on to agenda item 3. We asked the Executive to explain why it had chosen to use in the same set of draft regulations a combination of enabling powers that are contained in different enabling acts and which are subject to different parliamentary procedures. Two weeks ago, we wrote to the Executive to convey our general concerns about the increasing use of that method. We have received replies on both points.

First, the Executive has acknowledged that the approach that it adopted in the draft regulations was not in accordance with normal legislative practice, as we thought. Accordingly, it has withdrawn and relaid the regulations to address the points that we raised. We will consider the relaid regulations later in our agenda.

It has been suggested that we should draw the attention of the lead committee and the Parliament to the regulations and the Executive's failure to follow proper legislative practice. Do we need to do that, given that we will examine the new regulations later?

Ruth Cooper (Clerk): We need to draw the attention of the lead committee and the Parliament to the regulations at hand.

The Convener: Okay. Do members agree to report that the Executive, in using in the regulations a combination of enabling powers, some of which were subject to affirmative procedure and some of which were subject to negative procedure, did not follow proper legislative practice? It has acknowledged that and remedied the situation by relaying the regulations.

Members *indicated agreement.*

The Convener: The second issue was the combination in a single instrument of negative procedure and no parliamentary procedure. The Executive has set out its position and the legal briefing contains a commentary on it. I invite responses from members.

Mr Maxwell: My view has not changed since the last time we discussed the matter. The Executive has failed to make its argument. It is simply not possible to combine those two separate procedures in the same instrument. As the legal briefing says, if there was an objection to a part of an instrument that contained provisions made under powers that were subject to no

parliamentary procedure, it is not clear whether it would be possible to annul the instrument as a whole on the basis of that objection. It is a minefield and I do not know why the Executive wants to step into it. I hold to the view that the two procedures should be kept separate.

The Convener: Paragraph 33 of the legal briefing says:

“legal advisers have no reason to depart from the traditional view expressed by the JCSI”—

which is the equivalent of the Subordinate Legislation Committee at Westminster. The approach that the Executive has adopted seems to go against the normal procedure.

11:15

Mr Maxwell: Our legal briefing includes a quote on the issue from a report by the Joint Committee on Statutory Instruments. It makes the point that if someone moved a motion to annul such an instrument—I think that at Westminster a prayer for annulment has to be moved—considerable difficulties would be caused because some provisions would be subject to parliamentary proceedings and some would not be. We have yet to receive from the Executive a sensible explanation of why it might be appropriate to combine procedures in that way.

The Convener: It is an important point, so shall we add it to our legacy paper?

Murray Tosh: The matter should be pursued with the Executive, given that the JCSI says that

“it is accepted practice that such instruments are not made.”

It is worth investigating that further and if it is found to be absolutely the case that down the road there is a clear belief that the making of such instruments is poor practice, we or our successor committee must challenge the Executive on why it takes a different view. By all means let us find Scottish solutions to Scottish problems, but let us not compound Scottish problems by introducing procedural flaws that no one else would ever contemplate.

The Convener: Exactly. If the committee agrees, I would like us to take from the legal briefing its explanation of the reasoning behind our opposition to what the Executive proposes. Does anyone have a problem with that?

Mr Maxwell: The legal briefing is very clear.

The Convener: Shall we use that and put it in the legacy paper?

Members indicated agreement.

Renewables Obligation (Scotland) Order 2007 (draft)

The Convener: We asked the Executive to explain the reference in article 24(4)(b) to subparagraph (c), when no such subparagraph exists. The Executive has acknowledged that there is no subparagraph (c), but does not think that the words have any legal effect. I am just waiting for Stewart Maxwell to suggest that it would be much easier if the draft order could be amended.

Mr Maxwell: Our view on the matter is on the record, so there is no point in bringing it up again. *[Interruption.]*

The Convener: What did you say, Murray?

Murray Tosh: I was just asking the legal people whether the reference to a non-existent paragraph was otiose. We always try to look for examples of things that are otiose.

The Convener: We will report to the lead committee and the Parliament that the draft order contains defective drafting. Is that okay?

Members indicated agreement.

Town and Country Planning (Marine Fish Farming) (Scotland) Order 2007 (draft)

The Convener: We asked the Executive four questions about the draft order and we have received its response. In relation to our first point, the Executive has acknowledged its failure to follow proper legislative practice and, on our second, third and fourth points, it has provided adequate explanations. Do members have any comments?

Members: No.

The Convener: Members are content with what the Executive has said.

Avian Influenza (Preventive Measures) (Scotland) Order 2007 (SSI 2007/69)

The Convener: We asked the Executive to explain which powers enable articles 5 to 7 of the order, as they do not appear to be enabled by sections 1 and 8A of the Animal Health Act 1981. The Executive explains that, in its view, articles 5 to 7 are enabled by section 1 of the 1981 act. However, it is argued that if the Executive was content to rely on section 1 of the 1981 act to enable all measures necessary to prevent the spread of animal disease, it would not have considered it necessary to insert into that act new section 8A. What do members want to draw to the attention of the lead committee and the Parliament?

Mr Maxwell: I would not go any further than to say that, in the light of the examples with which the legal briefing provides us, articles 5 to 7 have been made by an unusual or unexpected use of the powers in the 1981 act. Apart from that, the order seems to be okay.

The Convener: As no other members have points to raise, we will just report that articles 5 to 7 have been made by an unusual or unexpected use of the powers conferred by the parent act.

Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2007 (SSI 2007/73)

The Convener: We asked the Executive to explain the delay between the making and the laying of the order, and it has told us that it was caused by the absence from work of the relevant official. What do members want to say about that? Was it a justifiable delay?

Mr Maxwell: I do not want to say anything about it. If someone was off work, that could not be helped. The delay was not intentional; I am sure that the order was laid as soon as it could have been.

Murray Tosh: Yes, but if somebody is off and something has to be done, should somebody else not do it? Should the office not be managed in such a way as to absorb staff absences? Everybody else's office should be; why should this Executive office be any different? The explanation is not very impressive.

Mr Maxwell: I agree, but it was a relatively short delay. It was not inordinately long.

The Convener: Euan, have you any further points?

Euan Robson: I do not think that we should detain ourselves on the matter.

The Convener: Okay. Are we going to report that a satisfactory explanation was given?

Mr Maxwell: Murray thinks that it was not satisfactory—although it was an explanation.

The Convener: We can always add that somebody else might have been able to undertake the work. I am easy—we could phrase a response along those lines.

Murray Tosh: Euan does not wish to be detained and I would hate to be the cause of detaining him.

The Convener: Okay, in our report to the lead committee and Parliament we will accept the explanation given.

Housing (Scotland) Act 2001 (Alteration of Housing Finance Arrangements) Order 2007 (SSI 2007/74)

The Convener: We asked the Executive to explain the purpose of the word “year” in article 2 of the order, and to explain—as with the previous order—the reason for the delay between making and laying. The reason given for the delay was the same as that given for SSI 2007/73; and the Executive has confirmed that the word “year” should have been deleted but that the meaning of the order is unaffected. Do members agree that we should report in the same way as we will report on SSI 2007/73, and that we should explain about the word “year”?

Members indicated agreement.

Draft Instrument Subject to Approval

Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007 (draft)

11:21

The Convener: We move to agenda item 4. No points have been identified on the relaid regulations.

Instruments Subject to Annulment

Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2007 (SSI 2007/79)

Home Energy Efficiency Scheme (Scotland) Amendment Regulations 2007 (SSI 2007/85)

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2007 (SSI 2007/87)

11:21

The Convener: We now move to agenda item 5. No substantive points have been identified on these instruments—only a few minor points that we will report on.

Scottish Police Services Authority (Staff Transfer) Order 2007 (SSI 2007/88)

The Convener: No substantive points have been identified on the order, but a minor one is worth mentioning. Part of the order breached the 21-day rule, but an explanation has been given about the time needed to prepare staff transfer schemes before the deadline of 23 March. Are members content that we report along those lines?

Members *indicated agreement.*

Police, Public Order and Criminal Justice (Scotland) Act 2006 (Consequential Modifications) Order 2007 (SSI 2007/89)

Scottish Crime and Drug Enforcement Agency (Appointment of Police Members) Regulations 2007 (SSI 2007/90)

The Convener: No substantive points have been identified on the instruments, but we will report on some minor points.

Official Controls (Animals, Feed and Food) (Scotland) Regulations 2007 (SSI 2007/91)

The Convener: No points arise on the regulations.

Management of Offenders etc (Scotland) Act 2005 (Specification of Persons) Order 2007 (SSI 2007/92)

The Convener: No substantive points have been identified on the order, but we will raise some minor points informally.

Sale of Alcohol to Children and Young Persons (Scotland) Regulations 2007 (SSI 2007/93)

Potatoes Originating in Egypt (Scotland) Amendment Regulations 2007 (SSI 2007/94)

The Convener: No points have been identified on either set of regulations.

Licensing (Training) (Scotland) Regulations 2007 (SSI 2007/95)

The Convener: No substantive points have been identified on the regulations, but we will report on a minor one.

Occasional Licence (Scotland) Regulations 2007 (SSI 2007/96)

The Convener: No points have been identified on the regulations.

Licensing (Designated Airports) (Scotland) Order 2007 (SSI 2007/97)

The Convener: No substantive points have been identified on the order, but we will report on a minor one.

Licensing Qualification (Scotland) Regulations 2007 (SSI 2007/98)

Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Amendment Regulations 2007 (SSI 2007/99)

Adults with Incapacity (Conditions and Circumstances Applicable to Three Year Medical Treatment Certificates) (Scotland) Regulations 2007 (SSI 2007/100)

The Convener: No points have been identified on the regulations.

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2007 (SSI 2007/102)

The Convener: No substantive points have been identified on the regulations, but we will report on a minor point. This will be the ninth amendment to the regulations, so we might want to put that to the consolidation working group.

Mr Maxwell: It might be an idea to write to the Executive to ask it about the regulations. This is the ninth amendment, and we have a line at the fifth.

Actually, I notice from our legal brief that our legal advisers believe that the regulations have been amended more than 20 times, but that this amendment is the ninth “relevant amendment”. It is worse than we thought.

The Convener: Yes, it is worse. We will write to the Executive on that point. However, other than that and as I said, no substantive points have been identified on the regulations.

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2007 (SSI 2007/103)

Adults with Incapacity (Medical Treatment Certificates) (Scotland) Regulations 2007 (SSI 2007/104)

The Convener: No substantive points have been identified on the regulations, but we will report on a minor point.

Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Regulations 2007 (SSI 2007/105)

The Convener: No points have been identified on the regulations.

Quick-frozen Foodstuffs Amendment (Scotland) Regulations 2007 (SSI 2007/106)

The Convener: No substantive points arise on the regulations, but a few minor ones do.

Instruments Not Laid Before the Parliament

Valuation Timetable (Scotland) Amendment Order 2007 (SSI 2007/81)

Bankruptcy and Diligence etc (Scotland) Act 2007 (Commencement No 1) Order 2007 (SSI 2007/82)

11:24

The Convener: We come to agenda item 6—and I am glad that members are staying with me. No points have been identified on these orders.

Police, Public Order and Criminal Justice (Scotland) Act 2006 (Commencement No 3, Transitional and Savings Provisions) Order 2007 (SSI 2007/84)

Act of Sederunt (Rules of the Court of Session Amendment No 2) (Fees of Solicitors) 2007 (SSI 2007/86)

The Convener: No substantive points have been identified on the instruments, but we will report on some minor ones.

Vulnerable Witnesses (Scotland) Act 2004 (Commencement No 4, Savings and Transitional Provisions) Order 2007 (SSI 2007/101)

The Convener: No points have been identified on the order, which is our final instrument.

However, I should go back to the Housing (Scotland) Act 2001 (Alteration of Housing Finance Arrangements) Order 2007 (SSI 2007/74). Members will remember that we talked about the definition of the word “year”. I did not make the point strongly enough on the record that there had been a failure to follow proper drafting procedure. We will report on that. I thank our legal adviser, Mairi Gibson, for keeping me right.

Meeting closed at 11:26.

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