

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 March 2007

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

11th 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

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 20 March 2007

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

Executive Responses

Queen Margaret University, Edinburgh (Scotland) Order of Council 2007 (SSI 2007/116)

The Deputy Convener (Mr Kenneth Macintosh): I welcome members to the 11th meeting in 2007 of the Subordinate Legislation Committee. Convener Sylvia Jackson sends her apologies, as does Adam Ingram. Euan Robson will be here shortly.

Agenda item 1 is a large number of Executive responses. Do members want to raise any points on the order in council?

Members: No.

The Deputy Convener: The defective drafting in article 2 was acknowledged by the Executive, although it is not such as to affect the order of council's validity.

The Executive provided clarification to the committee in respect of the transitional arrangements and a satisfactory response in relation to the reference to "any governors in office".

The Executive acknowledged the defective drafting in article 6(9), and it has provided information to the committee in relation to articles 6(7)(c) and (g).

Are members content to draw the attention of Parliament to the order of council on those grounds?

Members indicated agreement.

Charities Accounts (Scotland) Amendment Regulations 2007 (SSI 2007/136)

The Deputy Convener: Do members want to raise any points on the regulations?

Murray Tosh (West of Scotland) (Con): I am happy with what is recommended.

The Deputy Convener: We were concerned that there was no Executive note. One had in fact

been printed, but not sent to us, and we received an apology from the Executive.

Mr Stewart Maxwell (West of Scotland) (SNP): It was lost in the post.

The Deputy Convener: Exactly—it was lost somewhere in the realms of the Executive. Therefore, if members are content, we will draw the regulations to the attention of Parliament on the basis that the Executive inadvertently failed to provide us with an Executive note. Is that agreed?

Members indicated agreement.

Tuberculosis (Scotland) Order 2007 (SSI 2007/147)

The Deputy Convener: Are members content to draw the order to the attention of the lead committee and Parliament on the ground that there has been a failure to follow proper legislative practice by reason of the use of enabling powers subject to different parliamentary procedures in one instrument? The issue has raised its head a number of times.

Mr Maxwell: We have covered the point in the past few weeks, and we have come to a bit of an impasse with the Executive. It is now for the legacy paper and a future committee to take up.

I still hold to the view that it is not right to combine different powers in the same instrument. I find it slightly strange that the Executive has agreed that affirmative and negative powers should not be combined in the same instrument but takes the opposite view when the powers are subject to negative and no parliamentary procedure. I would have thought that the same logic held in both cases.

I also note that the Executive says that it is not a recent trend to use such instruments. However, considering the examples that it has given—two such instruments in the 1980s, one in the 1990s, a couple in 2003 and several in the past three weeks—it sounds as if there is a recent trend. However, that is for the next committee to take on board.

Murray Tosh: I agree. There is a slight difference in that the Executive has explained that, when an instrument contains negative procedure and no procedure, in the event that it is annulled the Executive may implement the no-procedure elements of the package from the same date if it so wishes. I suspect that it is therefore easier than combining the affirmative and negative powers.

There are a lot of issues and, as we have said before, they should be part of the legacy paper for our successor committee. We obviously have to accept what is proposed, but we should keep the issue on the agenda.

Mr Maxwell: We should still point it out to the lead committee.

The Deputy Convener: I agree with both members. The helpful note from our legal advisers goes through all the points. It sums up my feeling that there is a practical reason for the Executive's decision and that there is a sensible outcome in putting together two orders so that the control element and related compensation provisions are in the same instrument. I can understand the practical advantages of that to the users of the instrument. However, from a parliamentary procedure point of view, I note that our equivalent committee in Westminster made a strong point about that, which was accepted by the United Kingdom Government.

Murray Tosh: That strengthens the argument for a single procedure, does it not?

The Deputy Convener: Exactly—it adds to our general recommendations to reform the overall procedures.

Mr Maxwell: I am sure that I am right that we operate under the same procedures as the Westminster Parliament. It is where we got our procedures from, and we have not moved on from the transitional procedures. Given that we use the same procedure, it is odd that, although the Joint Committee on Statutory Instruments has taken a view and the UK Government has accepted it, the position is different here.

The Deputy Convener: It is probably not what you would describe as a Scottish solution for a Scottish problem.

Mr Maxwell: It does not sound like it.

The Deputy Convener: The point has been made that we are concerned about the procedure. I agree with Stewart Maxwell that there is a trend of using it—a few sporadic examples from the past do not counter that argument. We can draw our concern to the attention of the lead committee and Parliament and include it in our legacy paper.

There is a second point on the order, which is that the Executive was asked for, and has provided, further clarification of the meaning and use of the terms “inspector” and “keeper of the animal”. If members are content, we will also draw that to the attention of the lead committee and Parliament.

Education Authority Bursaries (Scotland) Regulations 2007 (SSI 2007/149)

The Deputy Convener: We asked the Executive to explain the terms “EEA agreement” and “EEA state”—EEA standing for European Economic Area. Members have seen the Executive's response. Are we content to draw the

regulations to the attention of Parliament and the lead committee on the basis that the Executive has provided an explanation?

Members indicated agreement.

Education (Fees and Awards) (Scotland) Regulations 2007 (SSI 2007/152)

The Deputy Convener: We asked the Executive if it intended to correct an error. We were concerned about it because we had highlighted such an error in a previous instrument. The Executive accepted our observation and said that it would correct it in future, but did not.

The Executive has explained that the correction slip was printed, but not acted on. Do members have any comments to make?

Members: No.

The Deputy Convener: I must say that I was reassured that it was cock-up rather than conspiracy.

Murray Tosh: I take it that you are ruling that that is an acceptable parliamentary term, convener.

Mr Maxwell: What, conspiracy?

The Deputy Convener: Slip-up.

Are members content to draw the instrument to the attention of Parliament and the lead committee on the basis of defective drafting, which was acknowledged by the Executive?

Members indicated agreement.

Graduate Endowment (Scotland) Regulations 2007 (SSI 2007/155)

The Deputy Convener: We asked the Executive a number of questions on the regulations, and members have a copy of the Executive's response.

Are members content to draw the instrument to the attention of the lead committee and Parliament on the grounds that have been highlighted in the legal brief?

Members indicated agreement.

Education Maintenance Allowances (Scotland) Regulations 2007 (SSI 2007/156)

The Deputy Convener: We asked the Executive why the definition of “employed” that is given in regulation 2 differs from the definition of “employment” that is used in a number of other Scottish statutory instruments. Are members content with the Executive's response?

Members indicated agreement.

The Deputy Convener: We will draw the regulations to the attention of the lead committee and Parliament on the ground that the Executive has provided an adequate explanation.

Repayment of Student Loans (Scotland) Amendment Regulations 2007 (SSI 2007/159)

The Deputy Convener: Are members content with the Executive's response to the committee's question?

Members indicated agreement.

The Deputy Convener: We will draw the regulations to the attention of the lead committee and Parliament on the ground that further information was sought from and provided by the Executive.

Disabled Persons (Badges for Motor Vehicles) (Scotland) Amendment Regulations 2007 (SSI 2007/162)

The Deputy Convener: We asked the Executive why it did not amend the definition of "disabled person" in regulation 2(1) of the principal regulations. Are members content with its explanation?

Members indicated agreement.

The Deputy Convener: Are members content that we draw the attention of the lead committee and Parliament to the regulations on the ground of defective drafting by reason of the failure to amend the definition of "disabled person" in regulation 2(1) of the principal regulations?

Members indicated agreement.

Waste Management Licensing Amendment (Waste Electrical and Electronic Equipment) (Scotland) Regulations 2007 (SSI 2007/172)

The Deputy Convener: This is the 21st time that the principal regulations—the Waste Management Licensing Regulations 1994 (SI 1994/1056)—have been amended. Stewart Maxwell asked whether that is a record.

Mr Maxwell: I was not being serious; I am sure that there are worse cases.

The Deputy Convener: Our legal advisers have told us that there are worse cases.

We asked the Executive whether it has any plans to consolidate the waste management licensing regulations. It has replied that it intends to consolidate them once the policy review of the waste framework directive has been completed.

Are members content to draw SSI 2007/172 to the attention of the lead committee and Parliament

on the ground that an explanation has been provided by the Executive?

Members indicated agreement.

Radioactive Contaminated Land (Scotland) Regulations 2007 (SSI 2007/179)

The Deputy Convener: We asked the Executive to explain the vires for regulation 17. Are members content with the Executive's response?

Members indicated agreement.

The Deputy Convener: In that case, we will draw the regulations to the attention of the lead committee and Parliament on the basis of a failure to follow proper legislative practice, as acknowledged by the Executive.

Local Governance (Scotland) Act 2004 (Remuneration) Regulations 2007 (SSI 2007/183)

The Deputy Convener: We asked the Executive to explain the purpose of the definition of "the 2004 Act" in regulation 2(1), as that definition does not appear to be used in the regulations. Are members content with the Executive's response?

Members indicated agreement.

The Deputy Convener: In that case, we will draw the regulations to the attention of the lead committee and Parliament on the basis of defective drafting by reason of the inclusion of an unnecessary definition in regulation 2(1).

Teachers' Superannuation (Scotland) Amendment Regulations 2007 (SSI 2007/189)

The Deputy Convener: We asked the Executive whether there was an incorrect cross-reference in regulation 29. Are members content to draw the regulations to the attention of the lead committee and Parliament on the ground of defective drafting, although the drafting is not defective to the extent that it will affect the validity of the regulations?

Members indicated agreement.

National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2007 (SSI 2007/193)

The Deputy Convener: We asked the Executive two questions. Are members content to draw the regulations to the attention of the lead committee and Parliament on the ground that the Executive has provided an adequate explanation

in relation to amending the reference to “paragraph 11” in schedule 1 and on the ground of the defective drafting of regulation 2(12)(a)—which the Executive has acknowledged—although that drafting is not defective to the extent that it will affect the validity of the regulations?

Members *indicated agreement.*

Charities References in Documents (Scotland) Regulations 2007 (SSI 2007/203)

The Deputy Convener: Are members content to draw the regulations to the attention of the lead committee and Parliament on the ground that the Executive has provided an adequate justification of the vires for regulation 3?

Mr Maxwell: The answer is that we probably are, although it still seems slightly odd that the regulations should use the word “wholly” when the phrase “wholly or mainly” could be used. Arguments that were made in our original debate on the regulations are still valid.

However, the Executive has made its position clear. We should simply accept that position and draw the matter to the attention of the lead committee and Parliament.

The Deputy Convener: Indeed. There was confusion about the use of the word “wholly” and the phrase “wholly or mainly”, but the Executive has presented an argument, and it must justify that argument.

Charities Reorganisation (Scotland) Regulations 2007 (SSI 2007/204)

The Deputy Convener: We asked the Executive to explain whether it is intended that the Office of the Scottish Charity Regulator’s obligation in regulation 6(3) to send a copy of its decision to

“any person that has sent it a notice of objection”

extends to those objectors who have sent such a notice that arrives at OSCR after the latest date for receipt of objections. Members have seen a copy of the Executive’s response.

Are members content to draw the regulations to the attention of the lead committee and Parliament on the ground that the meaning of regulation 6(3) could be clearer?

Members *indicated agreement.*

The Deputy Convener: The Executive said that it is up to OSCR whether to send a copy of a decision to people who submitted late objections.

Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2007 (SSI 2007/215)

The Deputy Convener: We asked the Executive three questions on the order. The Executive has responded.

Are members content to draw the order to the attention of the lead committee and Parliament on the ground of failure to follow legislative practice, although that failure is not such that it affects the validity of the order; in relation to the vires for inserting a new paragraph 25 in schedule 1 to the Council Tax (Exempt Dwellings) (Scotland) Order 1997 (SI 1997/728) and in relation to the citing of an enabling power in the Local Government Finance Act 1992; and on the ground that the meaning of the newly inserted paragraph 25(3) could be clearer?

Members *indicated agreement.*

Instruments Subject to Annulment

Napier University (Scotland) Order of Council 1993 Amendment Order of Council 2007 (SSI 2007/160)

10:45

The Deputy Convener: Are members content to ask the Executive why the definitions that will be inserted by article 2(2)(a) of the order are not used in the 1993 order and, accordingly, whether those definitions are intended to correspond to the words that are used in newly inserted articles 3(2)(d)(ii) and (iii) of the 1993 order?

Murray Tosh: We wondered about that.

The Deputy Convener: We are content. The Executive has gone to only a fourth definition.

Mr Maxwell: We are not really content.

The Deputy Convener: No; rather, we are content to ask the Executive a question.

Animals and Animal Products (Import and Export) (Scotland) Regulations 2007 (SSI 2007/194)

Gambling (Premises Licence Fees) (Scotland) Regulations 2007 (SSI 2007/197)

The Deputy Convener: No points arise on the regulations.

Firefighters' Compensation Scheme (Scotland) Amendment Order 2007 (SSI 2007/198)

The Deputy Convener: No substantive points arise on the order, although there is a minor point concerning gender neutrality, I think.

Murray Tosh: You could be in trouble for considering that point to be minor.

The Deputy Convener: Some of my colleagues would not see it as a minor point. However, we will raise it informally.

Mr Maxwell: I do not think that that point arises on this order. However, there is a minor point to do with the definition of "Scottish fire authority".

The Deputy Convener: I am sorry. The point about gender neutrality relates to another instrument. You are right—there is a minor point on the definition of "Scottish fire authority".

Firefighters' Pension Scheme (Scotland) Order 2007 (SSI 2007/199)

The Deputy Convener: No points arise on the order.

Firefighters' Pension Scheme Amendment (Scotland) Order 2007 (SSI 2007/200)

The Deputy Convener: Are members content to ask the Executive why it was necessary to include the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999 (SI 1999/1750) in a footnote, given that it no longer has effect by reason of not having been included as a saved enactment under the Firefighters' Pension Scheme (England and Scotland) Order 2004 (SI 2004/2306)?

Members indicated agreement.

Police Pensions (Scotland) Regulations 2007 (SSI 2007/201)

The Deputy Convener: Are members content to ask the Executive whether the reference, in paragraph 8(a) of schedule 3, to regulation (2)(a)(iv) should be to regulation 6(2)(a)(iv), and whether it is content that the amount of £30,000 that is specified in regulation 84(4) is correct, given the much smaller amount of £5,000 that is specified in the equivalent English provision?

Mr Maxwell: We should probably ask the Executive about that, but I assume that the decision that was made was simply a policy decision. Otherwise, it would be an odd typo.

The Deputy Convener: The figure does not strike me as a typo. We would welcome an explanation of it, as the difference between the figures seems so remarkable.

Mr Maxwell: We could certainly ask for an explanation.

Business Improvement Districts (Scotland) Regulations 2007 (SSI 2007/202)

The Deputy Convener: Are members content to ask the Executive, in relation to regulations 9(1) and 9(2), given that "eligible ratepayer" and "eligible person" may comprise more than one person, how the vote allocated to the "relevant property" is to be exercised jointly if there is disagreement between those persons?

Members indicated agreement.

The Deputy Convener: These are the regulations on which a gender neutral point arises. There is a reference to "his" rather than to "their" functions.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2007 (SSI 2007/205)

National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2007 (SSI 2007/206)

The Deputy Convener: No points arise on the regulations.

National Health Service (Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2007 (SSI 2007/207)

The Deputy Convener: No substantive points arise on the regulations, although there is a minor point that can be raised informally.

National Health Service (Pharmaceutical Services) (Scotland) Amendment Regulations 2007 (SSI 2007/208)

The Deputy Convener: This will be the 19th amendment to the principal regulations. Are members content to add the regulations to our list for the consolidation working group in session 3?

Members *indicated agreement.*

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2007 (SSI 2007/209)

The Deputy Convener: Are members content to add the order to the list for the consolidation working group?

Members *indicated agreement.*

The Deputy Convener: I note that, when we raised the issue in 2001, the Executive said that its priority was to consolidate the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223). The Executive has an interesting definition of priority.

Mr Maxwell: Indeed.

The Deputy Convener: There are also some minor points to raise informally.

Justices of the Peace (Scotland) Order 2007 (SSI 2007/210)

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2007 (SSI 2007/211)

Bankruptcy Fees (Scotland) Amendment Regulations 2007 (SSI 2007/220)

The Deputy Convener: No points arise on the instruments.

Town and Country Planning (Application of Subordinate Legislation to the Crown) (Scotland) Amendment Order 2007 (SSI 2007/221)

The Deputy Convener: No points arise on the order, but members might wish to note that it remedies a defect that the committee identified in relation to the Town and Country Planning (Application of Subordinate Legislation to the Crown) (Scotland) Order 2006 (SSI 2006/270).

Personal Injuries (NHS Charges) (Reviews and Appeals) (Scotland) Amendment Regulations 2007 (SSI 2007/222)

The Deputy Convener: No substantive points arise on the regulations, but there is a minor point that can be raised informally.

Health and Social Care (Community Health and Standards) Act 2003 Supplementary Provisions (Recovery of NHS Charges) (Scotland) Order 2007 (SSI 2007/223)

Seed (Scotland) (Amendments for Tests and Trials etc) Regulations 2007 (SSI 2007/224)

The Deputy Convener: No points arise on the instruments.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2007 (SSI 2007/225)

The Deputy Convener: Are members content to ask the Executive to explain the vires for regulation 2, which appears to give regulation 3(2)(c) retrospective effect, despite the apparent absence of express authority to do so in the parent act—the National Health Service (Scotland) Act 1978.

Retrospection is of serious concern to the committee. Although I do not doubt the policy intention, we should draw the issue to the Executive's attention as a serious matter.

The committee might wish to note that this is the eighth amendment to the principal regulations. We can add the regulations to our list for the consolidation working group.

Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) Revocation Order 2007 (SSI 2007/239)

Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No 2) Order 2007 (SSI 2007/240)

The Deputy Convener: No substantive points arise on the orders, but they breach the 21-day rule. We have had received correspondence from our colleague Fergus Ewing.

Mr Maxwell: The correspondence from Mr Ewing is on SSI 2007/240, not on SSI 2007/239. Does it apply to both orders?

The Deputy Convener: I think that it applies to both. I put the orders together on the agenda. We are discussing both.

Mr Maxwell: It is just that the header in his e-mail refers to SSI 2007/240.

The Deputy Convener: We are discussing both orders on the basis that the points raised apply to both.

Murray Tosh: The issues raised in our briefing on the orders relate to the breach of the 21-day rule. In the circumstances, we can probably accept the explanation given. Mr Ewing's point was about the failure to consult adequately the Mallaig and North West Fishermen's Association and the Scallop Association. Our attitude to that would have to be that it is clear from the power that the secretary of state and, therefore, the Scottish ministers, have the power to consult such bodies as they consider to be appropriate. Although I might agree with Fergus Ewing's point that the associations are appropriate bodies to consult, from our point of view the exercise is to be assured by the minister that appropriate consultation has taken place.

If anyone feels that appropriate bodies have not been consulted, that is a matter for the lead committee. We might be advised to refer Mr Ewing's complaint to the lead committee for its consideration. The fact that the associations were not consulted seems a surprising oversight, but it is not a procedural problem as much as a decision about which bodies it was appropriate to consult.

Mr Maxwell: I agree. It seems odd that the associations were not consulted, because they seem the obvious ones to consult. However, Murray Tosh is right that the secretary of state and the Scottish ministers can consult such bodies as

they consider appropriate, so there is no technical flaw in the orders in that regard. I agree that Mr Ewing and Mr McGrigor, who was also involved, should take up the matter with the lead committee, which might want to pursue it with the minister.

The Deputy Convener: That is a fair statement of the position. SSI 2007/239 revokes the original Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) Order 2007 (SSI 2007/186), because the date in italics at the top did not match the date in the order itself. The new order—SSI 2007/240—implements the provisions from the correct date. That mistake means that the order breaches the 21-day rule, but we are happy to accept that.

The points that Mr Ewing made are of genuine concern, but they are for the lead committee, rather than for us. On that basis, we will write to the lead committee to draw Mr Ewing's correspondence to its attention.

Murray Tosh: We should do so as a courtesy to Mr Ewing.

The Deputy Convener: We will forward Mr Ewing's correspondence to the lead committee along with a note of our discussion and a reference to the general power, which states that ministers may, after consultation with such bodies as they consider appropriate, make orders. It actually says:

"The Secretary of State may, after consultation with such bodies as he considers appropriate, make orders".

Murray Tosh: There is a gender point there, which you might wish to raise and pursue, convener.

The Deputy Convener: The power was drafted in a bygone age. We have moved on since then.

Mr Maxwell: I realise that you think that it is a minor point, but some of us think that it is a major point.

The Deputy Convener: Given that I raised it, that tells you exactly what I think.

Instruments Not Laid Before the Parliament

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Animal Welfare Act 2006) 2007 (SSI 2007/233)

Act of Sederunt (Rules of the Court of Session Amendment No 3) (Fees of Shorthand Writers) 2007 (SSI 2007/234)

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Vulnerable Witnesses (Scotland) Act 2004) 2007 (SSI 2007/237)

10:56

The Deputy Convener: No points arise on the instruments.

Act of Adjournal (Criminal Procedure Rules Amendment) (Animal Health and Welfare etc) 2007 (SSI 2007/238)

The Deputy Convener: No substantive points arise on the act of adjournal, but there is a minor point to raise informally.

Serious Organised Crime and Police Act 2005 (Commencement No 10) Order 2007 (SSI 2007/241)

Private Security Industry Act 2001 (Commencement No 2) (Scotland) Order 2007 (SSI 2007/242)

The Deputy Convener: No points arise on the orders.

Executive Correspondence

10:57

The Deputy Convener: Item 4 is Executive correspondence. Members will recall that the convener, Sylvia Jackson, wrote to the Minister for Parliamentary Business, Margaret Curran, to raise concerns about the number of Scottish statutory instruments that were to be laid before dissolution. Given that we have just dealt with a huge number of SSIs—although we did so fairly rapidly—I would welcome any comments on the Executive's response.

Mr Maxwell: This harks back to our inquiry on the regulatory framework and the necessity for forward planning and advance notice. We dealt with that fairly extensively in our inquiry report. It would benefit us all—this committee, lead committees and the Executive—if we had an advance planning and notification system in place. I note from the minister's response that she sees potential for improvements in the process. I hope that that is a hint for a future Executive to try to improve things.

The Deputy Convener: Indeed. We can note the minister's response. She acknowledges that the number of SSIs is a concern. I imagine that it is a concern for her officials as much as it is for us, and, certainly, our legal advisers, who must be almost overwhelmed with instruments at the moment. We can highlight the issue in our legacy paper, which we will discuss shortly.

Annual Report

10:58

The Deputy Convener: Item 5 is discussion of our draft annual report. Members will be aware that such reports follow a specific format. Are members content with it?

Members *indicated agreement.*

The Deputy Convener: It is very matter-of-fact, but that is fine. We can sign it off now; we do not have to bring it back next week.

Legacy Paper

11:00

The Deputy Convener: I suggest that we go through our draft legacy paper page by page, but before we do that, do members have general comments about it? Has anything been missed out, for example?

Members: No.

The Deputy Convener: I invite comments on the introduction, the section on our inquiry into the regulatory framework in Scotland and the section on bills, which starts at paragraph 4.

Mr Maxwell: It is a shame that three years' work on our inquiry into the regulatory framework in Scotland has been reduced to two paragraphs. I hope that a future committee will consider our report seriously, because it would be a shame if it was left to gather dust. We made useful comments about possible solutions to problems with parliamentary procedures. I am not suggesting that we amend the legacy paper, but it is worth stressing the importance of our report. I strongly recommend that members of our successor committee after the election take the time to consider it.

The Deputy Convener: I agree. Given the amount of time and work we put into our inquiry and the importance of reforming and improving the regulatory framework, our efforts should not be wasted, even if our successor committee does not follow our recommendations. We wrestled with the issue and mapped out a number of possible approaches, as well as a very specific way forward.

The clerks have used relatively neutral language in paragraphs 2 and 3, but I suggest that we beef those remarks up by highlighting the importance of our inquiry in a way that reflects the tone of Stewart Maxwell's comments. We can consider a new draft at our meeting next week, if members are content to do that.

Mr Maxwell: I am happy with that.

The Deputy Convener: Do members have comments on paragraphs 4 to 8, on bills, or paragraph 9, on instruments?

Murray Tosh: We note that there were a number of bills to which the committee lodged amendments or to which the Executive lodged amendments in response to our comments. It might be appropriate to add that we have had a reasonably good dialogue with the Executive recently and that ministers have lodged amendments when we have pressed for them, particularly in the context of our concerns about the use of the negative resolution procedure.

I do not want to induce complacency in our successor committee, but we could give a steer about the improved understanding that there is between Executive officials and the committee. The group of officials who most recently attended a committee meeting were particularly responsive to our comments, which perhaps demonstrates that the Executive is more comfortable with the committee's angle on matters. Of course, the improved way of working might also be to do with the expert legal work that goes into our submissions.

The Deputy Convener: Indeed. You make a fair point. We say in paragraph 4:

"The Committee successfully pressed for amendments to a number of bills over the session",

and in paragraph 5:

"There are many examples of the Committee's success in this area",

but perhaps we could expand a little on that.

Murray Tosh: The phrase "the Committee's success" gives the impression that we made a point and the Executive gave way, but the approach has been more constructive. There has been improved understanding on the part of many Executive bill teams.

The Deputy Convener: We occasionally comment that there have been only one or two attempts to annul a piece of subordinate legislation, none of which has been successful—the same situation applies at Westminster. It would be fair to highlight how we work with the Executive and what we regard as our successes. Often, the committee expresses concern and the Executive accepts our point, but no one outside the committee is any the wiser about what has happened, so it is worth drawing the Parliament's attention to the constructive relationship that exists, so that our successor committee can build on that, rather than start afresh.

Murray Tosh: We should nod in the direction of Executive officials and ministers, who are perhaps more used to reading comments in the *Official Report* that are critical and express frustration. When things work well, we should acknowledge that.

The Deputy Convener: That is right. People go to see their MSPs only when they have a problem, but we do not assume that everyone has a problem; our relationship with the Executive is similar. Are the clerks happy to redraft the paper to reflect members' comments?

Ruth Cooper (Clerk): Yes. Would members also like the paper to mention our evidence-taking sessions with Executive officials after a bill has been amended at stage 2, which seem to be a component of the constructive relationship that Murray Tosh talked about?

Mr Maxwell: In that context, in paragraph 8, we express concern about

“the short time between the completion of stage 2 and the stage 3 debate”.

We should explain that we often have either to accept what the Executive says or to lodge a manuscript amendment. Timetabling needs to be addressed. The recent approach in which Executive officials have attended committee meetings to explain issues has been helpful, but we should expand paragraph 8 a little to set out the problem.

The Deputy Convener: We could include that point in paragraph 8, but Murray Tosh's comments were not limited to that issue.

Murray Tosh: Stewart Maxwell's suggestion is good, but we should also say that our handling of such issues has improved. Perhaps we should have started inviting officials earlier in this session of the Parliament; their evidence has benefited us recently.

Mr Maxwell: We recently discussed the production of supplementary delegated powers memorandums after stage 2. Sometimes no memorandum is produced or changes are incorporated into the previous memorandum, which can make it difficult to ascertain where changes have been made. We might comment on that. When we discussed the matter, we thought that changes should be highlighted.

The Deputy Convener: I remember that we considered a memorandum that had been circulated internally, in which changes had not been highlighted. I think that the Executive accepts the need to highlight changes, but perhaps it is worth emphasising the importance of doing so.

Murray Tosh made a good point. In the first session of the Parliament, Executive officials came to every meeting of the Subordinate Legislation Committee, which was unnecessary. We have got closer to striking the right balance, in that we occasionally invite officials to give evidence, which can be helpful and saves correspondence. We could recommend that our successor committee try to strike a balance by not inviting officials to every meeting but taking advantage of the ability to invite officials, particularly after a bill has been amended at stage 2.

Are members content with page 2?

Murray Tosh: There might be a continuity problem in paragraph 10, which ends with a dash.

The Deputy Convener: The dash is followed by subheadings—

Murray Tosh: Oh, I see. It is not obvious that the dash introduces the italicised subheadings on the next page.

The Deputy Convener: Perhaps we should add a colon, or something.

Do members have any points on page 3?

Euan Robson (Roxburgh and Berwickshire) (LD): Paragraph 16 suggests that legislation should be consolidated

“where principal regulations are amended on 5 occasions”.

I understand the point, but do we need to be so specific? Legislation might need to be consolidated after four or six amendments of the principal regulations. Indeed, on some occasions, it might be appropriate to amend the principal regulations five, six or even seven times without the need for consolidation. I simply wonder whether we need to be tied to a specific reference to “5 occasions”.

The Deputy Convener: I do not know why that particular trigger was chosen, although it is, of course, important to have a trigger point. Last week, we dealt with a case in which the principal regulations had been amended nine times. However, the amendments, all of which were very minor, simply took account of inflation and did not change the legislation's substantive meaning.

The point is that if the principal regulations are amended on five—or even six or seven—occasions, we at least consider whether there should be consolidation. Of course, we do not have to recommend that consolidation take place.

Mr Maxwell: It could be the wording of the paragraph, which says:

“where principal regulations are amended on 5 occasions, they should be consolidated.”

That makes it sound like we are drawing a line in the sand. That is not the case; we have always accepted that in some cases, one or two amendments might trigger the need for consolidation and that, in others, 10 amendments might be made without any particular problem. The reference to “5 occasions” simply sets out a general rule of thumb for the point at which the committee should consider the need for consolidation. Perhaps the sentence does not really make it clear that we deal with these matters on a case-by-case basis.

The Deputy Convener: The clerk has suggested that “they should be consolidated” be changed to “they should be considered for consolidation”. Members make a fair point that the current wording might be overly strong.

Mr Maxwell: Although it is implied, paragraph 11 does not explicitly set out our view that the committee should produce what might be described as an annual report card on what the Executive has or has not done with our comments and recommendations and what work is outstanding.

The Deputy Convener: Yes, perhaps. It might be better to change the heading of that paragraph to "Tracking reports".

Mr Maxwell: That was more the idea. The report was supposed to show whether the Executive had responded to our points.

The Deputy Convener: The annual report, which we have just considered, is based on a formal template.

Mr Maxwell: That is a different thing.

The Deputy Convener: We are talking about producing a very specific iterative document that allows people to follow whether the Executive has implemented our recommendations. Perhaps we should reword paragraph 11 to bring that point out and to make it clear that it would be in addition to our annual report.

Mr Maxwell: Yes.

The Deputy Convener: Paragraph 12, on "Reports to lead Committees", deals with our relationship with other committees. I think it was Euan Robson who not so long ago pointed out that there might be an issue with the language we use. I believe that the phraseology is laid down in standing orders—I can see Ruth Cooper thumbing through that very document even as I speak. For example, we use terms such as "defective drafting" that colleagues who have never been members of the Subordinate Legislation Committee might find difficult to understand. Moreover, despite the imperative in the Parliament to use English at all times, the committee uses a fair amount of Latin. I am in two minds about that, because it is an educated language.

Mr Maxwell: I am not quite sure what you mean by that.

The Deputy Convener: Do we not use Latin terms a fair bit?

Murray Tosh: But surely the Latin terms that we use have become loan words or phrases, and are therefore perfectly acceptable—quod erat demonstrandum.

Mr Maxwell: Apart from that phrase. I have absolutely no idea what it means.

The Deputy Convener: Point well made, Murray. However, I feel that the committee's language is open to misinterpretation by other committees. In particular, there is a tendency for lead committees to look at our reports and not understand whether we have serious concerns about an instrument or bill, or whether we are raising important matters that nevertheless do not affect an instrument's validity or do not negate the fact that it is ultimately up to the Executive to justify it.

I have been a member of a lead committee that has not been able to deduce from the language used the importance that the Subordinate Legislation Committee has placed on a particular item. Perhaps we should look at the matter again, either by reviewing the language set out in standing orders or by providing a guide.

11:15

Mr Maxwell: I agree that we should look at the language set out in standing orders. However, if we did not have a standard set of criteria or expressions, the wording of our reports would be all over the place and committees might find it more difficult to appreciate our exact point. Of course, the problem might lie less in the language that we use than in our failure to provide proper and exact explanations of the phrases as set out in standing orders.

Murray Tosh: But we already cover that. Our reports already draw attention to defective drafting and, with regard to the more minor cases, say that they do not affect the validity of the instrument. We could abbreviate that to a reference to "technically defective drafting" to signal instances that are not so serious. However, it is not the case that we are not doing that already. If we did not make such a qualification, we might well be suggesting that the defective drafting in question was more serious than it actually was.

The Deputy Convener: The issue is tricky, because it goes to the heart of what we do.

Murray Tosh: Perhaps it is up to the committee clerks to understand what we mean when we say that something is defective, or that it is defective but does not affect an instrument's validity. There is a distinction to be made in that respect.

The Deputy Convener: That is correct, but I think that the committee clerks understand the issue. When the matter has been raised before, the clerks have had no difficulty making it clear that a particular point is not so important or that the committee is quite concerned about it.

That said, we have an odd relationship with lead committees—particularly, for example, those considering bills. Although all our reports go to them, they do not so much dismiss our comments or reduce our concerns to minor points as marginalise what we have to say. They do not necessarily take on board our serious points or acknowledge the range of our concerns.

I think that there is room to improve our relationship with lead committees. I am not quite sure how we might do that, but I think that a lot of it has to do with the language. We have all served on lead committees. Of course, our attitude to the Subordinate Legislation Committee's reports might be different because we serve on the committee,

but in practice other members tend not to look at them.

Or am I wrong?

Mr Maxwell: I think that you make a valid point, but I am not quite sure what to do about it. At the end of the day, members have a responsibility to read and pay proper attention to the reports that are put before them. I am not sure that we can force them to do that.

Perhaps more members should spend time on the Subordinate Legislation Committee to understand the purpose of subordinate legislation and its impact on the overall legislative framework. After all, you are right to suggest that many members who have never served on the committee lack an understanding of subordinate legislation—although that is not necessarily their fault.

The Deputy Convener: Indeed. It is something to do with language.

We all trust colleagues on other committees to do their job and they trust us to get on with our job with regard to subordinate legislation. That is fine, but when I read reports from other committees, I see a communication gap between the Subordinate Legislation Committee and other committees that simply does not exist when the other committees communicate with each other. As I say, it is to do with the inaccessible language we use.

Murray Tosh: Perhaps you would like to draft a paragraph for inclusion in our report. We could consider it next week.

The Deputy Convener: It is a legacy paper, so I will ask my colleagues in the future Subordinate Legislation Committee to draft that paragraph, effectively.

Murray Tosh: But you will have to express the thought for members of that committee to be able to do that.

The Deputy Convener: My thought is that some of the terminology that we use, for example “defective drafting”, is relatively inaccessible. Members on other committees might have to refer to other documents to work out exactly what such terms mean.

Her Majesty’s Inspectorate of Education has now improved its reporting on schools. HMIE provides a wee guide at the back of its reports now, which provides explanations about the ratings of “excellent”, “very good”, “satisfactory”, “fair”, “unsatisfactory” and so on. It is like a traffic light system. We need either to include a little guide with every report we issue, to explain what our recommendations mean on the scale of things, or to use some form of traffic light system, to indicate how important things are.

Murray Tosh: I do not think that you need to identify the solutions. You could just express your concerns and the future committee could consider them.

The Deputy Convener: That is enough on that point. We could perhaps refer to the use of language and terminology. A change to standing orders might be required, which would be quite complicated, but we need something to address the relationship between this committee and lead committees.

There are no further points on page 3 of our draft paper—on forward planning or consolidation—so let us turn to page 4.

Euan Robson: I have a point to raise about that poor girl, IRIS, who we are shoving around all over the place. Paragraph 18 states:

“The Committee recommended that the Executive should relocate its Improving Regulation in Scotland Unit”.

From where to where: Glasgow to Edinburgh, or one department to another? We might need to specify for the reader who does not know the background where IRIS is off to.

Murray Tosh: I think it is the Borders, Euan.

Euan Robson: If that is agreed, I am happy to find a building for the unit.

The Deputy Convener: That is a fair point. Originally, we recommended that the unit be relocated in the First Minister’s office—we thought that it should be relocated somewhere where it could have greater influence. We are talking about a departmental reorganisation, not necessarily a physical one.

Euan Robson: Somebody reading that paragraph cold might not know what we are trying to say.

The Deputy Convener: So we should put something like, “that the Executive should relocate its improving regulation in Scotland unit (IRIS) within its departments, in order to have a greater impact on other departments”.

Murray Tosh: The middle sentence in paragraph 18 also needs to be adjusted. It is clear to us that we mean that IRIS should have an enhanced role but, as it is written, the sentence suggests that the committee should have an enhanced role.

The Deputy Convener: That is about the use of “it”.

Murray Tosh: Yes. We should replace the pronoun with “IRIS”.

The Deputy Convener: There are no other points on page 4, so we come to page 5, on combined powers. Ruth Cooper has pointed out to me that we are currently just mentioning the

combination of negative and affirmative powers. The Executive says in its letter that it does not wish to combine negative and affirmative powers, but it thinks it is okay to combine the negative procedure and no procedure. We have concerns about that. Today's legal brief was particularly good on that point. We would not want to attach the whole of the legal brief to paragraph 26 of our report.

I am sorry—I see that the paper does in fact mention the combination of negative procedure and no procedure:

"However, where the Executive combined negative procedure with no procedure the situation was different."

Perhaps we could expand paragraph 26, not to the extent that is covered in today's legal brief, but making the points that the JCSI at Westminster has raised the matter and that the United Kingdom Government accepts that the types of procedure should not be mixed. We should say that, although there are practical situations where such a practice might be advantageous for the users of instruments, that creates difficulties—in parliamentary terms and for various other reasons—for users in the end. We should express our outstanding concerns.

Murray Tosh: The last sentence of paragraph 26 is clear to us, but it would be better if it started, "The Executive's views".

There is also a pronoun problem in paragraph 24. This is not just pedantry—the wording makes us wonder what exactly is meant. I think that "they" refers not to the SLC, but to lead committees. The meaning would be stronger if the wording read "lead committees could take these into account".

The Deputy Convener: Is that a recommendation that clarity could be clearer? It is a point of clarity, at any rate.

No points arise on financial transparency or on European issues, on page 6.

Murray Tosh: Subject to a pronoun check.

The Deputy Convener: I like the way the report ends on the happy note of away days. It makes it sound as if it is fun, fun, fun on the Subordinate Legislation Committee.

Mr Maxwell: On a serious note, it was very useful for the original committee members to have a day being briefed and having things explained to them at the start of session 2. The language the committee uses can be difficult to get into. The day was helpful.

The Deputy Convener: We will return with the paper next week, having incorporated those recommendations.

I close the meeting and thank members for their attendance.

Meeting closed at 11:26.

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