



SUBORDINATE LEGISLATION COMMITTEE

AGENDA

11th Meeting, 2007 (Session 2)

Tuesday 20 March 2007

The Committee will meet at 10.30am in Committee Room 4.

1. **Executive responses:** The Committee will consider Executive responses in relation to the following—

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

the Charities Accounts (Scotland) Amendment Regulations 2007, **(SSI 2007/136)**

the Tuberculosis (Scotland) Order 2007, **(SSI 2007/147)**

the Education Authority Bursaries (Scotland) Regulations 2007, **(SSI 2007/149)**

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

the Graduate Endowment (Scotland) Regulations 2007, **(SSI 2007/155)**

the Education Maintenance Allowances (Scotland) Regulations 2007, **(SSI 2007/156)**

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

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

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

the Radioactive Contaminated Land (Scotland) Regulations 2007, **(SSI 2007/179)**

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

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

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

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

the Charities Reorganisation (Scotland) Regulations 2007, **(SSI 2007/204)**

the Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2007, **(SSI 2007/215)**.

2. Instruments subject to annulment: The Committee will consider the following—

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

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

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

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

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

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

the Police Pensions (Scotland) Regulations 2007, **(SSI 2007/201)**

the Business Improvement Districts (Scotland) Regulations 2007, **(SSI 2007/202)**

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

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

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

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

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

the 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)**

the Bankruptcy Fees (Scotland) Amendment Regulations 2007, **(SSI 2007/220)**

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

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

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

the Seed (Scotland) (Amendments for Tests and Trials etc.) Regulations 2007, **(SSI 2007/224)**

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

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

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

3. **Instruments not laid before the Parliament:** The Committee will consider the following—

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)**

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

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

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

4. **Executive correspondence:** The Committee will consider a response from Margaret Curran MSP, Minister for Parliamentary Business, regarding the number of SSIs laid before dissolution.

5. **Committee Annual Report 2006-2007:** The Committee will consider a draft Annual Report.

6. **Legacy Paper:** The Committee will consider a draft Legacy Paper.

Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212

The following papers are relevant to this meeting:

Agenda Items 1 – 3

Legal brief (Private)

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Agenda Item 1

Executive responses

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Agenda Items 2 - 3

Copies of instruments (circulated to Members only)

Agenda Item 4

Executive correspondence

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Agenda Item 5

Draft Annual Report

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Agenda Item 6

Draft Legacy Paper

[SL/S2/07/11/5](#)

SUBORDINATE LEGISLATION COMMITTEE

11th Meeting, 2007 (Session 2)

Tuesday 20 March 2007

Executive Responses

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

1. On 13 March 2007 the Committee asked the Executive for an explanation of the following matters -

“(a) why article 2 has a paragraph (1) when there are no subsequent paragraphs in that article;

(b) whether it is satisfied with the transitional provisions that have been put in place in article 17, given (1) that existing governors will become members of the newly established Court for the remainder of their term of office and (2) that there shall not be more than 24 members of the new Court in total including members appointed or elected under article 4;

(c) whether the reference to “any governors in office” in article 17(1) includes staff governors appointed under article 4(1)(c) of the Queen Margaret College, Edinburgh (Scotland) Order of Council 1994 Order;

(d) to explain the purpose and meaning of the words “for a term to be approved by the Court” in article 6(9), given that article 6(1) provides that a member’s term of office shall be for a 3 year term, and

(e) to clarify what is meant by “in the opinion of the Court” in article 6(7)(c) and (g) and in particular how it will be formed or constituted and recorded.”

The Scottish Executive responds as follows, adopting the Committee’s numbering:

(a) We thank the Committee for drawing this typographical anomaly to our attention and note that it has no legal effect on the Order;

(b) We are satisfied with the policy as contained in the transitional provisions of article 17 of the Order, under explanation that the number of existing governors does not exceed the new maximum permitted number set by the Order;

(c) The reference to “any governors in office” includes staff governors under explanation that the terms of article 6(1) and (3) of the Queen Margaret College, Edinburgh (Scotland) Order of Council 1994 Order create a clear legal intention that staff governors referred to in article 4(1)(c) thereof are to be regarded as part of the corpus of governors;

(d) The reference to “Subject to” should be a reference to “Notwithstanding” and is a typographical error, for which we are grateful to the Committee for bringing to our attention. As article 6(9) stands, it has no legal effect and is of no purpose if the words “Subject to” are given their normal meaning. In order to correct this typographical error, we propose to submit a correction slip to replace the words with the word “Notwithstanding” which will merely have the effect of giving the provision the effect which it was intended to have; and

(e) It will be for the Court to formulate its own opinion on the matter of capacity and behaviour in particular cases, having regard to the breadth of possible capacity and behavioural issues that may arise.

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

2. On 13th March 2007, the Committee asked the Executive to explain why, in accordance with normal drafting practice, no Executive Note has been provided with these Regulations.

The Scottish Executive responds as follows:

3. An Executive Note was produced for these Regulations but unfortunately, on this occasion, it was not sent to the Committee when the Regulations were laid. We apologise for this oversight and attach a copy of the Executive Note for the Committee’s information.

EXECUTIVE NOTE

The Charities Accounts (Scotland) Amendment Regulations 2007 (S.S.I. 2007/136)

4. The above Regulations were made in exercise of the powers conferred by section 44(4) and (5) of the Charities and Trustee Investment (Scotland) Act 2005 (“the Act”). The regulations are subject to negative resolution procedure.

Policy Objectives

5. The purpose of the Regulations is to make further provision to extend the category of those eligible to undertake an audit or independent examination of a charity’s accounts to include those appointed by the Accounts Commission for Scotland. Under the Local Government (Scotland) Act 1973, auditors of local authority accounts, including those of charities, are appointed by the Accounts Commission for Scotland and this amendment seeks to remove any potential need for two separate auditors to be engaged to audit the same accounts under the different regimes. These Amendment Regulations insert additional references in Regulations 1(2), 10(2) and 11(2) of the Charities Accounts (Scotland) Regulations 2006, to include auditors appointed by the Accounts Commission for Scotland among those eligible to audit or independently examine charity accounts

Consultation

6. These Amendment Regulations have been drafted following consultation with the Office of the Scottish Charity Regulator and Audit Scotland.

Financial Effects

7. The Regulations are deregulatory as they should remove the potential for two separate audits of local authority charities to be undertaken by different auditors under different statutory regimes.

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

8. On 13 March 2007 the Subordinate Legislation Committee, having considered the above instrument raised the following points:-

Parliamentary procedures

9. The Committee asked the Executive to explain -

(a) why it has used a combination of enabling powers subject to different procedures, namely negative procedure and no Parliamentary procedure;

(b) whether the Executive is convinced that what is gained by mixing procedures outweighs the potential legal and practical complications; and

(c) why there has been what the Committee considers to be a recent trend to combine powers that are subject to different procedures and whether there has been a change in policy so that more powers and procedures will, in future, be combined in single instruments.

Terminology

10. The Committee also asked the Executive -

(a) to explain whether the term “inspector” used in articles 21, 24 and 25 is to be construed differently from the term “veterinary inspector” which appears to be the term used through the rest of the Order; and

(b) to clarify if there is a difference between a person “who has possession of or is in charge of” an animal within the meaning of articles 4 and 5 of the Order and a “keeper” of an animal, which is a term used throughout the rest of the Order.

The Scottish Executive responds as follows:

Parliamentary procedures

11. With reference to paragraph 1(a) above the Executive refers to its letter sent on 22 February 2007 in response to the Committee’s earlier letters of 14 and 20 February.

That response contains the Executive's views which are, in summary, that combining powers should be generally avoided but that there will be some cases in which it is appropriate to do this, in particular in the interests of the ultimate users of the legislation.

12. Legislative provision for control of bovine tuberculosis is currently contained in the Tuberculosis (Scotland) Order 2005 and provision for compensation for animals slaughtered because of bovine tuberculosis is contained in the Brucellosis and Tuberculosis (Scotland) Order 1978. As both the control measures and the compensation provisions required amendment it was decided that it would be more user friendly to have the control and the related compensation provisions in the same instrument.

13. With reference to paragraph 1(b) the Executive refers to paragraph 5 of its response of 22 February. When balancing the benefits to the user against the potential consequences of a successful motion to annul the Executive is of the view that in this case the benefit of accessibility outweighed the risk that there would be a successful motion to annul and the whole instrument would fall.

14. With reference to paragraph 1(c) the Executive advises that there has been no change in policy on the question of mixing procedures. The Executive notes that the Committee believes this to be a recent trend, which has appeared since 2003. However, there are a number of examples of instruments laid before that time which mixed procedures. On the same subject matter as the above Order, the Tuberculosis (Deer) Notice of Intended Slaughter and Compensation Order 1989 combined control and compensation provisions which were subject to a mixture of negative procedure and no procedure. The Importation of Embryos, Ova and Semen (Amendment) Order 1984 also mixed no procedure with negative procedure, as did the Brucellosis and Tuberculosis Compensation (Scotland) Amendment Order 1996 and the Sheep and Goats Spongiform Encephalopathy (Compensation) Amendment (Scotland) Order 2001.

15. The Executive does not consider that there is a new trend for mixing procedures. Each decision to mix procedures is based on a particular set of circumstances pertaining to a particular case. Any increase in mixed instruments in recent weeks would appear to be the result of a natural variation in the number of situations where mixing procedures is seen as justified.

Terminology

16. With reference to paragraph 2(a), the definitions of "inspector" and "veterinary inspector" for the purpose of the above Order are found in section 89 of the Animal Health Act 1981. They are to the effect that an "inspector" is a person appointed to be an inspector for the purposes of the Act by the Scottish Ministers or by a local authority and a "veterinary inspector" is a veterinary inspector appointed by the Scottish Ministers. Only qualified veterinary surgeons are appointed as "veterinary inspectors" and all references to "veterinary inspectors" relate to matters which should only be dealt with by a qualified veterinary surgeon. Facilitation of examination, testing and valuation and the issuing of licences are administrative matters and can be dealt with by inspectors who are not qualified veterinary surgeons.

17. With reference to paragraph 2(b), a keeper of an animal is the person with responsibility for the day to day wellbeing of the animal. The obligation to notify Scottish Ministers that an animal or carcase is affected with or suspected of being affected with tuberculosis applies to a wider range of people in order to ensure that any person who has possession or is in charge of an animal makes notification. Once notification has taken place all subsequent obligations lie with the person who has principal responsibility for the animal, ie the keeper.

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

18. On 13 March 2007 the Committee asked the Executive–

“to explain why the terms “EEA agreement” and “EEA State” are not expressly defined, given that they were defined in SI 2995/1739.”

The Scottish Executive responds as follows:

19. The Executive thanks the Committee for these comments on the Orders.

20. The Executive confirms that definitions for “EEA agreement” and “EEA state” were inserted into the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 by the Legislative and Regulatory Reform Act 2006 which came into force on 8th January 2007. Therefore, the definitions in SI 1995/1739 were not replicated.

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

21. On 13 March 2007 the Committee commented as follows –

“The Committee notes that in Schedule 1, paragraph 11, the word “or” is used between sub-paragraphs (a) and (b). This has the effect of making sub-paragraph (a) a stand alone criterion, unqualified by the provisions in sub-paragraph (b). The result is that an excepted student (entitled to the same level of tuition fees as UK residents) is any student who has not been ordinarily resident in the UK throughout the 3 year period before the start of the course of education. This error was pointed out to the Executive by the Committee when the 1997 Regulations were amended in 2006 (by SSI 2006/323).

The Executive's response drew the Committee's attention to the qualification, which appears to be part of paragraph 11(b), on line 3 of that sub-paragraph, beginning “by reason only that that person...”. It stated that the qualification was intended to apply to both paragraphs 11(a) and 11(b) and therefore should be on a separate line below paragraph 11(b). The Executive intended to correct this error by means of a correction slip. It appears that no such correction was made.

The Committee asks the Executive if it intends to correct the error contained in paragraph 11 of Schedule 1, given its response to the Committee in relation to SSI 2006/323”

The Scottish Executive responds as follows:

22. The Executive thanks the Committee for these comments on the Regulations.
23. The Executive confirms that a correction slip was instructed on 4th September 2006 in relation to SSI 2006/323. Unfortunately no correction has been carried out by the Office of Public Sector Information and given the time which has elapsed it would appear that this correction slip has been missed.
24. It is regrettable that the same error was made in the consolidation of the Regulations. The Executive intends to correct the error in paragraph 11 of Schedule 2 to the Regulations by means of a correction slip and shall ensure that the correction is carried out prior to 1st August 2007 when the Regulations are due to come into force.

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

25. On 13 March 2007 the Committee asked the Executive to explain –
- “(a) why the definition of “European Economic Area” used in this instrument differs to that used in SSIs 2007/149/151/152/153;
- (b) how the requirement that a UK national insurance number be included in a completed application sits alongside the exception to the requirement that a UK national insurance number be provided if requested, granted in regulation 9(5); and
- (c) whether it is content that the cross references contained in paragraph 2(4)(b) of Schedule 2 are correct”

The Scottish Executive responds as follows:

26. The Executive thanks the Committee for these comments on the Regulations.
27. The Executive confirms that during the consolidation process steps were taken to make minor amendments and clarifications where necessary in the Regulations. Notwithstanding the fact that the definition of “European Economic Area” differs from that used in other regulations relating to student support, it was not considered necessary to make changes purely for the reason of achieving consistency with other regulations.
28. The Executive confirms that the requirement that a UK national insurance number be included in a completed application form is not an absolute requirement. The Executive advises that the policy intends that, in the vast majority of cases, no loan is to be given to an applicant who does not have a UK national insurance number. However, it is also recognised that the Scottish Ministers may wish to exercise their discretion in

exceptional circumstances. Where the Scottish Ministers choose to use their discretion under regulation 9(5), the student will not be required to provide their UK national insurance number to the Scottish Ministers. Therefore, regulation 10(2) is qualified by the words “as the Scottish Ministers may require”.

29. The Executive is content that the cross-references contained in paragraph 2(4)(b) of Schedule 2 are correct. In relation to paragraph 2(4)(b), the Executive confirms that prior to consolidation, the cross references were to paragraphs 1 or 9 of Schedule 1. After consideration the Executive took the view that these cross references were incorrect and that the correct cross references ought to have been to paragraphs 2 or 8 of Schedule 1.

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

30. On 13 March 2007 the Committee asked the Executive –

“to explain why the definition of “employed” given in regulation 2, differs from the definition of “employment” used in SSIs 2007/149/151/152 and 153”

The Scottish Executive responds as follows:

31. The Executive thanks the Committee for this comment on the Regulations.

32. The Executive confirms that “employed” was defined rather than “employment” as “employment” is not a term which appears in the Regulations save for in the definition of “employed”. Other regulations refer to both “employment” and “employed” depending on the context.

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

33. On 13 March 2007 the Committee asked the Executive –

“to clarify whether new Regulation 11(2) of the Repayment Regulations (Regulation 6 of this instrument) subdelegates to Scottish Ministers powers to specify and require information, and if so, the justification for doing so”

The Scottish Executive responds as follows:

34. The Executive thanks the Committee for this comment on the Regulations.

35. The Executive confirms that new regulation 11(2) does not subdelegate to the Scottish Ministers powers to specify and require information. The Scottish Ministers have powers under section 74(1) of the Education (Scotland) Act 1980 to make payments made to persons subject to requirements and section 73B of that Act sets out the requirements in full. Section 73B(3) enables the Scottish Ministers to make such provision as is “necessary or expedient in connection with the recovery of amounts due

from borrowers” including, in terms of section 73B(3)(c)(i), requirements with respect to the provision of information relating to their income.

36. New Regulation 11(2) does not subdelegate powers to the Scottish Ministers but simply allows them to specify a reasonable period of time in which the borrower must respond to such requirement for the provision of such information relating to their income.

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

37. On 13th March 2007 the Committee asked the Executive for an explanation of the following matter:

“The Committee asks the Executive why it has not amended the definition of “disabled person” in regulation 2(1) of the principal Regulations, given the amendment to Regulation 4 of those Regulations by regulation 5(2) of the current amending Regulations to include persons below the age of 2 years.”

The Scottish Executive responds as follows:

38. The Executive thanks the Committee for bringing this error to our attention. The definition of “disabled person” in regulation 2(1) of the principal Regulations should have been amended in consequence of the prescribed descriptions in regulation 4 being amended to make certain categories of disabled persons under 2 years old eligible for a disabled person’s badge. Whilst we acknowledge this missed consequential amendment we are of the view that the intention behind new regulation 4(1) is sufficiently clear to the reader. However, we note the error and will correct it at the next available opportunity.

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

39. In its letter of 13 March 2007, the Committee commented as follows-

“The Committee notes that this will be the 21st amendment of the 1994 Regulations and asks the Executive whether it has any plans to consolidate the principal Regulations”.

The Scottish Executive responds as follows:

40. The Executive is conscious that the Waste Management Licensing Regulations 1994 have been frequently amended, and fully intends to consolidate them at an appropriate time. Last year, we moved to codify the important provisions of Schedule 3 to the 1994 Regulations. This is the one of the most frequently used parts of the Regulations and its “consolidation” now makes it a much simpler instrument both for regulators and for industry to use. A review of the Waste Framework Directive (2006/12/EC) is currently underway. Once agreement has been reached on the revised

Directive, the Department will take that opportunity to consider the option of fuller consolidation of the law in this area.

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

41. In its letter of 13th March 2007 in relation to this instrument the Committee commented as follows –

“The Committee asks the Executive to explain the *vires* for regulation 17 as the power at section 78YC(b) of the Environmental Protection Act 1990 appears to allow only for the modification of “any other Act” rather than subordinate legislation.”

The Scottish Executive responds as follows:

42. The purpose of the Regulations is to modify Part IIA of the Environmental Protection Act 1990 (“the 1990 Act”) so that it has application to land contaminated by radioactivity. One of the central purposes of that modification is to ensure that such land may be designated as a “special site” in respect of which measures are taken at the hand of the Scottish Environment Protection Agency. Regulation 17 amends the Contaminated Land (Scotland) Regulations 2000 to add land contaminated by radioactivity to the list of types of land which can be so designated.

43. The power to prescribe land for that purpose is contained in section 78C of the 1990 Act and in particular section 78C(8). Regrettably, through oversight, reference to that section was left off the face of the preamble to the Regulations. However, that power was exercised for the making of regulation 17 and is considered by the Executive to be necessary in the circumstances for that purpose. The Executive considers that, whilst it would have been more transparent to refer directly to that power, the reference in the preamble to “any other powers enabling them in that behalf” is sufficient in the circumstances to justify its use.

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

44. On 13th March the Committee asked for an explanation of the following matter.

“The Committee asks the Executive to explain the purpose of the definition of “the 2004 Act” in regulation 2(1) which does not appear to be used in the instrument.”

The Scottish Executive responds as follows:

45. Thank you for raising this point.

46. The Executive acknowledges that the definition of “the 2004 Act” in regulation 2(1) is not used in the instrument. The definition became redundant during the evolution of the draft instrument since the full title of the 2004 Act is used in the instrument where it

occurs, but unfortunately the definition was not removed from regulation 2(1) when the draft was being finalised.

47. The inclusion of the definition does not affect the instrument itself but we will seek to remove it in the event of a future amendment to the instrument.

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

48. On 13 March 2007 the Committee asked the Scottish Executive for an explanation of the following matter-

"The Committee asks the Executive whether the reference in regulation 29, which introduces new Regulation E7A into the 2005 Regulations to para (5), should be a reference to para (6)."

The Scottish Executive responds as follows:

49. The Scottish Executive thanks the Committee for bringing this referencing error to its attention. As the Committee surmises, the cross-reference in the new Regulation E7A(5), inserted by regulation 29 of the Teachers' Superannuation (Scotland) Amendment Regulations 2007, to paragraph (5) should be a reference to paragraph (6). In our view, while the error is regrettable, the intention of E7A(5) as referring to paragraph (6) rather than itself is sufficiently clear to the reader particularly given that the paragraph refers to the retirement pension being "adjusted as specified" and the paragraph immediately following starts with "The adjustments are". We have, however, noted the error and will correct it at the next available opportunity.

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

50. The Scottish Executive thanks the Committee for their comments on 13 March. The Committee requested information on the following matters.

51. The Committee asks the Executive to explain:

(a) why, given its response to the Committee regarding SSI 2006/135, it has not taken this opportunity to amend the reference to "paragraph 11" in paragraph 11(1) of Schedule 1.

52. The reference to "paragraph 11" was amended by regulation 2(4) of the National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2006 (SSI 2006/329).

(b) whether the reference to "sub-paragraph (3)" in regulation 2(12)(a) is intended to be a reference to "paragraph (3)" or alternatively to "sub-paragraph (3)(a)".

53. The Executive can confirm that the reference is a reference to “paragraph (3)”. The Executive would suggest that it could not be read as “sub-paragraph (3)(a)” because regulation 2(12)(a) provides that the new wording is inserted “after “suspended”, *at both places where it occurs*” and “suspended” only occurs once in sub-paragraph 3(a). The Executive regrets this error and is grateful to the Committee for bringing this point to its attention. The Executive will undertake to amend this as a printing and minor point.

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

54. On 13th March 2007, the Committee asked the Executive to explain the *vires* for regulation 3 which, as drafted, covers only documents wholly in a language other than English, given the terms of the enabling power in section 15(2)(b) of the parent Act which refers to documents “wholly or mainly” in a language other than English.

The Scottish Executive responds as follows:

55. The Executive considers that regulation 3 is within *vires*, as it is considered that section 15(2)(b) of the parent Act allows the Regulations to make provision a) for documents wholly in a language other than English, b) for documents mainly in a language other than English, or c) for documents wholly or mainly in a language other than English. The policy in relation to regulation 3 is that where a document is wholly in a language other than English, the required information specified in regulation 2 may be in that other language. A document, therefore, which is mainly in a language other than English must include the information specified in regulation 2 in English.

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

56. On 13th March 2007, the Committee asked the Executive to explain whether it is intended that OSCR’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 might have sent such a notice but which arrives with OSCR after the latest date for receipt of objections.

The Scottish Executive responds as follows:

57. There is no obligation on OSCR to send a copy of its decision to a person who has failed to object timeously. However, we hope this is something OSCR will choose to do as a matter of practice and we will be raising this issue direct with OSCR.

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

58. Thank you for your letter of 13 March 2007 requesting further information on the above Order. You have asked the Executive to explain:

(a) the vires for inserting a new paragraph 25 in Schedule 1 to SI 1997/728 which prescribes a class of exempt dwelling;

(b) why section 72(5) of the Local Government Finance Act 1992 has been cited as an enabling power; and

(c) the meaning of “exclusive right to use” in newly inserted paragraph 25(3) of the principal Order, given that the exemption and its exception can apply to residences with more than one tenant or licensee. In particular, is this “exclusive” of non - residents only or exclusive of other residents too?

Thank you for drawing these points to our attention. We would respond as follows:

(a) The Executive considers that the vires for inserting the new paragraph 25 in Schedule 1 to The Council Tax (Exempt Dwellings) (Scotland) Order 1997 (SI 1997/728), which prescribes a class of exempt dwelling, is section 72(7) of the Local Government Finance Act 1992. That subsection is cited in the preamble to the instrument. The new paragraph 25 prescribes a class of exempt dwelling by reference to the fact that dwellings are occupied by persons of prescribed descriptions, and by reference to such other factors as the Scottish Ministers think fit, all in accordance with section 72(7).

(b) The Executive acknowledges that section 72(5) of the Local Government Finance Act 1992, which is also cited in the preamble, is not required to be cited as an enabling power for the instrument. This has arisen from following the style of a previous instrument where section 72(5) was a relevant enabling power, but inadvertently retaining this reference in this Order. The Executive acknowledges the point made by the Committee though it does not affect the validity of the instrument, and this citation in the preamble should be treated pro non scripto.

(c) The newly inserted paragraph 25(2)(c) of the 1997 Order prescribes, as a requirement for a dwelling to be exempt, the fact that it is one in respect of which every licensee, tenant and sub-tenant has the right to share the use of certain facilities, with at least one non-resident. The newly inserted paragraph 25(3) prescribes an exception to the exemption where every licensee, tenant or sub-tenant "also has the exclusive right to use" certain other facilities. The provision must be read in context and "exclusive" must be given its ordinary meaning. The Oxford English Dictionary contains the relevant meaning as: "of a monopoly or grant: excluding all other persons from the rights conferred". This means that no other person apart from the licensee, tenant or sub-tenant has the right to use the facility in question. By way of an example, every tenant in a dwelling may share the use of a kitchen with a non-resident (under paragraph 25(2)(c)), but every such tenant in the dwelling may also have an exclusive right to use separate "en suite" bathrooms in the dwelling (under paragraph 25(3)). Such a dwelling would not be exempt.



SCOTTISH EXECUTIVE

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13 March 2007

Thank you for your letter of 7 March in which you expressed concerns on behalf of the Subordinate Legislation Committee in relation to the number of SSIs expected to be laid before dissolution.

You will have seen my response to the separate letter on this subject from Trish Godman on behalf of the Conveners' Group. I can also reassure your committee members that I understand their concerns and the pressures which result from the current workload.

I think we all recognise that there is a certain inevitability about increased business in the lead up to recesses, and in particular in the final weeks before dissolution. Nonetheless, as I indicated when we met last week, I have asked my officials to look carefully at the Executive's subordinate legislation programme, with a view to identifying ways of avoiding excessive future demands on committees in the run up to parliamentary recesses. I can, for example, see obvious potential for improvements both in the planning and prioritisation of forward business and in the way in which our respective officials work together to ensure that committees have better advance warning of impending peaks and troughs in the volume of subordinate legislation.

I appreciate that none of this alleviates the immediate demands on your committee. But there are certainly some helpful pointers here which can be pursued in the next Parliament.

MARGARET CURRAN





Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

(a) any-

(i) subordinate legislation laid before the Parliament;

(ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Dr Sylvia Jackson (Convener)

Janis Hughes (from 28 November 2006)

Mr Adam Ingram

Gordon Jackson (until 23 November 2006)

Mr Kenneth Macintosh (Deputy Convener)

Mr Stewart Maxwell

Euan Robson (from 31 October 2006)

Mr Jamie Stone (from 23 February 2006 until 6 October 2006)

Murray Tosh

Committee Clerking Team:

Clerk to the Committee

Ruth Cooper

Senior Assistant Clerk

David McLaren

Assistant Clerk

Jake Thomas

Support Manager

Andrew Proudfoot



Subordinate Legislation Committee

X Report, 2007 (Session 2)

Annual Report 2006-07

The Committee reports to the Parliament as follows—

Introduction

1. This Report covers the work of the Subordinate Legislation Committee during the Parliamentary year from 7 May 2006 to 8 May 2007. The Committee has scrutinised a high number of bills and instruments again this year, reporting on technical issues to subject Committees and the Parliament.

Inquiries and Reports

2. The Committee completed its inquiry into the regulatory framework in Scotland, and published its final report on 24 February 2007. The Committee recommended the replacement of the current procedures for scrutinising subordinate legislation with a new system that the Committee developed, called the “Scottish Statutory Instrument Procedure”.

3. Over the reporting period and in addition to the publication of the final inquiry report, the Committee has published 35 statutory instrument reports, 14 on bills as amended at Stage 2, and a draft report on its inquiry into the regulatory framework in Scotland.

Bills

4. The Committee considers delegated powers provisions in Executive, Members’, Committee and Private bills. Over the reporting period, the Committee has considered 15 bills at Stage 1 and 14 bills as amended at Stage 2.

5. The Committee’s recommendations on these bills have led to a number of amendments to relevant provisions and through its scrutiny process the Committee continues to ensure that the correct balance between primary and secondary legislation is maintained.

Subordinate Legislation

6. The Committee works to tight timescales in its consideration of subordinate legislation, usually producing at least one report per week during periods when the Parliament is sitting. The Committee has considered and reported on XXX (currently 514) Scottish statutory instruments in the reporting period.

Meetings

7. The Committee met 34 times from 7 May 2006 to 8 May 2007. Of these meetings, none were entirely in private and 13 were partly in private. Of the 13 items in private, all were to consider a draft report.

8. All the meetings were held in Edinburgh.

SUBORDINATE LEGISLATION COMMITTEE

11th Meeting, 2007 (Session 2)

Tuesday 20 March 2007

Legacy Paper

Introduction

1. The Subordinate Legislation Committee has continued its scrutiny role this session in relation to an increased number of bills and instruments. This scrutiny, together with its comprehensive inquiry into the regulatory framework in Scotland, has led to its setting out the following key issues for its successor committee.

Inquiry into the Regulatory Framework in Scotland

2. The Committee undertook a three year inquiry into the Regulatory Framework in Scotland and examined the procedures for the making and scrutiny of subordinate legislation. Following extensive evidence taking and consultation, the Committee agreed that the best way forward was to reform the existing procedures and create a new streamlined process called the "Scottish Statutory Instrument Procedure". The Committee's report, which it published just before dissolution in February 2007¹, sets out all of the Committee's findings and the detail of its proposals for changing the current scrutiny system. The Committee heard evidence from the Executive at both phases of its inquiry and although progress was made in some areas of discussion, the Executive did not support the Committee's main proposal for reform.

3. At the time of publishing this legacy paper, the Committee expected a formal response from the Executive to its final inquiry report. A successor committee may wish to consider this response and how it might take forward the areas identified in the Committee's report, especially given that the transitional order² which governs the current procedures should be replaced.

Bills

4. The Committee strengthened its scrutiny role in relation to bills over the session, examining the balance struck between what was set out in each bill and what had been delegated to subordinate legislation. The Committee successfully pressed for amendments to a number of bills over the session where it did not consider that this balance was correct. Particular examples include areas where a definition or its amendment was delegated to subordinate legislation and where maximum penalties for offences were not included on the face of a bill.³

¹ <http://www.scottish.parliament.uk/business/committees/subleg/reports-07/sur07-14-00.htm>

² The Scotland Act 1998 (Transitional and Transitory Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096)

³ For example, the Aquaculture (Scotland) Bill and the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill

5. The Committee examined carefully powers to amend primary legislation by way of subordinate legislation (Henry VIII powers) and pressed successfully for amendment to the procedure that many of these powers are subject to. In the Committee's view a Henry VIII power should be subject to affirmative procedure, so that full Parliamentary approval of an instrument must be achieved for instruments that amend primary legislation. There are many examples of the Committee's success in this area.⁴ Where the Committee agreed to exceptions to this approach it was content that the powers to be exercised were narrow.

6. On more than one occasion the Committee lodged its own amendments successfully, for example in relation to the Planning (Scotland) Bill. It lodged amendments in relation to section 198(1) of the Bankruptcy (Scotland) Bill as it felt that, although it may not be necessary in every case, there should be an option for more substantial regulations made under this power to be subject to affirmative procedure. The Executive responded by lodging its own amendment, subject to "open" procedure as the Committee requested, but also subject to affirmative procedure for the first exercise of the power.

7. The use of "open" procedures has been discussed in the Committee's inquiry report and in evidence-taking from the Executive and this is an area, together with the acceptable balance of power between primary and secondary legislation, which a successor committee may wish to examine. The Committee considers that a post-legislative examination of a bill or bills passed during the first two sessions could also provide important information that would assist the Committee in its scrutiny role in relation to bills.

8. Finally, the Committee considers that its successor should examine how the Subordinate Legislation Committee scrutinises the powers in bills and interacts with and reports to lead Committees and the Parliament. The timescales that the Committee has to keep to in respect of this work are also important, particularly the short time between the completion of stage 2 and the stage 3 debate.

Instruments

9. The number of Scottish Statutory Instruments that the Committee has considered has increased each year since 1999. Given this increase in regulation and its impact on the wider community, the Committee considers that the Scottish Parliament's system of examining subordinate legislation should be as open and straightforward as possible. This was one of the considerations that led to the Committee's main inquiry recommendation to reform current scrutiny procedures.

10. The Committee's inquiry work, together with its weekly examination of instruments, has highlighted additional areas of priority, which the Committee brings to the attention of its successor—

⁴ Examples include the Licensing (Scotland) Bill and the Custodial Sentences and Weapons (Scotland) Bill

Ad hoc/Annual reports

11. The Committee realised from its scrutiny work and its examination of procedures at the Joint Committee on Statutory Instruments (JCSI) at Westminster that it would be useful to compile reports setting out concerns raised by the Committee and the Executive's response to points made. This is particularly true of those areas where the Executive has undertaken to make changes "at the next legislative opportunity". The Committee believes it is imperative to the work of the Committee that it should track progress on instruments and report on areas where the Executive has not addressed an issue when it has undertaken to do so. One such example is in relation to the Education (Fees and Awards)(Scotland) Regulations 2007 (SSI 2007/152) where an error in a schedule repeated a previous error that the Executive had undertaken to correct.

Reports to lead Committees

12. The Committee has learned through its experience of reporting on instruments that it can be difficult for lead Committees to scrutinise the technical points that the SLC raises. A successor committee may wish to examine how it might distinguish between important and more minor points for lead Committees and the terms used. The Committee is restricted to some degree in that it reports in terms of 10.3.1 of Standing Orders but, nevertheless, the Committee considers that improvement can be made in this area.

Forward Planning

13. The large volume of instruments laid by the Executive just before Parliamentary recesses has been the subject of correspondence between the Committee and the Executive on a number of occasions in session 2. The Committee believes strongly that the Executive should have a more co-ordinated approach to the laying of SSIs.

14. The Committee also heard in evidence from the lead Committees the importance of receiving advance notice of instruments to be laid. Without this notice the Committees find it difficult to plan and prioritise their workload in relation to SSIs. In particular, the Committee's attention was drawn to the system at the National Assembly for Wales, where considerable advance notice is given to committees in relation to instruments.

15. The Committee corresponded with the Minister for Parliamentary Business in relation to the high number of instruments laid shortly before dissolution. In this correspondence the Minister indicated that work would be undertaken by Executive officials to improve planning and prioritisation of future business. A successor Committee may wish to take forward the dialogue with the Executive.

Consolidation

16. The Committee is of the view that where principal regulations are amended on 5 occasions, they should be consolidated. In the course of Session 2, the Committee identified a number of instruments that were

amended on 5 occasions or more but where the Executive in its response indicated that it either had no plans for consolidation, or it offered to “consider doing so at an appropriate time in the future”.

17. The Committee recommends in its inquiry report that a Consolidation Working Group should be established to plan and bring forward proposals to the SLC for the consolidation of instruments. This proposal was raised by the Executive in evidence and it supports the Committee’s recommendation. A successor Committee can, should it consent in principle to this work being taken forward, agree the remit of this working group at the start of session 3. It may also be useful for a successor to examine whether there is a role for the Procedures Committee in examining this issue.

Improving Regulation in Scotland Unit

18. The Committee recommended that the Executive should relocate its Improving Regulation in Scotland Unit (IRIS), in order to enhance its profile and extend its focus beyond the business sector. The Committee also considered that it should have an enhanced role. The Committee’s successor may wish to take forward dialogue with the Executive in relation to the location and role of IRIS.

Executive Notes

19. Through inquiry discussions the Executive has agreed to work with the Committee on an agreed format for Executive Notes that accompany instruments. These notes are designed to set out the policy background to an instrument and can assist the public in understanding its purpose and content.

20. In its written evidence, the Queen’s Printer for Scotland suggested that the Parliament and the Executive might wish to refer to recently published guidance by Office of Public Sector Information (OPSI) on explanatory memoranda at Westminster, following consultation with the Joint Committee on Statutory Instruments and the House of Lords Merits Committee.

21. The Committee has recommended that a template for Executive notes is agreed between the Executive and the Committee and, given their importance for Parliamentary and public understanding of statutory instruments, a successor committee may wish to take this work forward in session 3.

Parallel consideration

22. The Committee noted during its inquiry considerations that moving towards parallel consideration by the SLC and subject Committees would allow for more time to be given to the consideration of statutory instruments and may to some degree ease some of the pressure on Committees.

23. The Committee initially considered the SLC being given a power to recommend annulment/disapproval of an instrument on technical grounds, which would enable the full separation of the role of the SLC and the lead Committees. However, the Committee considered that this power was not

necessary. It also felt that lead Committees should be able to take on board recommendations made by the SLC.

24. A compromise was reached in the Committee's report. The Committee considers that lead Committees should not be obliged to await the SLC's report but, in order to protect the SLC's ability to inform the lead committee of any serious issues in relation to an instrument, Standing Orders should provide that, under normal circumstances, lead committees should allow the SLC at least one consideration of an instrument. Should there be any comments or concerns expressed by the SLC at this point they could take these into account, and perhaps await the SLC report, before they complete their own consideration.

25. The Committee's successor may wish to examine with lead Committees how this should work in practice.

Combined powers

26. Towards the end of session two, the Committee considered instruments made by the Executive which contained powers which were subject to different procedures. Following correspondence from the Committee, the Executive separated into two instruments the Local Governance (Scotland) Act 2004 (Allowances and Expenses) Regulations 2007, (SSI 2007/draft), which originally combined negative and affirmative powers. However, where the Executive combined negative procedure with no procedure the situation was different. Although the Committee took the view that there could be considerable problems with the legal and practical effect of laying this type of instrument, should a motion to annul be lodged against it, the Executive considered that the increased accessibility of the legislation outweighed these problems. Its views on the level of difficulty this would pose also differed from that of the SLC.

27. In its correspondence to the Committee, the Executive itself mentioned the importance of examining this issue in the context of a Scottish Statutory Instruments Bill. The Committee believes strongly that its successor Committee should examine this issue at the earliest opportunity with the Executive and considers the impact combining powers such as these has on Parliamentary scrutiny.

Financial Transparency

28. The Finance Committee expressed some concern in relation to the scrutiny of the financial impact of subordinate legislation. Financial memoranda which accompany Bills can devolve scrutiny of costs onto subordinate legislation. There is currently no procedure that allows the Finance Committee to check whether the final costs are consistent with estimates given in the financial memoranda.

29. The Committee recommended in its inquiry report that there should be a procedure which would allow the Finance Committee the opportunity to scrutinise costs which are delegated to subordinate legislation. It specifically recommended that the Executive should notify the Finance Committee when

the relevant SSIs are to be laid. Its successor Committee may wish to forward discussions with the Finance Committee and the Executive to support such a procedure being put in place.

European issues

30. The Committee took forward some examination of its own role in the scrutiny of the implementation of European legislation. It submitted written evidence to the European Committee's reporter-led "Inquiry into the scrutiny of European legislation".⁵ It recommends that its successor Committee continues to work with the European and External Relations Committee towards improving scrutiny in this area.

Away Days

31. The Committee has an appreciation of the technical knowledge each member of the Subordinate Legislation Committee must have to conduct effective scrutiny of the bills and instruments that come before the Committee. There is an element of this information that is best absorbed whilst doing the job itself but there are key areas that should be detailed to members at the outset of the next session, especially if the Committee is to take forward work on scrutiny reform and a statutory instruments bill.

32. The Committee recommends that its successor holds an away day at the start of the session to cover the main areas of the Committee's scrutiny function, with an opportunity to undertake ad hoc briefings away from formal Committee meetings throughout the session. This Committee found this type of briefing particularly useful during session 2.

⁵ European and External Relations Committee, "Inquiry into the scrutiny of European legislation Report"