Executive Responses

- the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2004, (SSI 2004/281)
- the National Health Service (Transfer of Property between Health Boards) (Scotland) (No.2) Regulations 2004, (SSI 2004/285)
- the Environmental Protection (Restriction on Use of Lead Shot) (Scotland) Regulations, (SSI 2004/289)
- the National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004, (SSI 2004/292)
On 22\textsuperscript{nd} June 2004 the Committee asked the Executive for an explanation of the following matters –

“1. The Committee asks the Executive whether there is an established practice of writing to objectors in similar circumstances to this proposal.

2. The Committee asks the Executive to confirm that in this case no steps were taken to advise the previous objectors personally of the making of the new proposals.

3. The Committee asks the Executive how many objectors there were to the original proposal and to outline the substance of those objections.

4. The Committee asks the Executive whether any objections were received to the proposals provided for in the Order and if so what was the substance of those objections.

5. The Committee asks the Executive whether the original proposals were materially different from those provided for in the Order and whether they took into account the objections raised to the original proposal.

The Scottish Executive responds as follows:

First Question

1. There is no established practice of writing to objectors in similar circumstances. In considering proposals for a protection order the Executive's practice is to follow the procedure provided by statute.

Second Question

2. The Executive confirms that no steps were taken to advise objectors to the previous proposals personally of the making of the new proposals.

Third Question

3. The Executive received thirteen objections to the previous proposals. The Executive offers no comment in this letter as to the validity or relevancy of those objections. The substance of those objections was as follows:

- proposed permit charges too high
- unfair to charge visiting anglers more for permits than residents would be charged
- already sufficient provision for fishing on rivers in the area covered by the proposals
- conservation measures poorly defined
- lack of information on fisheries improvements
- anglers would be prohibited from using float-tubes on waters where boats are available
• lack of information on where permits to be purchased
• unlikely that the proposals would increase angling opportunities in the area
• while the proposals indicated that fly-fishing would be the only permitted method for catching freshwater fish, the applicant had stated that juvenile anglers may be allowed to use some baits
• there was an anomaly in that while the proposals permitted fishing for eels there were no methods allowed which would be suitable for catching them
• the reasons given for restricting Sunday fishing, where this is the case, were not valid.

Fourth Question

4. There were two objectors to the proposals provided for in the Order. The substance of their objections, fully considered by Ministers before the present Order was made, was as follows:

• increased access not dependent on granting of protection order
• increased access in contrast to stated aims of applicant
• protection order not ideal mechanism for increasing access
• unreasonable and unjustified reduction in access
• protection order would not contribute to the conservation of wild fish stocks
• trout did not require protection
• public banned from fishing Kirkaig and Inver estuaries
• total ban on fishing Culag Burn
• bank fishing banned on Loch Culag
• whole south bank of Loch Assynt denied to anglers
• “fly only” on Loch Assynt
• no bait fishing
• River Inver – fishing for riparian owners and guests only
• all river fishing should be removed from the proposals in the interests of conservation of resident and migratory species, or access should be reduced, not increased, in the interest of conservation
• permit prices too high
• all charges should be standardised across the area
• Sunday fishing should be allowed
• protection order not appropriate at this time
• boat hire should not include the cost of fishing permit, instead purchase of a permit should be a separate transaction
• there should be no ‘Put and Take’ fisheries

Fifth Question

5. The original proposals were materially different from those provided for in the Order. The new proposals took account of the objections raised to the original proposals. In considering the new proposals the Executive took account only of objections to those new proposals, as required by the statutory procedure.

Scottish Executive Environment and Rural Affairs Department
On 22nd June 2004 the Committee asked the Executive for an explanation of the following matter –

“The Committee asks the Executive to explain the drafting of regulation 3(2) which does not appear to be an amendment of SI 1989/1490 as stated in regulation 3(1) but either a free-standing provision or an amendment of regulation 2 of SSI 2003/178.”

The Scottish Executive responds as follows –

SI 1989/1490 (“the principal Regulations”) was amended by SSI 2003/178. The amendments made by the latter instrument were of limited application as they only applied to “civil legal aid”. The effect of regulation 3(2) is to further amend the principal Regulations to extend the amended provisions (which are now contained within the principal Regulations) to “legal aid other than criminal legal aid”. That is, the provisions introduced into the principal Regulations by SSI 2003/178 will now apply to all forms of legal aid to which the principal Regulations apply. The Executive therefore considers that regulation 3(2) does in fact amend SI 1989/1490 as stated in regulation 3(1).

Scottish Executive Justice Department
On 22 June 2004 the Committee asked the Executive for an explanation of the following matters -

“1. The Committee asks the Executive to explain what powers authorise regulation 2(c). There does not seem to be any provision in the parent Act that would permit regulations under sub-section 5(4) to modify the effect of subsection (5). Accordingly it would appear that there are no powers in that subsection that would permit regulations under subsection (4) to impose a condition on the transfer in the terms of regulation 2(c). The Executive is asked for an explanation.

2. The Committee asks the Executive for comments on the words in regulation 2(c) from “without prejudice to the provisions of section 5(5) of the Act” to the end of that paragraph. It would seem that in the absence of a power to modify section 5(5) the Regulation cannot prejudice the effect of that section.

3. The Committee seeks the Executives comment on regulation 2(d)(vii) which is related to regulation 2(c) and raises a similar issue in relation to section 5(5) of the parent Act.”

The Scottish Executive responds as follows:

The Executive does not consider that it is modifying section 5(5) at all. Indeed the Executive took pains to preserve its effect by saying “without prejudice to”. The Executive considers that there is nothing to prevent it from imposing a condition requiring a transfer to be for a specific time, provided that it is made subject to subsection (5). This makes it clear that the transfer cannot be for an indefinite time and must be transferred back at the end of the period unless it has been recalled sooner.

Scottish Executive Health Department
THE ENVIRONMENTAL PROTECTION (RESTRICTION ON USE OF LEAD SHOT) (SCOTLAND) REGULATIONS, (SSI 2004/289)

In its letter of 22nd June the Committee asked the Executive for an explanation of the following matters -

“1. The Committee asks the Executive to confirm whether notice of the making of the Regulations was published in the London Gazette as well as in the Edinburgh Gazette as required by subsection (6)(b) of the enabling power.

2. The Committee asks the Executive to explain what power authorises the conferral of powers and duties on the police under regulations 5 and 6. The enabling power does not appear to permit provision of this nature to be made in the Regulations. The Committee acknowledges that subsection (3)(c) provides that the regulations may confer powers corresponding to those conferred by section 108 of the Environment Act 1995 on persons authorised for any purpose of the regulations by the Scottish Ministers or any local or other authority. However, the power seems to be silent on conferring powers on the police. The powers are to be conferred on authorised persons.

3. The Committee asks the Executive to explain what power authorises regulation 5(1)(a) as there seems to be nothing in section 108 that would authorise powers to stop and search to be provided for under the regulations.

4. The Committee asks the Executive to explain why the Regulations do not reflect all the provisions of Schedule 18 to the Environmental Protection Act 1990 which are attracted by section 108 of that Act. The Committee asks the Executive for comment on how this may affect the vires of the provisions of regulation 5 other than paragraph (1)(a).

5. The Committee asks the Executive to explain the purpose of regulation 5(6)

6. The Committee asks the Executive to explain the purpose of regulation 8(3). Section 221 of the 1995 Act applies as a matter of course and does not seem to need to be attracted by the Regulations. The Committee also asks the Executive for comment on the vires for the regulation given that it refers to powers conferred on the police by or under regulation 5.

7. The Committee asks the Executive to explain on what basis it is considered that the reference to the Ramsar Convention will cover amendments of that Convention from time to time as stated in the second paragraph of the Explanatory Note.

8. The Committee asks the Executive why the reference in regulation 2 to the Ramsar Convention does not include the words “as amended” as section 20(2) of the Interpretation Act 1978 extends only to domestic legislation and not to international instruments (or for that matter to EC legislation);

9. The Committee asks the Executive why the Explanatory Note does not indicate where a copy of the Ramsar Convention can be obtained.”
The Scottish Executive responds as follows:

1. Notice of the Regulations was published only in the Edinburgh Gazette. The Executive is of the view that the first “and” in section 140(6)(b) of the Environmental Protection Act 1990 (“the 1990 Act”) is disjunctive and that the duty imposed on Scottish Ministers by that provision is to be interpreted as requiring publication of a notice in the Edinburgh Gazette where the Regulations extend to Scotland only.

2. The Executive considers that section 140(3)(c) of the 1990 Act allows Ministers to authorise constables to exercise powers as specified in the Regulations and in particular those set out in regulations 5 and 6. The effect of regulation 5 is to directly authorise constables in relation to those functions. Although the expression “authorise” is not used it is clear that that is the effect of the provision.

3. The Executive considers that section 140(3)(c), which allows conferral of powers “corresponding to” those set out in section 108 of the Environment Act 1995 (“the 1995 Act”), is sufficiently broad in nature to permit the conferral of powers to stop and search persons in investigating any suspected offence set out in regulation 7. Section 108 appears to be drafted principally with the search of premises in mind. However, the offence in these regulations relates to use of lead shot by an individual. It therefore appears to the Executive appropriate in the context of these regulations to provide corresponding powers to search an individual since it is in relation to the individual that evidence will be found in that context. In addition, the Executive refers the Committee to the supplemental power in section 140(3)(d), which would also enable conferral of such functions.

4. Section 140(3)(c) allows the conferral of functions “corresponding to” those in section 108 of the 1995 Act. The Executive does not consider that this power requires the application of section 108 as it stands, but rather that it permits the application of the same or similar powers, depending on the purpose of the Regulations being made. In this case the powers given to constables have been tailored to the limited circumstances of the use being prohibited. In so doing, corresponding provisions have been provided for only those parts of section 108 and Schedule 18 as are required to provide proper enforcement of the prohibition in the Regulations.

5. The purpose of regulation 5(6) is to clarify that when the powers specified in regulation 5(5) are exercised in pursuance of a warrant they must be exercised in a manner and to an extent which conforms to the terms of the warrant.

6. Whilst the Executive accepts that the reference in regulation 8(3) to section 221 of the Criminal Procedure (Scotland) Act 1995 is not strictly necessary, it is provided to assist the reader and to make it clear that section 221 of the 1995 Act applies to these regulations. This approach has been used in other enactments such as section 47(3) of the Nature Conservation (Scotland) Act 2004. The Executive consider that this is a supplemental provision permitted by section 140(3)(d) of the 1990 Act.

7. The Executive accepts that the Explanatory Note is not well expressed on this point. The reference to the Ramsar Convention at regulation 2 is not intended to include any future amendments to that Convention but rather to refer to those
amendments which are specified in footnote (c) on page 1 of the Regulations. The Executive will amend the Explanatory Note before publication to reflect that position.

8. The Executive agrees that it may have been clearer to add the words “as amended” to the definition of the Ramsar Convention in the body of the Regulations. However, it takes the view that the footnote to that definition makes it clear that the intention is to refer to the Convention as amended at the time the Regulations were made.

9. The Executive agrees that it may have been helpful to include in the Explanatory Note an indication as to where a copy of the Ramsar Convention can be obtained. Again the Executive will ensure that the Explanatory Note is amended before publication to correct this omission. The Committee may also wish to note that the Executive will issue guidance on the Regulations, which will include information as to where a copy of the Convention may be obtained.

Scottish Executive Environment and Rural Affairs Department
THE NATIONAL HEALTH SERVICE (VOCATIONAL TRAINING FOR GENERAL DENTAL PRACTICE) (SCOTLAND) REGULATIONS 2004, (SSI 2004/292)

On 22 June 2004 the Committee asked the Executive for an explanation of the following matters:

1. “The Committee asks the Executive to clarify the date within 5 years of which training must be completed for the purposes of regulation 2(1)(b)(ii).

2. The Committee asks the Executive to explain the purpose and effect of regulation 2(6).

3. The Committee asks the Executive in relation to regulation 7(1), to confirm whether the removal of the definition of “vocational training” from the 1996 Regulations is correct as that term appears to be used in regulation 22(4) of the 1996 Regulations. Conversely to explain why the definition of “approved trainer” has not been removed from the 1996 Regulations as the term no longer seems to be used in those Regulations.

4. The Committee asks the Executive to explain the word “practitioner” in paragraph 5 of the Schedule.”

The Scottish Executive responds as follows:

First question

1. The date referred to is the date of the application for a vocational training number made under regulation 2(1).

Second question

2. The Committee is referred to regulation 5(2) of the National Health Service (General Dental Services) (Scotland) Regulations 1996. A dentist who wishes to practice in the National Health Service must have his name included in the dental list of the Health Board responsible for the area of the country in which he wishes to practice. To be included in a Health Board’s dental list, the dentist must have a vocational training number. A vocational training number is obtained after the dentist has undergone the relevant vocational training, or by showing that the dentist has equivalent experience to that which would have been gained after completion of vocational training, or is exempt from the requirement to undergo vocational training. In terms of regulation 2(6), if a dentist who has a vocational training number does not, for the specified time, provide general dental services (in terms of section 25 of the National Health Service (Scotland) Act 1978), then the vocational training number ceases to be valid and the dentist cannot then remain on the dental list of a Health Board.
Third question

3. The Executive observes that there is no regulation 22(4) in the 1996 Regulations. The Committee may be referring to the reference to “Vocational training allowances” contained in Determination IV of the Table referred to in regulation 22(1). “Vocational training allowances” are not the same thing as “vocational training” and so it is not considered necessary to retain the definition of “vocational training” because of that alone. If that understanding of the Committee’s point is correct, then what is referred to is something other than “vocational training”. The absence of a definition of “Vocational training allowance” is consistent with the approach taken to the other matters listed in “Column 2 Subject Matter of Determination”, none of which is defined.

4. The Executive agrees that the definition of “approved trainer” should have been removed and thanks the Committee for bringing this to its attention. The definition will be removed at the next available opportunity.

Fourth question

5. The Executive explains that the word is intended to refer to the dentist whose competencies are being tested. It acknowledges that it would have been better to have used the term “dentist” again, as it did in paragraph 1 of the Schedule, and will amend at the next available opportunity for the sake of consistency. It considers though that the use of the term does not affect the clarity of the paragraph.