SUBORDINATE LEGISLATION COMMITTEE

AGENDA

30th Meeting, 2004 (Session 2)

Tuesday 9th November, 2004

The Committee will meet at 10:30am in Committee Room 3.

1. **Letter from the Minister for Parliamentary Business**: The Committee will take evidence from the following Scottish Executive officials—


2. **Delegated powers scrutiny**: The Committee will consider the response from the Scottish Executive to points raised on the following Bill—

   the Gaelic Language (Scotland) Bill at Stage 1.

3. **Draft instruments subject to approval**: The Committee will consider the following—

   - the Agricultural Holdings (Right to Buy Modifications) (Scotland) Regulations 2004, *(draft)*
   - the Budget (Scotland) Act 2004 Amendment (No.2) Order 2004, *(draft)*.

4. **Draft instruments subject to annulment**: The Committee will consider the following—

   - the Holyrood Park Amendment Regulations 2004, *(draft).*

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

   - the Scottish Network 2 Tourist Board Scheme Amendment Order 2004, *(SSI 2004/465)*
the Education (Graduate Endowment, Student Fees and Support) Switzerland (Scotland) Amendment Regulations 2004, *(SSI 2004/469)*

the Debt Arrangement Scheme (Scotland) Amendment Regulations 2004, *(SSI 2004/470)*

the Marketing of Fruit Plant Material Amendment (Scotland) Regulations 2004, *(SSI 2004/471)*

the Food Labelling Amendment (No.2) (Scotland) Regulations 2004, *(SSI 2004/472)*

the Nature Conservation (Designation of Relevant Regulatory Authorities) (Scotland) Order 2004, *(SSI 2004/474)*

the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2004, *(SSI 2004/475)*

the Land Registration (Scotland) Amendment Rules 2004, *(SSI 2004/476)*

the Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004, *(SSI 2004/477)*

the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Prescribed Periods) Order 2004, *(SSI 2004/478)*

the Lands Tribunal for Scotland (Title Conditions Certificates) (Fees) Rules 2004, *(SSI 2004/479).*

6. **Instruments not subject to Parliamentary procedure:** The Committee will consider the following—


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

   the Scottish Network 1 Tourist Board Scheme Amendment Order 2004, *(SSI 2004/464)*

   the Lands Tribunal for Scotland Amendment (Fees) Rules 2004, *(SSI 2004/480).*

Alasdair Rankin
Clerk to the Committee
Tel: 0131 348 5212
The following papers are relevant to this meeting:

**Agenda Item 1**

Letter from the Minister for Parliamentary Business

**Agenda Items 2 - 7**

Legal Brief (for members only) – to follow

**Agenda Item 2**

Executive response

**Agenda Items 3 - 7**

Copies of instruments (circulated to Members only)

**Papers circulated for information:**

Minutes of 29th meeting, 2004 (Session 2)
Thank you for your letter of 2 November 2004 regarding the Subordinate Legislation Committee’s discussion of the Gaelic Language (Scotland) Bill at Stage 1. The Committee asks for further explanation on two matters.

Section 2 National Gaelic language plan

The Committee considered that, given the importance of the national Gaelic language plan in providing strategic direction for Scottish public authorities on Gaelic language development, that there may be a case for greater Parliamentary involvement in the approval process.

The Executive has considered the Committee’s view and would point out that subsection 2(2) provides for public consultation of at least 3 months duration on a draft national plan and for any representations made during that period to be taken into account in the development of the final national plan. Given that opportunity for input by any person or body with an interest, including Parliament, the Executive is not convinced approval of the plan requires to be by statutory instrument. The Executive would, nevertheless, be content to bring forward an amendment at Stage 2 in line with the Committee’s suggestion that when the national plan is approved by Scottish Ministers it should be laid before Parliament, as is provided for in relation to financial reports under paragraph 9(b) of schedule 1.

Section 9 Guidance on Gaelic education

The Committee noted that the preparation of the guidance under this section was subject to slightly different procedures to the preparation of guidance under section 8 and requested confirmation of the Executive’s position.
Section 8 provides for the development of guidance which will underpin sections 3 to 7 of the Bill, which in turn create a new statutory framework for the development of the Gaelic language in association with the national Gaelic language plan. Section 8 provides that the Bòrd must prepare that guidance when it thinks fit, and this provision reflects the Executive’s view that the Bòrd will prepare such guidance in early course after the Act comes into being in order that public authorities are able to effectively discharge their functions under the Bill. This provision is based on that which applies to the preparation of the national Gaelic language plan.

Section 9 provides for the development of Gaelic education guidance which would build on existing legislative provision in the Standards in Scotland’s Schools etc Act 2000 and guidance recently issued by the Minister for Education and Young People. Section 9 provides that the Bòrd may issue guidance on Gaelic education and this reflects the Executive’s view that the Bòrd may or may not determine that further Gaelic guidance is required when the Act comes into being. This provision is based on that which applies to the issuing of guidance by Ministers under the 2000 Act with additional provision made for Ministerial input and consultation.

We trust these comments will be of assistance to the Committee.

Yours sincerely

Douglas Ansdell
Head of Gaelic Unit
Dear Sylvia,

Given the remit of the Subordinate Legislation Committee, it occurred to me that you and your fellow members may like to know about the steps that we are taking within the Executive in order to improve our performance in bringing forward, within appropriate timescales, secondary legislation that is robust and of good quality.

As background, it is perhaps first worth reflecting on recent performance. In particular, trends in the volume of the work should probably be acknowledged. Whereas the Executive's general approach has been that we should do less but do it better, in relation to subordinate legislation we have needed to do more and do it better. The volume of subordinate legislation made by Scottish Ministers has almost doubled since devolution, with 623 SSIs being made in 2003 compared with 337 Scottish SSIs in 1998. We should not underestimate the demands this has placed on all concerned, nor overlook the fact that the vast majority of instruments are prepared and made timeously, are fit for purpose, and do not attract fundamental criticism.

That said, we are well aware that there is room for improvement in some areas. We are taking a number of steps internally to raise our game. For instance:

- we are making arrangements to reinforce our network of SSI advisers, whose function is quality control of the drafting of subordinate legislation;
• we are reinforcing the administrative SSI unit, so that in future it will be better staffed at times of greatest pressure;

• we are reinforcing management of the SSI unit and making arrangements for improved backup at times of greatest demand;

• we are progressing arrangements for our electronic tracking system of the SSI caseload, in tandem with a case management system being introduced within the Office of the Solicitor to the Scottish Executive;

• we are emphasising to officials across the Executive that the need for an SSI should be identified as far in advance as possible, in order to ensure that the determination of policy and drafting is not rushed.

We are confident that these measures have the potential to help to deliver further improvements in performance. Even so, issues will no doubt still arise from time to time, some of which may be substantive and some of which may be legitimate differences in opinion. I hope that we will be able to address such issues on the basis that both the Executive and Committee are committed to ensuring that subordinate legislation is properly made. Informal dialogue between our respective officials may well be able to facilitate mutual understanding and to resolve some of the issues.

It was in this vein that my predecessor, Patricia Ferguson, agreed that Executive officials should meet informally with your Committee last December to discuss issues of mutual interest, following their contribution to your Committee’s AwayDay last August. We were pleased by reports that the meeting was positive and, as intended, that the dialogue seemed to help to foster a greater appreciation of various perspectives and concerns. Your Committee might find it helpful if I take this opportunity to offer an update on our thinking in respect of the issues that were covered then and others that have arisen subsequently.

Ancillary Provisions in Bills

There was a question about whether it is appropriate for the word “supplemental” routinely to be used in provisions in primary legislation that empower Ministers to make subordinate legislation. One example cited is contained in the NHS Reform (Scotland) Act:

“Scottish Ministers may by order made by statutory instrument make such incidental, supplemental, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act”.

As I understand it, the underlying concern is that the word is too loose, potentially enabling Ministers to make subordinate legislation that goes beyond that envisaged by Parliament when it scrutinised the primary legislation. I can perhaps see a theoretical basis for that concern. It seems to me, however, that in practice there are effective safeguards. First and foremost, of course, is the scrutiny role of the Parliament in general and your Committee in particular. Ultimately, the courts would be able to set aside any subordinate legislation that was judged as being “ultra vires” the parent Act.

The Executive believe, therefore, that the potential risks are negligible in practice. On the other hand, we believe that the potential benefits can be significant. To use an example with which I think your Committee is already familiar, such a power could enable rapid, remedial action to be taken if an Act includes a right of appeal for a range of specified cases, but it then emerges that there is another relevant case for which a similar right of appeal would be appropriate. In the absence of a power to make supplemental provision, it may well be that potential appellants would be denied that right for some time, pending further primary legislation.
Section 41(2) of the Local Government in Scotland Act 2003, which conferred a power on Scottish Ministers to make regulations, provides a different but specific and recent example of the value of being able to make supplemental provision. Because of an oversight, the Act itself did not make that power subject to any procedure in the Scottish Parliament. However, section 58 of that Act conferred a general power to make ancillary provision (including supplemental provision) and was used, in SSI 2003/567, to make any such regulations subject to negative procedure. Had there been no such power, there would not have been an expedient way to apply a process of parliamentary scrutiny for those regulations.

Notwithstanding the value of a power to make supplemental provision, I have given some thought to whether it might be possible in light of the Committee’s concern to limit the number of occasions on which it is included within Executive Bills. A difficulty, of course, is that a purpose of such a power is to enable unforeseen situations to be addressed, and inherently it is not generally possible to foresee when unforeseen situations are likely to arise. Having said that, we will endeavour to look at all relevant provisions on a case by case basis. Moreover, I can also give an assurance that we would review most carefully any specific instances where the Committee were to express a concern that improper use was being made of a power to make supplemental provision.

**Illustrative lists**

The practice of having illustrative lists within some Bills but not others has been questioned by the Committee, for instance, in light of its consideration of the Primary Medical Services (Scotland) Bill. There has been a suggestion that greater consistency is required. The difficulty is, of course, that different circumstances call for different approaches. The rigid application of one set formula in each and every case would likely prove inappropriate or problematic on some occasions. Therefore, our preference is to judge each case on its merits, recognising that sometimes an illustrative list is useful, sometimes a general power is better, or indeed sometimes both are helpful.

**More complete information on instruments**

The Committee has suggested that, where the Executive could reasonably anticipate that it will have a query about a particular aspect of an SSI, it should endeavour to pre-empt that query by proactively providing explanatory information at the outset. Though the issue is a wider one, an example that the Committee cited was the Feeding Stuffs (Scotland) Amendments (No 3) Regulations 2003, which was being amended for the fifth time and was, therefore, in all probability going to provoke a query about intentions for consolidation.

I don’t doubt that the Committee and the Executive would both wish to get away from the ping-pong of query and explanation that can accompany SSIs. In principle, therefore, I agree that we should seek to anticipate and address in advance any concerns that the Committee is likely to have in relation to any SSI. Our ability to do that in practice will grow with experience. I anticipate that the changes that I have already outlined in respect of the Executive’s approach to the management of secondary legislation will assist in this regard. I am also sure that informal dialogue between our respective officials can help to resolve misunderstandings and provide clarification, and this is something that I would encourage.

**Consultation criteria**

The Committee asked how the Executive consults on SSIs, with regard to the consistency and logic of its approach. Normally, we would expect consultation to be carried out where required in statute, where a commitment was made in the passage of the primary legislation, and where it was otherwise
considered appropriate. Often it was a question of judgement and the need for proper consultation must be balanced against over-burdening organisations with too much consultation, a point which has been made on a number of occasions, including the CSG debate last November.

Guidance and use of guidance in place of statutory provision

The Committee queried whether, when the Executive issues guidance that in large measure has the same practical impact as would subordinate legislation, that guidance should not be subject to equivalent Parliamentary scrutiny. A question was also raised about whether it is appropriate, where the Scottish Ministers have been specifically empowered to make subordinate legislation on any matter, for them to choose instead to proceed by way of guidance.

Our essential view – recognising that guidance does not generally have legislative effect, but is simply guidance and so qualitatively different from regulations, orders and even directions – is that we should proceed in whatever way appears to be most appropriate and effective in any given circumstances. Of course, when Ministers conclude that it appears optimal to proceed by way of guidance, they are still accountable to the Parliament for it. Any such guidance is published, questions can be asked and, if Members wish it, the matter can be debated. Generally speaking, levels of Parliamentary scrutiny are fixed by the primary legislation underpinning the guidance or the subordinate legislation. I should also make clear that proceeding by way of guidance rather than through subordinate legislation should not be taken to imply that any relevant powers to make subordinate legislation were unnecessary or have become redundant. While the Executive may consider that it is preferable to guide people to comply with best practice in a relatively flexible manner, if that does not work it can be useful to have recourse to fall-back powers in the event that a more prescriptive approach is required in due course.

Instruments laid at Westminster

The Committee raised the issue of UK SIs which impinge on devolved matters and whether these could be notified to the Parliament. The particular example given was an SI consequential on the Water Industry (Scotland) Act 2002. In this regard, Patricia subsequently replied to a letter from you and answered a Parliamentary Question from Murray Tosh. I trust that the approach that Patricia outlined was acceptable to you.

Implementing EU Obligations and Transposition Notes

The Committee sometimes asks about the Executive’s approach to transposing EU obligations into Scots law. There are several options, but the Executive's preference is the use of specific legislative powers to implement an EU obligation, where these cover the subject matter of the obligation. However, if these do not exist, or there is a good reason not to use those powers, the general powers contained in section 2(2) of the European Communities Act 1972 can be used instead. A third alternative is to use section 2(2) in conjunction with specific powers as joint enabling powers. In addition to these options, there may be some cases where there are good reasons for the legislation to be made on a GB or UK basis through the UK Parliament (Section 57(1) of the Scotland Act 1998) – but this will be the exception rather than the rule.

The Committee has also been raising for some time the issue of the production of Transposition Notes in relation to SSIs that implement EU obligations. On this matter, we share the Committee’s view that it can be helpful if Transposition Notes are provided in connection with such SSIs and, therefore, have been reviewing our approach. Having discussed the issues with other relevant parties, including agencies such as the Food Standards Agency, I think that we will soon be in a position to make some progress. We are currently looking at options for piloting the production of
Transposition Notes in appropriate cases and I will let you have further information about our plans as they develop.

**Publishing Executive Notes**

It has been suggested, I believe, that we should consider following the practice recently introduced south of the border whereby HMSO publish the Executive Memorandum for each draft affirmative and general instrument on the appropriate website. In principle, the Executive would support such a development and we are in discussions about the practicalities. I will get back in touch with you shortly to let you know how matters are progressing.

**Consolidation of Subordinate Legislation**

I am aware that your Committee has a long-standing view that greater attention should be paid to the consolidation of SSIs that are much amended. This is a matter on which, in principle, we do not diverge from you. Richard Henderson wrote to you on 3 November last year, setting out our thinking, and I was pleased that a working group of officials from the Executive and Committee had begun to take forward consideration of this issue. I hope that this work can be progressed.

**Super-Affirmative Procedures**

On occasion, it has been mooted that there could be more of a role for ‘super-affirmative’ procedures in respect of certain subordinate legislation. As you know, we have reacted cautiously to such suggestions. We are keenly aware of the burdens and resource implications that already fall on the Executive, the Parliament and civic Scotland as a result of the level of consultation and scrutiny associated with, amongst other things, subordinate legislation. However, while we would not wish to exacerbate that unnecessarily, neither do we wish to close the door entirely against any proposition if, in certain cases, there could be a significant benefit for the governance of Scotland.

In order to inform further consideration of this issue, if that is what the Committee wish, it would probably be useful to clarify some of the thinking, perhaps on the basis of a note of what you might envisage a ‘super-affirmative’ procedure to look like, the sort of circumstances and criteria that might justify its use and the sort of benefits that might be anticipated. Having said that, for the avoidance of doubt I should make clear that I am not signalling any reduction in initial scepticism, simply a willingness to look at the merits of the arguments.

**Committee Inquiry into the Regulatory Framework in Scotland**

Finally, I should record that I am writing to you separately in connection with the consultation paper that your Committee issued this summer. This covers a wide range of issues, some of which are touched on above. As I make clear in that letter, we are committed to continuing to engage constructively with this Inquiry as with the generality of your Committee’s work.

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*Best Wishes*

MARGARET CURRAN