SUBORDINATE LEGISLATION COMMITTEE

AGENDA

18th Meeting, 2005 (Session 2)

Tuesday 31st May, 2005

The Committee will meet at 10.30am in Committee Room 6.

1. **Executive responses:** The Committee will consider responses from the Executive to points raised on the following—

   the Mental Health (Safeguards for Certain Informal Patients) (Scotland) Regulations 2005, *(SSI 2005/draft)*

   the Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Amendment Regulations 2005, *(SSI 2005/257)*

   the Additional Support for Learning (Appropriate Agency Request Period and Exceptions) (Scotland) Regulations 2005, *(SSI 2005/264)*

   the Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005, *(SSI 2005/265)*

   the Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Regulations 2005, *(SSI 2005/266)*.

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

   the Dentists Act 1984 (Amendment) Order 2005, *(SSI 2005/draft)*.

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

   the Right to Purchase (Prescribed Persons) (Scotland) Amendment Order 2005, *(SSI 2005/275).*
4. **Instruments not subject to Parliamentary procedure:** The Committee will consider the following—

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 3) (Scotland) Revocation Order 2005, *(SSI 2005/272)*

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 8) (Scotland) Order 2004 Revocation Order 2005, *(SSI 2005/273)*

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No. 9) (Scotland) Order 2004 Revocation Order 2005, *(SSI 2005/274).*

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Clerk to the Committee
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The following papers are relevant to this meeting:

Agenda Items 1-4

Legal Brief (Private)  SL/S2/05/18/1

Agenda Item 1

Executive responses  SL/S2/05/18/2

Agenda Items 2-4

Copies of instruments (circulated to Members only)
THE MENTAL HEALTH (SAFEGUARDS FOR INFORMAL PATIENTS) (SCOTLAND) REGULATIONS 2005 (SSI 2005/DRAFT)

On 24 May 2005, the Committee asked for an explanation of the following matter:

The term “the 2003 Act” is defined in regulation 1(2) but the Regulations refer to “the Act”. The Committee asks the Executive whether the definition in regulation 1(2) should be a definition of “the Act”, given that the term “the 2003 Act” is not used in the instrument.

The Scottish Executive responds as follows:

The Executive accepts the Committee’s point and is grateful to the Committee for bringing to their attention. The reference to “the 2003 Act” is a hangover from earlier drafts. It is not considered that the reference will affect the validity of the instrument or will mislead the reader. The Executive will bring forward an amendment to correct the reference at the earliest legislative opportunity.
On 24 May the Committee asked the Executive for an explanation of the following matters.

1. The Committee asks the Executive for clarification of the meaning and effect of the time limit provisions in regulation 2, which provides that an appropriate agency must comply with a request within a period of 10 weeks “starting on the date when the request was made by the authority”. It is not clear to the Committee what “made” means in this context and whether the 10 week period will commence on receipt of the request or when it is signed or posted. The Executive is asked for explanation.

2. The Committee notes that the same question arises in relation to regulation 3(3) which adopts identical wording in calculating the 16 week period mentioned in that provision.

The Executive's response

The Executive's view is that a request is made when it is communicated to the Appropriate Agency whether in writing or in another form as provided for in section 28 of the Act. It will be a matter of fact as to when a request is made. These Regulations do not require requests to be signed and are intentionally not prescriptive as to the method of communication.
On 24 May the Committee asked the Executive for an explanation of the following matters –

1. It appears to the Committee that the wording “where the authority seek advice and information under sub-paragraph (a)”, where it appears in regulation 3(2)(b), amounts to words of qualification. Given that the obligation to seek relevant advice and assistance under sub-paragraph (a) appears to be mandatory by virtue of regulation 3(1) it is not clear to the Committee why this wording was used in regulation 3(2)(b). The Executive is asked for clarification.

The Scottish Executive responds as follows:

Regulation 3(1) imposes a duty upon education authorities, within the timescale set out, to take the action specified in regulation 3(2). Regulation 3(2)(a) requires education authorities to seek relevant advice and information from such appropriate agencies and other persons as the authority think appropriate. There may be situations in which the authority do not consider it appropriate to seek such advice and information. In terms of regulation 3(2)(b) (and leaving aside the qualification which is made with reference to regulation 3(4)) where the agency or other person is one which the authority has thought it appropriate to seek advice and information from, and has duly done so, the authority is, in those circumstances, required then to seek and take account of the views of the persons referred to in regulation 3(2)(b)(i) and (ii).

The policy is that the obligation in terms of regulation 3(2)(b) applies where the authority has sought advice and information from agencies and other persons which the authority has considered appropriate. The Committee may have noted that the approach taken in relation to the drafting of regulation 3(2)(b) is broadly comparable to that in section 12(5) and (6)- in particular 12(6)(b)- of the primary legislation (which section deals with duties to seek and take account of views, advice and information).
THE ADDITIONAL SUPPORT FOR LEARNING (CO-ORDINATED SUPPORT PLAN) (SCOTLAND) REGULATIONS 2005, (SSI 2005/266)

On 24 May the Committee asked the Executive for an explanation of the following matters.

3. The Committee asks the Executive to explain the inclusion of regulation 3(1)(b)(iv) in view of the scope of the enabling power in section 11 (8)(b) of the 2004 Act. The Committee noted that this power allows Ministers to make provision in the Regulations as to the information, in addition to that required by section 9(2), which must be contained in the co-ordinated support plan.

4. Also, it is not clear to the Committee what is meant by the words “subsection (5)(a) of that section” where they appear in regulation 5(a) as the preceding wording of the regulations refers to both section 10 and section 11 of the parent Act. The Executive is asked for clarification.

5. Finally, the Committee noted that there were five separate cross-references to the parent Act in regulation 5 and asks whether this could have been avoided in the drafting of this instrument.

The Scottish Executive responds as follows:

First question

The Executive acknowledges that the enabling power in section 11 (8)(b) of the 2004 Act allows Ministers to make provision as to the information to be contained in co-ordinated support plans in addition to that required by section 9 (2). The Executive also acknowledges that the reference to the primary legislative provisions in regulation 3 (1)(b)(iv) is superfluous. Inclusion of the reference to the matters specified in section 9 (2)(a) to (d) in the list of information to be included in a plan was intended to assist the user of the Regulations particularly when considering the form prescribed by the Regulations and the jurisdiction of the Additional Support Tribunal for Scotland including the provision in section 18 (3)(d)(i).

Second and third questions

The Executive is grateful to the Committee for its comments on the drafting of regulation 5. The reference in sub-paragraph (a) of regulation 5 to “subsection (5)(a) of that section has to be read as a reference to the last quoted section (i.e. section 10) and is in consequence an erroneous reference.

The intention is to bring forward an amendment before commencement of the Act expected in the autumn and in drafting that amendment regard will be had to the Committee’s helpful comments in its third question.
On 24 May 2005 the Committee asked:

The Subordinate Legislation Committee today considered the above instrument and seeks an explanation of the following matters.

The Committee notes the explanation provided in the letter to the Presiding Officer for the breach of the 21 day rule and asks the Executive for further information in relation to the reasons for the delay with these regulations, particularly in relation to the Executive’s awareness of the adoption and publication of Commission Regulation (EC) No. 606/2005.

The Scottish Executive Rural Affairs Department responds as follows:

The Executive was aware in February 2005 of the proposal to allow two 10 month periods from the EC Commission Management Committee for Direct Payments. The Executive took an active part with a representative in Brussels for the meeting on 18 February at which this development was discussed. It was known at that time that the amendment to the EC legislation was intended to be retrospective so as to apply from 1 January 2005. There was however no guarantee that the final form of the amendment would reflect this discussion, and it was known that there would be a significant delay before the EC Regulation discussed at that meeting would be adopted and published in the Official Journal of the EU. The Executive took further proactive steps at the end of March to check the position on what was agreed and further details were obtained direct from Brussels, however there was no progress on the adoption of the EC Regulation at that time.

Usually the Executive receives early intimation through UK channels via the UK Permanent Representation to the EU in Brussels and the Whitehall Department for Environment, Food and Rural Affairs. In this case, this intimation did not follow on from the adoption of the measure, and the fact that the measure had been adopted was discovered in the course of ordinary discussions with colleagues in the other UK administrations. We entirely accept that the Executive should have been more active in checking for the publication of the measure directly and not relied on the usual channels, and this is the oversight referred to in the Executive Note.

We note the Committee’s concerns about informing farmers of the change. The Executive was also concerned about the position of those who might have been unable to take advantage of the facility. That is why the Executive took the decision to write to all producers on 8 April to explain the change in the EC Regulations, set out the procedures for applying and making clear the basis on which the change would occur. It was a difficult decision to make this flexibility available but the timing was such that Scottish producers would otherwise have lost the opportunity offered by this change. The amendment, therefore, regularises the position for that reason.

The Committee also discussed other concerns about farmers who may not be paid as much as they were previously. Whilst the Executive are conscious of the concerns of specifically agri-environment scheme participants on this basis, we are not aware of such concerns in relation to the effect of this particular SSI.