The Scottish Parliament

Subordinate Legislation Committee

17th Report, 2009 (Session 3)

Health Boards (Membership and Elections) (Scotland) Bill as amended at Stage 2

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The Scottish Parliament

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:

Jackson Carlaw
Malcolm Chisholm
Bob Doris
Helen Eadie
Tom McCabe
Ian McKee (Deputy Convener)
Jamie Stone (Convener)

Committee Clerking Team:

Clerk to the Committee
Shelagh McKinlay

Assistant Clerk
Jake Thomas

The Scottish Parliament

Subordinate Legislation Committee

17th Report, 2009 (Session 3)

Health Boards (Membership and Elections) (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meetings on 3 and 10 March the Subordinate Legislation Committee considered the delegated powers provisions in the Health Boards (Membership and Elections) (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Scottish Government provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill. The Committee's correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

3. Generally, the Bill concerns the constitution and membership of Health Boards. It amends provisions on the membership of Health Boards contained in the National Health Service (Scotland) Act 1978 ("the 1978 Act"). It also provides for the election of certain members to Health Boards.

4. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in sections 2 and 4 of the Bill. The Committee also welcomed the amendments to section 4, proposed by the Scottish Government, in response to comments and recommendations made by the Committee in its Report at Stage 1.

Section 1(5) and (6) (Constitution of Health Boards) – Power to specify the circumstances in which elected, appointed or councillor members must vacate office

5. At introduction, section 1(5) of Bill amended the 1978 Act to give Scottish Ministers a power to make regulations that could specify the circumstances in which-

(a) an elected member must vacate office before the end of the period that a member held office, and (b) the Scottish Ministers could determine that an elected member is to vacate office before the end of that period.

6. Section 1(6) of the Bill amended the 1978 Act to provide also that regulations could specify circumstances in which Scottish Ministers may determine that appointed and councillor members shall vacate office. Accordingly, at introduction the Bill provided that Scottish Ministers could determine when a member (elected, appointed or councillor) shall vacate office, and the circumstances in which this function could be prescribed by regulations.

7. The Committee noted the substantial changes to section 1(5) of the Bill following Stage 2 proceedings, such that regulations may only specify further circumstances in which an elected member must vacate office before the end of the period of appointment, (particularly that an elected member is to vacate office on becoming the holder of a post set out in a list of restricted posts maintained by the Health Board concerned for that purpose). The Ministerial power to specify the circumstances in which an elected member is to vacate office has been removed – so the Bill no longer provides for Ministerial discretion on this matter.

8. Section 1(6) of the Bill however, which was not amended at Stage 2, still provides that regulations may specify circumstances in which Scottish Ministers may determine that appointed and councillor members are to vacate office (as well as circumstances in which they simply must vacate office). The Bill provides that the regulations under section 1(5) and 1(6) are subject to negative procedure.

9. Members discussed the delegated powers and the proposed negative procedure. Helen Eadie MSP and Tom McCabe MSP expressed concerns about the power under section 1(6), in so far is it applies to councillor members of Health Boards. Particularly, Mrs Eadie and Mr McCabe felt that a power which enables regulations to specify circumstances in which Ministers may determine that councillor members are to vacate office should be subject to affirmative procedure. However, Bob Doris MSP and Ian McKee MSP were content with the proposed negative procedure.

10. **Following discussion, members agreed that the difference of opinion within the Committee on this matter should be noted in the Committee's report and that the attention of the Parliament should be drawn to the views expressed in the Official Report of the meeting.**

Section 6 (termination of pilot scheme)

11. Section 6 does not directly confer any powers to make subordinate legislation. However, this section relates to the consequences of both a pilot order and a roll –out order and consequently members felt that it would be helpful to draw the attention of the Parliament to this provision.

12. The Bill provides that the pilot order is (automatically) revoked on the day 7 years after the earliest Health Board election to be held in a Health Board area specified in the pilot order, but Ministers have the power to revoke the order earlier.

13. If the pilot order is revoked before a roll-out order is made, or if (under the revised procedures for a roll-out order) a question of whether to approve a draft roll out order is put to the Parliament but not agreed, then either on the day the pilot order is revoked, or on the day after the question is put (as the case may be), in effect the whole substance of the Bill is repealed.

14. Because now by section 4, the revocation of a pilot order is by affirmative procedure, and by section 7, a roll-out order is now by a form of "super-affirmative" procedure, the result is that once a pilot order has been made, then a revocation of that order, or any rejection of a subsequent roll-out order, requires to be affirmed by the Parliament. Accordingly, Parliament requires to affirm the repeal of the Bill provisions, in substance.

15. Members noted that, if there were to be a rejection of a roll-out order, by section 6 the substance of the Bill is repealed. There is no express provision, however, for what happens to the pilot order in this circumstance. Because the enabling power to make the pilot order would be repealed, with the rest of the Bill, we assume the pilot order would require to be revoked, to tidy-up the statute book. However, there may have been substantial arrangements for elections to Boards made in the pilot Health Board areas, by virtue of the pilot order up to that point.

16. Section 10 would not be repealed by section 6(2) if the pilot order is revoked, or a roll-out order is rejected. Section 10 permits supplemental or consequential provisions, but only in an order under the remaining provisions of the Act. As there may have been substantial arrangements made in the pilot areas for elections and re-constitution of Health Board memberships following on from the pilot order, the questions arises as to whether it is necessary for the Government to make some supplemental or consequential provisions (under section 10), at the point when section 6(2) repeals the substance of the Bill.

17. Again, the Bill does not appear to provide (or make clear) whether this would be permitted or required, on the repeal of the substance of the Bill under section 6. Section 6 would only provide for automatic repeal, and so termination of the powers under all of sections 1 to 7.

18. **Accordingly, the Committee wishes to draw to the attention of the lead committee and the Parliament, that––**

(a) section 6(2) of the Bill provides for the automatic repeal of sections 1 to 7 and paragraph 2 of the schedule, if the pilot order is revoked, or on the day after the Parliament fails to resolve to approve a draft roll-out order, but section 6 does not provide for the revocation of the pilot order in the event that the Parliament fails to approve a draft roll-out order (although it appears that must be the effect of the repeal of those sections); and

(b) were Parliament to fail to approve a draft roll-out order, the Bill does not appear to provide or make clear whether, on the automatic repeal of sections 1 to 7, the Scottish Ministers are permitted any delegated powers to make any further or consequential provisions that might be needed in regard to the pilot area arrangements. This is given that

such arrangements for elections, or the re-organisation of the membership of Health Boards, may have been implemented up to the date of any rejection of a roll-out order, by virtue of the pilot order. (This assumes that those powers are sought or may require to be taken by the Scottish Ministers in those circumstances, which is a matter to be considered by the Government).

Section 7(1) (roll-out) – Powers to make a "roll-out order"

19. Section 7 of the Bill was amended at Stage 2 such that the procedure attaching to a roll–out order should be a form of "super affirmative" procedure. This is, generally, where a proposed draft of the order is considered by the Parliament before the draft of the order is finally laid in Parliament.

20. The Committee agreed that the roll-out to further Health Board areas of the Bill provisions, including provisions which modify primary or secondary legislation, were significant matters and that the proposed form of "super affirmative" procedure is appropriate.

21. **The Committee is therefore content that a roll-out order in terms of section 7 of the Bill shall be subject to the prescribed form of "super-affirmative" procedure.**

22. Section 7(3A)(c) provides that Ministers must have regard to any representations about the proposed draft order, any resolution of the Parliament about that draft, and any Parliament committee report on the proposed draft, made "*during the 60 days following the day on which the proposed draft roll-out order was laid before the Scottish Parliament."* This is prior to laying a draft of the order. The 60 day period here is a 60 calendar day period.

23. Concerns were expressed at Committee that the 60 day period takes no account of Parliamentary recesses. Members noted that in some cases, for example if the proposed draft roll-out order was laid just prior to the summer recess, the effect of the 60 day period could be that there is little or no time for Parliamentary consideration.

24. Members therefore agreed to ask the Scottish Government to explain why the period of 60 (calendar) days specified for Parliamentary and committee consideration of a proposed draft roll-out order does not exclude any days during which the Parliament is dissolved or in recess.

25. Members also agreed to ask the Scottish Government for a commitment to bring forward an amendment at Stage 3 to provide that the period of 60 days specified takes account of the effect of recess or dissolution days on the Parliament's ability to consider the proposed draft roll-out order, ensuring that the 60 days include sufficient sitting days for the necessary Parliamentary consideration to take place.

26. The Scottish Government responded pointing out its concerns that excluding parliamentary recesses could in some circumstances mean that a proposed draft order laid over the summer recess would be left with the Parliament for

consideration until mid November, and that the order could not be made until early the following year.

27. However, the response went on to confirm that the Cabinet Secretary had instructed that an amendment be submitted at Stage 3 setting out that, after the proposed roll out order is laid before Parliament, the 60 day timescale must include at least 30 days when the Parliament is not dissolved or in recess.

28. **The Committee therefore finds section 7 acceptable subject to the amendment proposed by the Government that the period of 60 days must include at least 30 days when the Parliament is not dissolved or in recess.**

Annexe 1

Letter to the Scottish Government,

Health Boards (Membership and Elections) (Scotland) Bill as amended at Stage 2

The Subordinate Legislation Committee considered the above Bill on Tuesday 3 March and agreed to write seeking a response on the following matter—

Section 7(1) (roll-out) – Powers to make a "roll-out order"

The Committee considered the new delegated power which provides for "super-affirmative" procedure in relation to a roll-out order.

The Committee noted that, although the Bill provides that the Minister must have regard to any representations about the proposed draft order, any resolution of the Parliament about that draft, and any Parliament committee report on the proposed draft, made "during the 60 days following the day on which the proposed draft roll-out order was laid before the Scottish Parliament", the Bill does not take account of any Parliamentary recess or dissolution periods so that, in the worst case, a 60 day period could allow not Parliamentary consideration of the proposed draft.

The Committee therefore asks the Scottish Government to explain urgently (due to the deadline for Stage 3 amendments), in relation to section 7(3A)(c), why the period of 60 (calendar) days specified for Parliament and committee consideration of a proposed draft roll-out order does not exclude any days during which the Parliament is dissolved or in recess, so far as the effect of this may be that there is an insufficient period for Parliament consideration of a proposed draft roll-out order after it is laid.

The Committee also wishes to ask the Scottish Government (again urgently) for a commitment that it will bring forward an amendment at Stage 3 which will provide that the period of 60 days specified takes account of the effect of recess or dissolution days on the Parliament's ability to consider the proposed draft roll-out order, ensuring that the 60 days will include sufficient sitting days for the necessary Parliamentary consideration to take place.

You may wish to note that the Committee today agreed that an amendment should be drafted to address this issue which may be lodged in the Convener's name, depending on the response received by the Scottish Government.

Please email your response to the shared e-mail address above **by 2.00pm on Wednesday 4 March 2009**. This timescale is in order to enable members of the Committee to consider the response and then give further consideration to lodging a possible amendment in time for the deadline on Friday 6 March.

3 March 2009

Scottish Government Response
Health Boards (Membership and Elections) (Scotland) Bill as amended at stage 2

Thank you for your letter of 3 March 2009 to Paul Johnston regarding the Subordinate Legislation Committee's consideration of the Health Boards (Membership and Elections) (Scotland) Bill and the provisions relating to making a roll-out order.

The procedure introduced by the amendment tabled at Stage 2 of the Bill, provides for greater parliamentary scrutiny of any roll out order. The 60 day time period that applies to the proposed draft roll out order is only one aspect of this procedure and is certainly not intended to try and circumvent any parliamentary procedure.

The 60 day period is expected to mirror the 12 week standard public consultation period that is used by the Government. In drafting the provision in this way we considered that it would appear unusual if, for instance, the 60 day period took place over the summer, that we would need to add on an additional 9 weeks to that period to allow for recess. A further delay caused by October recess could effectively mean having to leave the proposed draft for consideration with the Parliament until mid November and not being able to make the order until early the following year.

The Cabinet Secretary has considered the issue very carefully and has instructed that an amendment be submitted at Stage 3. The amendment will set out that, after the proposed roll out order is laid before Parliament, the 60 day timescale must include at least 30 days when the Parliament is not dissolved or in recess. This will ensure adequate time for Parliament to consider any proposed draft roll out order and avoid the possibility of having 2 recesses interrupting the procedure.

I hope this clarifies our position for the Committee.

4 March 2009

Health Boards (Membership and Elections) (Scotland) Bill: After Stage 2

14:15

The Convener: I will have to take this step by step because there is a lot in front of us today. We are considering the supplementary delegated powers memorandum provided by the Scottish Government following amendments made to the bill during stage 2. Under rule 9.7.9 of standing orders, we report on new or substantially altered delegated powers provisions following stage 2 consideration. Members might wish to note that the stage 3 debate on the bill will be held on 12 March, and that the deadline for lodging amendments is Friday 6 March, which is nearly upon us, so there is not a lot of time.

Sections 1(5) and 1(6) confer powers to specify the circumstances in which elected, appointed or councillor members must vacate office. Are we content that the delegated powers contained in sections 1(5) and 1(6) of the bill, as amended, are acceptable in principle, and that they are subject to negative procedure?

Helen Eadie (Dunfermline East) (Lab): No, convener, I am not content with that. This is one example of a power that is so significant that it should be subject to affirmative procedure. The issue has been debated here and in the Health and Sport Committee. It is unheard of for any minister to remove any elected member from any position in Scotland. If that were to be allowed in any particular case, the Parliament would want to take a view on it, and not simply allow a Government minister to do it by negative resolution. I hope that we can lodge a stage 3 amendment to that effect.

The Convener: Is your point about elected members? They are not hit by the provision, are they?

Ian McKee (Lothians) (SNP): My understanding is that the cabinet secretary yielded to the good arguments that we made at previous meetings and took elected members out of the equation, so we are really just talking about the ability to remove people whom the cabinet secretary has appointed in the first place. It seems reasonable that the cabinet secretary who appoints can dis-appoint.

Helen Eadie: Your point is reasonable, but paragraph 3 on page 3 of our legal brief does not make that clear. That is why I have raised the point today. The legal brief says that the issue could be controversial, and it is. I agree with Ian McKee; I thought that the minister had yielded the

point at the Health and Sport Committee debate when we had that discussion. Paragraph 3 of page 3 of the legal brief says:

"For example, such a circumstance might be that Ministers consider that the member is not acting in the best interests of the NHS, so should be removed. The Committee might consider in relation to that flexibility, whether this can be justifiable, given that paragraph 2, Schedule 1 of the 1978 Act (as amended by section 1(2) of the Bill) provides that appointed members are appointed by Scottish Ministers, and councillor members are also appointed by Ministers, but following nomination by local authorities in the area of the Health Board."

The way I read that, it seems to apply to elected members as well. If I have made a mistake, I apologise to the committee for taking up time.

The Convener: No, that is all right.

I read that paragraph as mentioning two categories. The beginning of the paragraph mentions "appointed and councillor members". Those councillor members are chosen by their peers.

Tom McCabe (Hamilton South) (Lab): Is the distinction not that there will be people who are directly elected to the board, and other people, who have been elected to councils, who will be appointed by the minister to the health board? If the minister has taken care of the concern about the directly elected members, that is a good thing.

The Convener: That is how I read it.

Tom McCabe: Okay, but however the council-elected member, if I can call them that, gets on to the health board—I acknowledge that the minister appoints them—it would set quite a precedent if someone who has been democratically elected could then be removed from their position on the health board by a minister. That is quite a big decision to take. The minister might feel that there were good reasons for it, but, at the very least, there could be political reasons. Surely a safeguard would be that any intention to do that should be subject to affirmative rather than negative resolution. It would just be a safeguard, because taking that action is quite a big step.

Removing a health board member might be 100 per cent justified but, as we all know because of our experience, many people would claim different because it would become politics. It would be a politician who was being removed and the politician might not be of the same political hue as the minister.

Ian McKee: I can see Tom McCabe's point that those people are elected to a council and then chosen by the council to be on the health board, but the fact remains that they will be appointed to the health board by the minister. If the minister appoints someone, they should be able to remove them. Presumably, as the decision to appoint a health board member is not subject to affirmative resolution, the minister could choose right at the beginning not to appoint someone. The minister could say that they did not like the person. There would be political repercussions but, technically, if the minister appoints, then it is a ministerial appointment.

Helen Eadie: That is a reasonable argument, but it falls down because, if a minister has confidence in their decision they should not be afraid of the Parliament affirming that decision or otherwise. I still believe that the provision should be subject to affirmative rather than negative procedure. The minister might have good reason to remove someone from a health board, and Parliament might agree with it, but I still feel that affirmative procedure is right in this case.

Tom McCabe: Ian McKee makes a good point there. Surely if the minister has the power to appoint someone, they should have the power to deregister the same individual.

The fact remains that, the minute the minister appoints, the issue moves into the political arena to some degree, because they have appointed an existing politician. That brings consequences with it. Reversing that decision could be seen in different lights. It could be alleged that it is being done for the wrong reasons. It could be alleged that a view that that person had expressed or the approach that they had taken on the health board had been tainted by politics rather than being an objective assessment of the issues. So the decision to appoint in the first place brings consequences. We should not take the power away from the minister, but the minister should be required to explain any subsequent decision to Parliament in more detail.

Bob Doris (Glasgow) (SNP): I am not convinced. I take on board what Helen Eadie said about the minister being confident about why they were removing someone whom they had appointed from the health board, so why not require affirmative procedure. However, by that logic, we would require affirmative procedure for everything that Government does. We would say that the Government should be confident of what it was doing, so everything should be put through under affirmative procedure. So I am not totally convinced. It is in effect a power of patronage for the minister to appoint in the first place, so the same functions exist in terms of relieving that person of their post.

I also take on board what Tom McCabe said about the politicisation of dismissal, but when the Government goes to Parliament under affirmative procedure, Parliament is full of a variety of politicians and politics can surely be played on both sides of the fence. I do not think that that is a reason to use affirmative procedure. The health

board members in question might be elected councillors, but they are appointed to the health board, not directly elected to it, so I am not convinced that the power to remove them being subject to affirmative procedure would be the best way to go.

Helen Eadie: The Cabinet Secretary for Health and Wellbeing has acknowledged that it would be controversial if an elected representative were removed from any board. Usually, a member would be removed only in criminal circumstances or in the other circumstances that are outlined in our papers for this meeting.

All of us in the Parliament have scars caused by the mood of the public. People want their elected representatives, irrespective of how they reached their position, to be able to speak freely at meetings and not to feel under any kind of cosh. That is why I stick to my point and would be willing to press it to a vote. Affirmative procedure should be used in these cases. No work that the Parliament has done in recent years has been more important than this particular bill. It has galvanised public opinion; people feel very strongly about it.

Tom McCabe: I want to make it clear that such instances would be rare, and that in the vast majority of them the minister would take an objective decision. Once a minister has taken a decision, and if Parliament chooses to consider it, we have to be confident that even a Parliament made up of different politicians would be able to be objective. We need to be confident about that; otherwise, we should not be wasting our time on this.

From my experience of being a minister, I think that ministers will be objective. We need to be confident that, when the issue is serious enough, the Parliament can be equally objective.

Ian McKee: I totally accept that the minister, from whichever party they came, would be objective. However, there will be circumstances—if this ministerial power were ever used—in which it would not be in the interests of the individual or of society for the issue to be debated in Parliament, as it would be under the affirmative procedure. We should take that into account. For example, the individual's health may have to be discussed.

The Convener: As I said earlier, the deadline for lodging amendments is Friday. We have had a good debate, and it will appear in the *Official Report*. I would rather not go to a division on this question, unless we absolutely have to. If Helen Eadie wishes, she could pursue the issue herself. She would be quite within her rights to do so.

What is being proposed is not hugely different from what has happened in the past. Helen, if we were to report to the lead committee and to Parliament, making it clear that two different points of view arose in the committee—yours and Ian McKee's—would that be sufficient for you?

Helen Eadie: Yes.

The Convener: Would that be all right with the clerks?

Shelagh McKinlay (Clerk): Yes.

The Convener: I undertake to ensure that our difference of opinion is flagged up. In our report, we should give our colleagues a steer to look at the *Official Report* of today's meeting, which will give the full flavour of our views.

Members *indicated agreement*.

The Convener: All right, let us move on.

Are members content that section 2(1A) of the bill, which inserts section 105(2A) into the National Health Service (Scotland) Act 1978—to provide that election regulations shall be subject to affirmative procedure—is acceptable?

Members *indicated agreement*.

The Convener: An additional provision in section 2(2) of the bill will insert schedule 1A to the 1978 act. Paragraph 3(2) of that schedule will provide that, if election regulations specify a division of a health board area into more than one ward, the regulations must also specify the number of elected members to be elected in each electoral ward. Is that acceptable?

Members *indicated agreement*.

The Convener: Committee members can imagine that that issue is of some interest to me. Where I come from is part of a very large health board area.

Section 2(2) of the bill will also insert paragraph 4(1) of schedule 1A to the 1978 act. That will provide that election regulations must appoint an individual as the returning officer for each ward in which a board election is to be held. Is that acceptable?

Members *indicated agreement*.

14:30

The Convener: Amended provisions in section 2(2) of the bill will insert paragraphs 7 and 8(1) of schedule 1A to the 1978 act, in relation to election regulations. Is that acceptable?

Members *indicated agreement*.

The Convener: Those changes only clarify the drafting.

An additional provision in section 2(2) inserts paragraph 8(4) of schedule 1A to the 1978 act. If

election regulations provide for votes in a health board election to be cast only by post, the regulations must also provide for a system of personal identifiers to be used. If a traditional ballot is used—that is, a mixture of ballot box and postal ballot—then personal identifiers will not be required. Is that acceptable?

Members *indicated agreement*.

The Convener: An additional provision in section 2(2) of the bill will insert paragraph 9(2) of schedule 1A to the 1978 act. It will provide that election regulations may disqualify from being a candidate an individual who holds a post that is on a list of restricted posts. The list will be maintained by the health board concerned for that purpose. Is that acceptable?

Members *indicated agreement*.

The Convener: That is rather similar to what has happened in local government for many years.

In section 4, "Pilot scheme", amendments made to subsection (4) will amend the procedures in connection with a pilot order. Are members content to welcome the fact that the Government has amended section 4 of the bill in response to comments and recommendations made by this committee at stage 1?

Members *indicated agreement*.

The Convener: We have achieved a bit of a result there, and I think that we can pat ourselves gently on the back, if MSPs are allowed to do that.

Section 6, "Termination of pilot scheme", is where things get a bit more complicated. We discussed the issue at quite some length at stage 1. I will ask committee members whether they are content to draw two particular points to the attention of the lead committee and the Parliament.

The first concerns section 6(2) of the bill. Section 6(2) provides for the automatic repeal of sections 1 to 7 and paragraph 2 of the schedule if the pilot order is revoked, or on the day after the Parliament fails to resolve to approve a draft roll-out order. However, section 6 does not provide for the revocation of the pilot order in the event that the Parliament fails to approve a draft roll-out order—although it appears that that must be the effect of the repeal of sections 1 to 7. Do we agree to draw that point to the attention of the lead committee and the Parliament?

Members *indicated agreement*.

The Convener: The second point is this. If Parliament were to fail to approve a draft roll-out order, the bill does not appear to provide that, or make clear whether, on the automatic repeal of sections 1 to 7, the Scottish ministers are permitted any delegated powers to make any further or consequential provisions that might be needed in regard to the pilot area arrangements. This is given that such arrangements for elections, or the reorganisation of the membership of health boards, may have been implemented up to the date of any rejection of a roll-out order, by virtue of the pilot order. That assumes that such powers are sought, or may require to be taken, by the Scottish ministers in those circumstances, which is a matter to be considered by the Government. Do we agree to draw that point, too, to the attention of the lead committee and the Parliament?

Members *indicated agreement*.

The Convener: We have to go through such issues at length, for the purposes of the record. Our clerks will also bring those matters directly to the attention of the Scottish Government, given the very tight timescales involved.

Section 7(1) of the bill is on powers to make a "roll-out order". A roll-out order in terms of section 7 of the bill shall be subject to the prescribed form of super-affirmative procedure—which has been described as "affirmative procedure with knobs on". Is that acceptable?

Members *indicated agreement*.

The Convener: On section 7(3A)(c), do we agree to ask the Government to explain urgently—after all, it is 3 March today and we need the response in sufficient time to meet the deadline for stage 3 amendments—why the period of 60 calendar days that is specified for Parliament and committee consideration of a proposed draft roll-out order does not exclude any days during which the Parliament is dissolved or in recess? We are putting the question because the effect may be to give an insufficient period for parliamentary consideration of a proposed draft roll-out order after it is laid.

Ian McKee: I can see why the period does not exclude any days during which the Parliament is dissolved or in recess. Under certain circumstances, particularly if the order is laid just before the summer recess, the risk is that an inordinate length of time would be added to the passage of the legislation. We ought to take account of that before putting the question to the Government.

Helen Eadie: The difficulty in which we find ourselves is that this is the last meeting at which we can consider the Government's response to any request for further information. We should have a fall-back position. I suggest that that takes the form of a stage 3 amendment. If we receive a reassurance from the Government that makes everyone round the table happy, we can withdraw the amendment on the day. I propose that we proceed on that basis.

Tom McCabe: I agree with that. It is obvious why the Government has done that. That said, the fact that recess days are not included hampers the Parliament's ability to input to legislation. A contradiction is involved and it needs to be fixed, one way or another. As we have discussed, the 60-day period gives the Parliament the ability to input to legislation. However, if an instrument is laid immediately before the Parliament's summer recess, the 60-day period elapses before we resume. I can see why the Government is trying to avoid having a time period that goes on for ever, but there is a contradiction and it should be fixed.

Helen Eadie: The restriction will apply, no matter which Government is in power.

The Convener: Today is 3 March. If we were to write to the Government tomorrow, we should receive a swift response. Depending on the response, are members content to leave it to me as convener to decide whether to lodge a stage 3 amendment?

Helen Eadie: Yes.

Tom McCabe: Yes.

Ian McKee: What is the wording of the amendment that you would lodge if the Government response is not satisfactory, convener?

The Convener: I would want to think about that. As Tom McCabe and Helen Eadie have said, we should have an amendment in our back pocket for use if necessary. I think that the response will be along the lines that Dr McKee suggests. That said, even if just to be tidy, we should have an amendment in hand.

Ian McKee: Confident though I am in your impartiality, skills and intelligence, convener, I am slightly reluctant to back anyone in lodging an amendment that I have not seen.

The Convener: If you turn to page 16 of the legal brief, you will see the proposed wording of the amendment.

Ian McKee: I have read it, but surely it needs to be in the *Official Report*.

The Convener: Absolutely. There is no problem in ensuring that. The amendment, which would be in my name, proposes to amend section 7(3A)(c), on page 8, line 25, by adding at the end:

"(no account being taken of any time during which the Scottish Parliament is dissolved or is in recess)."

Ian McKee: That is using a sledgehammer to crack a nut. We are concerned about legislation that might be introduced just before the summer recess. The amendment is more general than it needs to be.

Bob Doris: Perhaps we could be more specific. The time bar could apply to a period just before the summer recess. For example, we could say that the Government could not lay an instrument in the week before the recess.

The Convener: The clerk has said that an amendment could be drafted to take on board that point. Obviously, I would not move an amendment in the chamber without you guys having seen it and without you being happy with it.

Helen Eadie: Bob Doris's point is a good one. People get a bad taste in their mouths when legislation is introduced right on the cusp of a recess and parliamentarians are not given the opportunity to express a view that reflects public opinion. Perhaps the clerks can draft a revised amendment and circulate it to members for agreement. Once that is done, the amendment can be lodged.

The Convener: Helen Eadie made the point clearly. If we all coalesce on what she said, would that be acceptable guidance for the clerks?

Shelagh McKinlay: We have no problem in drafting an amendment for members to consider informally.

The Convener: Have you got the steer that you need from us?

Shelagh McKinlay: Yes.

Ian McKee: Is there any precedent for lodging such amendments?

The Convener: There are precedents. I think that we did something similar about a year ago.

Judith Morrison (Legal Adviser): We lodged an amendment during stage 3 of the Glasgow Commonwealth Games Bill.

The Convener: That is right.

Ian McKee: Was there a similar process?

The Convener: Yes.

Helen Eadie: On that occasion, did you not seek leave to withdraw the amendment, convener?

The Convener: I did, but only with the consent of committee members. As members might recollect, I was hurtling around the chamber to seek your agreement before I did that.

Helen Eadie: That is right. I remember that.

Bob Doris: First, I would like to see the reassurance that the Government gives us. In proposing the wording "one week", my intention was for the wording to be less open-ended than that of the proposed draft amendment.

The Convener: I suggest that we write to the Government along the lines that I have set out and that we do that as quickly as is humanly possible. Depending on the reply, I further propose that the clerks frame an amendment—I hope that I am being clear—that is not as blunt as the amendment in our legal brief but will take account of our concern about the long summer recess and undue delay. I will leave the actual wording to the wordsmiths.

Tom McCabe: I suggest that we go for a two-week window before the summer recess. If an instrument is laid before any other recess, two weeks are lost in any case. If we were to suggest such a restriction, the effect would be the same for all recesses—with the exception of the February recess, which is only one week.

The Convener: I have no intention of standing up in the chamber and speaking to an amendment for the glory of the moment or just to annoy the Government. I am not volunteering to do this for fun. I hope that we do not have to lodge an amendment, but if we come to that moment of truth, I would not be happy to stand up and speak to the amendment unless I had pretty much the unanimous support of the committee. If a section of the committee is deeply unhappy with the idea, it will not fly.

Helen Eadie: Members on both sides of the argument acknowledge the problem and agree that something needs to be done. As Bob Doris said, the Government's response will be helpful in any solution. Perhaps its observation will solve the problem, but we should have a back-stop nonetheless.

The Convener: Are members content with that?

Members *indicated agreement*.

The Convener: I thought that there were two further questions for the committee, but I have put them. We have got ahead of ourselves. Is that not clever?

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