SUBORDINATE LEGISLATION COMMITTEE

AGENDA

4th Meeting, 2009 (Session 3)

Tuesday 27 January 2009

The Committee will meet at 2.15 pm in Committee Room 6.

1. **Instruments subject to annulment:** The Committee will consider the following—
   
   the Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2009 (SSI 2009/1);  
   the Animal By-Products (Scotland) Amendment Regulations 2009 (SSI 2009/7);  
   the Plant Health (Import Inspection Fees) (Scotland) Amendment Regulations 2009 (SSI 2009/8).

2. **Instruments not laid before the Parliament:** The Committee will consider the following—
   
   the Scottish Register of Tartans Act 2008 (Commencement) Order 2009 (SSI 2009/5);  
   the Public Health etc. (Scotland) Act 2008 (Commencement No. 1) Order 2009 (SSI 2009/9);  
   Act of Sederunt (Registration Appeal Court) 2009 (SSI 2009/12).

3. **Health Boards (Membership and Elections) (Scotland) Bill:** The Committee will consider the Scottish Government's response to the Committee's Stage 1 report.

4. **Climate Change (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.

The papers for this meeting are as follows—

**Agenda Items 1-5**

Legal Brief SL/S3/09/4/1 (P)

Summary of Recommendations SL/S3/09/4/2

Government Responses SL/S3/09/4/3

**Agenda Item 3**

Government Response to SLC Stage 1 Report SL/S3/09/4/4

Paper from the Clerk SL/S3/09/4/5

SLC Health Board Elections Stage 1 Report SL/S3/09/4/6

**Agenda Item 4**

Climate Change (Scotland) Bill
Delegated Powers Memorandum

**Agenda Item 5**

Local Democracy, Economic Development and Construction Bill (UK Legislation)
The Committee will be invited to consider the following recommendations under consideration at today’s meeting. Decisions are a matter for the Committee.

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### Agenda Item 1  Instruments subject to annulment

**The Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2009 (SSI 2009/1)**

The Committee may wish to consider whether it is content with the explanation provided by the Scottish Government and to report to the lead committee and the Parliament accordingly.

**The Animal By-Products (Scotland) Amendment Regulations 2009 (SSI 2009/7)**

**The Plant Health (Import Inspection Fees) (Scotland) Amendment Regulations 2009 (SSI 2009/8)**

The Committee may wish to consider if it is content with these instruments.

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### Agenda Item 2  Instruments not laid before the Parliament

**The Scottish Register of Tartans Act 2008 (Commencement) Order 2009 (SSI 2009/5)**

**The Public Health etc. (Scotland) Act 2008 (Commencement No. 1) Order 2009 (SSI 2009/9)**

**Act of Sederunt (Registration Appeal Court) 2009 (SSI 2009/12).**

The Committee may wish to consider if it is content with these instruments.
Agenda Item 3  Health Boards (Membership and Elections) (Scotland) Bill

The Committee may wish to note and comment on the Scottish Government’s response to the Committee’s stage 1 report.

Agenda Item 4  Climate Change (Scotland) Bill

Section 4 - Setting annual targets

The Committee may wish to ask the Scottish Government, in relation to sections 4 and 6, on what bases it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of an order under those sections (setting or modifying annual targets) with specified persons or bodies who may have particular interest in the proposals.

Section 6 - Modifying annual targets

The Committee may wish to consider asking the Scottish Government—

(a) to explain and justify why it is considered, in relation to the power in section 6(4), that this may be exercised in any circumstances where the Scottish Ministers consider it appropriate to do so; and

(b) whether more defined circumstances in which it would be appropriate to exercise the power (in a similar manner to section 6(2) and (3)) could be prescribed, for instance where it becomes necessary for the achievement of targets.

Section 9 - Greenhouse gases

The Committee may wish to consider whether the proposed power, subject to affirmative procedure, to be acceptable in principle.
Section 11 – Baseline for additional greenhouse gases

The Committee may wish to consider whether the proposed power, subject to affirmative procedure, to be acceptable in principle.

Section 12 - The net Scottish emissions account

The Committee may wish to consider whether it should notify the Scottish Government that it does not favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as provided for in section 64(7)(a) in relation to section 12(2), rather than affirmative procedure.

The Committee may also wish to consider asking the Government—

(a) whether it could re-consider if all regulations under section 12(2) could be by affirmative procedure, and

(b) if it does not take this view, if it could fully explain to the Committee what types of “technical” provisions would be subject to second and subsequent negative procedure regulations under section 12(2) (but would not be provisions that would attract affirmative procedure under section 64(7)(a)); could a description of these provisions be put in the Bill; and why it is considered appropriate those provisions should be subject to negative procedure, while the other provisions should be subject to affirmative procedure.

Section 14 - Scottish share of emissions from international aviation and international shipping

The Committee may wish to consider whether it should ask the Scottish Government, in relation to section 14, on what bases it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of an order with specified persons or bodies who may have particular interest in these proposals.

Section 15 - Scottish emissions and removals

The Committee may wish to consider whether the proposed power, subject to affirmative procedure, to be acceptable in principle.
Section 17 – International carbon reporting practice

The Committee may wish to consider if the proposed power is acceptable in principle, and that it is subject to negative procedure.

Section 18 - Carbon units and carbon accounting

The Committee may wish to consider whether it should notify the Scottish Government that it does not favour the use of the lesser degree of scrutiny of negative procedure for second or subsequent regulations, as provided for in section 64(7)(b) in relation to section 18(1), rather than affirmative procedure.

The Committee may also wish to consider asking the Scottish Government—

(a) whether it could re-consider if all regulations under section 18 could be by affirmative procedure, and

(b) if it does not take this view, if it could fully explain and justify to the Committee why it is considered appropriate that the first use of the regulation-making power under section 18 together with any regulations making provision specifying a carbon unit of a kind not previously specified) should be subject to affirmative procedure, whereas all other second or subsequent regulations under section 18 should be subject to negative procedure.

Section 19 – Meaning of advisory body

The Committee may wish to consider if the proposed power is acceptable in principle, and that it is subject to affirmative procedure.

The Committee may wish to consider whether it should draw to the attention of the lead and secondary committees for the Bill (in relation to the effect of the delegated powers contained in sections 19 and 20, and Schedule 1) that the Explanatory Notes (para 33) and the Policy Memorandum (para 31) indicate that Ministers will require to seek expert, independent advice from the advisory body, but the Bill provides—

(a) in section 19(1) and (5), that a designated advisory body may be any public body as Ministers consider appropriate, which may be a person or body with functions of a public nature (not necessarily independent of the Scottish Ministers or Government), and

(b) in Schedule 1, paragraph 2, that the members of the Scottish Committee on Climate Change shall be appointed by the Scottish Ministers.
The Committee may wish to acknowledge, however, that in relation to those statements in the Policy Memorandum and Explanatory Notes, “independent” is capable of having different meanings and does not necessarily refer to a body which is wholly independent of the Scottish Ministers.

**Section 20 - Scottish Committee on Climate Change**

The Committee may wish to consider if the proposed power is acceptable in principle, and that it is subject to affirmative procedure.

**Schedule 1 (The Scottish Committee on Climate Change) (introduced by section 20)**

**Paragraph 2(2) – Membership of the Committee**

The Committee may wish to consider if this proposed power is acceptable in principle, and that it is subject to negative procedure.

**Delegated powers in form of directions or determinations**

The Committee may wish to consider if these proposed delegated powers are acceptable in the form of directions or determination (as the case may), and if it is considered that they are not more appropriately expressed in the form of subordinate legislation.

**Section 23 – Reporting on progress towards targets**

The Committee may wish to consider if these proposed powers are acceptable in principle, and that they are subject to affirmative procedure.

**Section 24 – Scottish Ministers’ response to reports on progress**

The Committee may wish to consider if these proposed powers are acceptable in principle, and that they are subject to affirmative procedure.
Section 26 – Guidance to advisory body

The Committee may wish to consider if this proposed delegated power is acceptable in the form of the issue of guidance, or whether the power would not be more appropriately expressed in the form of subordinate legislation.

Section 27 – Power to give directions to the advisory body

The Committee may wish to consider if this proposed delegated power is acceptable in the form of directions, or if it is considered that the power is not more appropriately expressed in the form of subordinate legislation.

The Committee may wish to consider whether it should draw to the attention of the lead and secondary committees for the Bill the delegated powers conferred on the Scottish Ministers in sections 26 and 27 to issue directions and guidance to the advisory body, given that the Explanatory Notes (para 33) and the Policy Memorandum (para 31) indicate that the advisory body shall provide independent advice to Ministers.

Section 35 - Further provision about reporting duties

The Committee may wish to consider if this power is acceptable in principle, and that it is subject to affirmative procedure.

Section 36 - Duties of public bodies relating to climate change

The Committee may wish to consider asking the Scottish Government——

(a) whether consideration was given to the type of ‘public bodies’ which could be subject to climate change duties and, if so, whether ‘public bodies’ for purposes of this section could be more narrowly defined; and

(b) whether consideration was given to providing a definition of ‘climate change duties’ which did not refer back to section 36(1) and, if so, whether ‘climate change duties’ for purposes of this section could be more specifically and more narrowly defined; and
given that climate change duties are not precisely defined and given that any order under section 36 could potentially affect a very wide range and large number of public bodies, whether consideration was given to providing for a broader range of persons whom the Scottish Ministers are obliged to consult under section 36(4) and (5).

Section 37 – Guidance to relevant public bodies

The Committee may wish to consider if this proposed delegated power is acceptable in the form of the issue of guidance and not more appropriately expressed as a power to make subordinate legislation. The Committee may wish to ask for further justification from the Scottish Government as to the nature and scope of the power sought under section 36, as to the function and likely content of this guidance.

Section 38 – Reporting on climate change duties

The Committee may wish to consider whether this power is acceptable in principle and that it is subject to negative procedure.

Section 39 - Appointment of monitoring body

The Committee may wish to consider whether this power is acceptable in principle and that it is subject to affirmative procedure.

Sections 40 to 44 – Investigations

The Committee may wish to consider whether the proposed powers to direct in sections 40(2), 42(1) and (2) and 44(1), to be acceptable in principle and not more appropriately expressed in the form of subordinate legislation.

The Committee may wish to consider if the proposed delegated power in section 43 is acceptable in the form of the issue of guidance and not more appropriately expressed in the form of subordinate legislation.

Section 46 - Variation of permitted times for making muirburn

The Committee may wish to consider asking the Scottish Government whether or not it considers it would be appropriate to consult the hill farming community, landowners
and others who may be affected on the dates which may be appropriate for
muirburn, in advance of making an instrument.

Section 47 - Power to modify functions of Forestry Commissioners

The Committee may wish to consider asking the Scottish Government, given that the
proposed power under section 47(1) to modify, by order, the functions of the Forestry
Commissioners in or as regards Scotland does not contain any limitation with
respect to the nature, scope or extent of any such modification, whether it has given
consideration to the imposition of a restriction, within the power, on the nature, scope
and extent of any modification which may be made; and, whether or not any such
consideration has been given, does it not consider that such a limitation would be
both feasible and appropriate.

Section 50 – Non-domestic buildings: assessment of energy performance and
emissions

The Committee may wish to consider whether the proposed power to make
regulations with respect to the assessment of energy performance and emissions to
be acceptable in principle; that (subject to the following exception) the affirmative
procedure is appropriate; the exception being that negative procedure is appropriate
in respect of regulations with respect to the levy of charges to enable the
enforcement authority to recover reasonable costs incurred by it in exercising its
functions under the regulations.

Section 52(1), (2) and (4) - Waste prevention and management plans

Section 52(3) - the enforcement authority must have regard to any guidance
given by the Scottish Ministers to it in relation to the functions conferred on it
by the regulations.

The Committee may wish to consider asking the Scottish Government—

a) what kinds or classes of persons does the Scottish Government intend or
anticipate will be subject to duties under the regulations? In particular is there
any intention to apply the power to domestic activities or individuals?

b) would it not be possible for the Scottish Government to specify, in the section,
the classes of persons to be subject to the regulations and, if so, why has this
not been done?
The Committee may wish to consider if the proposed delegated power to issue guidance is acceptable and not more appropriately expressed in the form of subordinate legislation.

Section 53(1), (2), (3) and (5) - Information on waste

Section 53(4) - SEPA may give guidance to persons to whom the regulations apply on how to comply with the requirements of the regulations

The Committee may wish to consider asking the Scottish Government—

c) what kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

d) would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

The Committee may wish to consider if the proposed delegated power to issue guidance is acceptable and not more appropriately expressed in the form of subordinate legislation.

Section 54(1), (2), (4) and (5) - Recyclable waste: facilities for deposit etc.

Section 54(3) – the enforcement authority must have regard to any guidance given by the Scottish Ministers to it in relation to the functions conferred on it by the regulations.

The Committee may wish to consider asking the Scottish Government—

e) what kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

f) would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

The Committee may wish to consider if the proposed delegated power to issue guidance is acceptable and not more appropriately expressed in the form of subordinate legislation.
Section 55(1) and (2) - Recyclable waste: facilities for deposit at events etc.

Section 55(3) and section 55(4) – local authorities and the enforcement authority respectively must have regard to any guidance given to them by Scottish Ministers in relation to the functions conferred on them by the regulations.

The Committee will wish to consider whether the powers in section 55(1) and (2) are acceptable in principle and that they are (with specified exceptions where negative procedure applies) subject to affirmative procedure.

The Committee may wish to consider if the proposed delegated powers under section 55(3) and (4) are acceptable in the form of the issue of guidance and not more appropriately expressed in the form of subordinate legislation.

Section 56(1), (2), (3) and (6) - Procurement of recyclate - regulations

Section 56(4) – The enforcement authority must have regard to any guidance given by the Scottish Ministers to it in relation to the functions conferred on it by regulations.

Section 56(5) – Persons to whom the regulations apply must have regard to any guidance given by the Scottish Ministers or the enforcement authority to them in relation to the requirements imposed by the regulations.

The Committee may wish to consider asking the Scottish Government—

a) What kinds or classes of persons does the Scottish Government intend or anticipate will be subject to duties under the regulations? In particular is there any intention to apply the power to domestic activities or individuals?

b) Would it not be possible for the Scottish Government to specify, in the section, the classes of persons to be subject to the regulations and, if so, why has this not been done?

The Committee may wish to consider if the proposed delegated power to issue guidance in section 56(4) is acceptable and not more appropriately expressed in the form of subordinate legislation.

The Committee may wish to consider if the proposed delegated power to issue guidance in section 56(5) is acceptable and not more appropriately expressed in the form of subordinate legislation.
Section 57(1), (2) and (4) – Targets for reduction of packaging etc.

Section 57(3) – the enforcement authority must have regard to guidance issued by the Scottish ministers in relation to the functions conferred on it by the regulations.

The Committee might wish to consider whether the particular power to issue guidance contained in section 57(3) is not more appropriate to be expressed as a power to make subordinate legislation.

In relation to section 57(1), (2) and (4), the Committee might wish to consider whether it should ask the Scottish Government to fully explain and justify why—

(a) unlike the approach taken in Part 1 of the Bill, the Scottish Government requires to take the powers in section 57(1) and (2), in so far as they propose that any targets without limit (set by any method) may be set for the reduction of packaging or the reduction of emissions produced by packaging, or requirements on persons to comply with those targets;

(b) given that the Memorandum refers to the possibility of targets being imposed on retailers, the Scottish Government requires to impose those targets or requirements on any types of persons (individuals or legal persons) who might be specified in the Regulations, and

(c) on what bases it has considered that there should be no requirements on the face of the Bill to the effect that Ministers shall consult on the terms of the regulations with specified persons or bodies that may have particular interest in the proposals.

Section 58 – Deposit and return schemes

The Committee may wish to consider if this power is acceptable in principle and (with specified exceptions where negative procedure applies) subject to affirmative procedure.

Section 59 - Charges for supply of carrier bags

The Committee may wish to consider if the powers are acceptable in principle, and subject to affirmative procedure (with the exception of negative procedure for regulations dealing only with charging by enforcement authority under section 64(7)(e)).
The Committee may wish to consider whether the power to issue guidance contained in section 59(3) is not more appropriate to be expressed as a power to make subordinate legislation.

Section 64 – Subordinate legislation

The Committee may wish to consider asking the Scottish Government why (in contrast to the approach taken in sections 74 and 75 of the Judiciary and Courts (Scotland) Act 2008))—

(a) it is considered that section 64(3) requires to contain a power for orders or regulations to modify any enactment (including the Act) by affirmative procedure (a “Henry VIII power”), without any reference to the purposes of such modification, for example, for the purposes of making consequential, incidental, transitional, transitory, or savings provisions, and

(b) if the Government would re-consider whether the power to make supplementary, incidental or consequential provision could be limited to the purposes of giving full effect to, any provision of the Act, and the power to make transitory, transitional or saving provisions could be limited to being in connection with the coming into force of any provision of the Act.

Section 67 – Commencement

The Committee may wish to if this power is acceptable, and that (being commencement order provisions) they are subject to no procedure.

Agenda Item 5 Local Government, Economic Development and Construction Bill (UK Parliament legislation)

Clause 143 Commencement: construction contracts

The Committee may wish to find acceptable this commencement power, which is conferred on the Scottish Ministers in regard to Part 8 provisions in the Bill relating to construction contracts.
The Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2009 (SSI 2009/1)

On 15 January 2009 the Scottish Government was asked to explain, given that—

- a new version of Table D in Part 2 of Schedule 2 to the principal regulations (SSI 2008/100, as amended) is inserted by regulation 5 of SSI 2009/1,
- the new version of the table includes both 'high pruning' at £1.30 per tree and 'high pruning of trees' at £400 per hectare, and
- neither term is defined in the principal regulations,

if there is a means of distinguishing between high pruning and high pruning of trees and, if not, how it is anticipated that it will be determined on which basis beneficiaries will be eligible for payment.

The Scottish Government responds as follows—

The terms ‘high pruning’ and ‘high pruning of trees’ can be distinguished. ‘High pruning’ covers the high pruning of an individual tree whereas ‘High Pruning of trees’ covers collective tree pruning. The difference can be found in the apportioning of the standard cost in column 2 of Table D. ‘High Pruning’ is awarded costs per tree but ‘High Pruning of trees’ is awarded costs by hectare, indicating that it covers areas including more than one tree.

Further regulation 21(2) of SSI 2008/100 states ‘Scottish Ministers must have regard to any guidance under paragraph (1) when performing their functions under these regulations’. There is up to date approved published guidance available which is user friendly and clearly defines each definition in Table D. The guidance explains the separate specifications for each capital item in table D of SSI 2009/1 and displays this information in an easy to follow table which mimics Table D in the legislation but in more detail. It is felt by the Scottish Government that by explaining terminology in the guidance, which is often lengthy and/or technical, the SSI avoids being overly complex. By defining the terminology in a comprehensive table in the guidance the reader is aware where to look to understand all the terms used in Table D and the process retains a consistent method by which the user can find exactly what each capital item covers. The guidance is available on line at:

http://www.scotland.gov.uk/Publications/2008/04/01115039/124

and defines the terms as follows:
High pruning
High pruning to increase light levels along path edges, to open up views or create a variety of habitat in areas under a managed access and/or recreation agreement.

Should be carried out using purpose made hand or mechanical pruning saws.

Cuts should be flush with stem. Includes pruning up to 6 metres high.

The first stage of high pruning larger branches is to remove most of the weight of the branch to ease the later cuts. This is achieved 6-12 inches away from the stem by a first undercut to prevent splitting followed by a second top cut which severs the branch at this point. Before the final cut is made the ‘branch bark ridge’ must be identified: this is an external feature which is readily visible at the trunk/bark junction. The final cut must not disturb this ridge or the internal anatomical features associated with it.

Presumes that woodland has been brashed previously or lower branches are minimal.

High pruning of trees
High pruning is the selective reduction and removal of branches to create some vertical lift of the tree canopy, allowing space under the tree for light, people, wildlife, vehicles and/or existing buildings. It can also open up views or create a variety of habitat in areas under a managed access, recreation and/or biodiversity improvement agreement.

Should be carried out using purpose made hand or mechanical pruning saws.

To ensure no adverse effects on individual tree increment, at least one-third of the total height of the tree should be crown.

High pruning should be carried out to achieve a minimum of 4 metres and up to 10 metres clear stem at the time of the first pruning operation.

The first stage of high pruning larger branches is to remove most of the weight of the branch to ease the later cuts. This is achieved 6-12 inches away from the stem by a first undercut to prevent splitting followed by a second top cut which severs the branch at this point. Before the final cut is made the ‘branch bark ridge’ must be identified: this is an external feature which is readily visible at the trunk/bark junction. The final cut must not disturb this ridge or the internal anatomical features associated with it.
Further to the Committee evidence sessions in Parliament on the Health Boards (Membership and Elections) (Scotland) Bill, I thought it would be helpful if I wrote to you and set out the main areas that we would seek to amend at Stage 2. These are in response to both our own internal scrutiny and to the helpful issues raised during these Committee sessions in Parliament.

Election Regulations (section 2(2) of the Bill)

Section 2(2) inserts a new Schedule 1A into the National Health Service (Scotland) Act 1978. Paragraph 13 of Schedule 1A gives Scottish Ministers powers to make regulations to be known as election regulations. These regulations are currently subject to negative procedure.

In our letter to the Subordinate Legislation Committee of 6 October, we indicated that we would bring forward an amendment at Stage 2 that would apply affirmative procedure to these regulations in order to enhance Parliamentary scrutiny.

Returning Officers – Paragraph 4(1) of the proposed Schedule 1A provides that the Health Board must appoint returning officers. As set out in the draft election Regulations previously circulated to the Committee, the policy intention is that the returning officer for Health Board elections is the returning officer for elections of councillors for the most populous local government area in the Health Board area. We intend to bring forward an amendment at Stage 2 to reflect this.

Restricted Posts – This was brought up in paragraph 72 of your report. We intend to amend paragraph 9(b) of the proposed Schedule 1A to ensure that Health Boards are authorised to establish their list of restricted posts as is the case for Local Authorities.

The identification of these posts and appeals process for those identified is set out in Rule 12 of our draft Elections Regulations that were supplied to your Committee in advance of their evidence sessions.
Pilot Order (section 4 of the Bill)

Section 4(1) provides that Scottish Ministers may, by pilot order, appoint a day on which sections 1 to 3 of the Bill are to come into force, with such modifications as Ministers consider appropriate, in respect of the Health Board areas specified in the Order. This Order is currently subject to no parliamentary procedure as it is akin to a commencement order.

However, we recognise that the power to modify goes further than a normal commencement order. So, in our letter to the SLC, we gave a commitment to bring forward an amendment at Stage 2 to provide that if the pilot order contains any modifications, i.e. express textual amendments, then the Pilot Order would be made subject to affirmative procedure.

Revocation of the Pilot Order (section 4 of the Bill)

If an issue were to arise within only one pilot area that was seen to be a threat to the operation of the NHS in that area, then Scottish Ministers could make use of their existing powers of direction or dismissal under the NHS (Scotland) Act 1978. Any issue with the pilots as a whole is different and I would agree that any move to revoke the pilot order in its entirety should be subject to Parliamentary procedure. We are currently considering amendments attracting parliamentary procedure to any Ministerial order that seeks to end pilots early. You also mentioned at paragraph 129 of your report that revocation would mean the removal of the statutory basis for Local Authority members being on a Health Board. If this happened, the Scottish Government would bring forward an amendment at the next available legislative opportunity to re-instate this. In the meantime, the places of Local Authority members would be ensured through the existing administrative process.

Length of Pilot Order (section 5 of the Bill)

I stated at Committee that the pilot schemes should last for a minimum of two years. The evaluation report on the pilots would be published no later than five years after the pilots began. We have considered the insertion of a minimum time requirement for pilots and I would propose that this should sit within section 5 of the Bill rather than sitting within subordinate legislation. An amendment reflecting this will be brought forward at Stage 2.

Roll Out of Elections (section 7 of the Bill)

Section 7(1) gives Scottish Ministers power to make a ‘roll-out order’ to appoint a day on which sections 1 to 3 are to come into force in respect of Health Board areas not specified in the pilot order. The roll-out order may modify any enactment, including the Bill, as Ministers consider appropriate and is currently subject to negative procedure.

Again, we gave an undertaking to the Subordinate Legislation Committee to bring forward an amendment requiring affirmative procedure for roll-out orders which make express textual amendments to enactments. However, given the exceptional nature of this legislation and the effect on NHS Boards, after further reflection I have instructed my officials to ensure that “super affirmative” procedure be adopted as recommended by the Committee and that this is reflected in the Bill at Stage 2.

I can assure the Committee that the tabling of the roll-out order will only follow a completely independent evaluation of the pilots.
Costs

One issue where the lead Committee asked for further information is around the costs associated with using personal identifiers for the pilot elections.

Using figures supplied by the Scottish Assessors Association, the cost of using identifiers would add, on average, £1 to the cost per registered elector. That would mean an additional £775,000 for pilots based on the figures used in the Financial Memorandum, which involved 20% of the population. The Scottish Assessors Association also indicated that there would be additional administration costs to support the use of personal identifiers.

The additional cost would mean the pilot scheme would cost £3.635m (up from £2.86m). Full roll out would cost £20.52m (up from £16.65m). Additional to these costs would be the administrative costs to support the process e.g. additional IT equipment, staff and accommodation.

As I stated in my evidence to the Health and Sport Committee on 26 November, we do not propose to use personal identifiers for the pilot elections due to the significant increase in cost and the effect it would have on the timetable. Discussions with Electoral Registration Officers have already highlighted to us the significant extra work that would have to be undertaken both initially in collecting identifiers but also as part of the process to check the identifiers during the vote itself. However, on the broader consideration of costs, I will instruct an amendment at Stage 2 that will ensure costs of pilots and potential roll out costs are fully considered as part of the independent evaluation of the pilots.

Pilot Arrangements

There were 2 generic issues that arose in the Committee stages with regard to the piloting of elections.

The Health and Sport Committee asked me to consider changing the title of the Bill. I have reflected on this and propose to bring forward an amendment to the long title of the Bill to reflect the fact that pilots have to take place initially.

The Health and Sport Committee report also asked that alternative approaches to increasing engagement and involvement should happen alongside the piloting of elections. I am happy to give an undertaking to bring forward details of non statutory pilot schemes that will run concurrently with elections in advance of Stage 3.

I hope this is helpful and I would like to pass on my thanks to you and your colleagues on the Committee for your useful input to the development of this Bill.

NICOLA STURGEON
SUBORDINATE LEGISLATION COMMITTEE

34th Meeting, 2009 (Session 3)

Tuesday 27 January 2009

Paper by the Clerk

HEALTH BOARDS (MEMBERSHIP AND ELECTIONS) (SCOTLAND) BILL

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Health Boards (Membership and Elections) (Scotland) Bill to the Health and Sport Committee, as lead committee for the Bill, on 24 November.

2. On 12 January the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP wrote to the Convener setting out the main areas that the Scottish Government intends to seek to amend at Stage 2. A number of amendments to the Bill are to be proposed in response to this Committee’s recommendations.

Section 1(5) and (6) (constitution of Health Boards) – Power to specify the circumstances in which an elected member must vacate office.

3. The Committee’s report drew to the attention of the lead committee a number of issues in relation to the delegated power to specify the circumstances in which an elected member must vacate office.

4. The Committee made only one specific recommendation in relation to this issue which is that, should the Parliament conclude that Ministers should have the power to set the circumstances in which they may dismiss elected members, these should be subject to affirmative procedure.

5. The Cabinet Secretary’s letter does not address issues relating to section 1(5) and (6).

Election Regulations (section 2(2) of the Bill)

6. The Cabinet Secretary’s letter confirms the Scottish Government’s intention to put forward an amendment at Stage 2 that would apply affirmative procedure to these regulations.
Pilot Order (section 4 of the Bill)

7. This power (to make the pilot order) is in effect a power to commence the substantive provisions in the Bill in relation to one or more Health Board areas in order to pilot elections.

8. The Scottish Government previously confirmed to the Committee (in a letter of 6 October) that it intended to lodge an amendment at Stage 2 to make a pilot order that modifies the Bill subject to affirmative procedure, and also where an amending order modifies the Bill.

9. In its report the Committee also raised issues relating to the provisions which would enable Ministers to revoke a pilot order. Section 7 provides for the automatic revocation of the pilot order 7 years after the first election if the scheme has not been rolled out and if the pilot order has not previously been revoked. If the pilot order is revoked by Ministers before that date then the provisions in the Bill enabling Health Board elections are automatically repealed.

10. The Committee drew this provision to the attention of the lead committee, highlighting the fact that it is novel and unusual. In its report, the Committee recommended that any order revoking a pilot order should be subject to affirmative procedure.

11. The Cabinet Secretary’s letter confirms the Scottish Government’s agreement that any move to revoke the pilot order in its entirety should be subject to parliamentary procedure and that it is currently considering amendments attracting parliamentary procedure to any Ministerial order that seeks to end pilots early.

Roll Out of Elections (section 7 of the Bill)

12. Section 7(1) of the Bill gives the Scottish Ministers powers to make a “roll-out order” to appoint a day on which sections 1 to 3 are to come into force, in respect of Health Board areas not specified in the pilot order.

13. The Bill currently proposes that the order be subject to negative resolution procedure. More than one roll-out order may be made. (This allows for a staged approach to commencement following evaluation of the pilot schemes.) There is nothing on the face of the Bill that requires a roll-out order (or a number of orders) to extend to the whole of Scotland.

14. A roll-out order can make such amendment or modifications to primary legislation as Ministers consider appropriate and is currently subject to negative procedure.
15. The Scottish Government had given a commitment to this Committee to bring forward an amendment requiring affirmative procedure for rollout orders which make express textual amendments to enactments.

16. However the Cabinet Secretary’s letter states that, given “the exceptional nature” of the legislation and the effect on NHS Boards the intention is to amend the Bill so that “super affirmative” procedure be adopted as recommended by the Health and Sport Committee.

Other Issues

17. The Cabinet Secretary’s letter makes reference to other amendments which the Scottish Government intends to bring forward at Stage 2, following consideration of the Bill by the Health and Sport Committee.

Progress of the Bill

18. The Bill passed Stage 1 on 15 January 2009. The clerks understand that the likely date for first consideration at Stage 2 in the Health and Sport Committee is 4 February.

Recommendation

Members are invited to note and comment on the Scottish Government’s response to the Committee’s report on the delegated powers provisions in the Health Board (Membership and Elections) (Scotland) Bill at Stage 1.

Shelagh McKinlay
Clerk to the Committee
Subordinate Legislation Committee

Report on Health Board (Elections and Membership) (Scotland) Bill at Stage 1

The Committee reports to the lead committee as follows—

1. At its meetings on 23 September, 28 October, 4 November, 11 November and 18 November, the Subordinate Legislation Committee considered the delegated powers provisions in the Health Boards (Membership and Elections) (Scotland) Bill at Stage 1. The Committee submits this report to the Health Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.¹

3. The Committee’s correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

4. 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.

5. The Committee considered each of the delegated powers provisions in the Bill. The Committee approves without further comment: sections 1(2) and 11(3). The Committee also approves without further comment schedule paragraph 1 which amends paragraph 4 of Schedule 1 to the 1978 Act.

Section 1(5) and (6) (constitution of Health Boards) – Power to specify the circumstances in which an elected member must vacate office

6. Section 1(5)² amends the 1978 Act to give Scottish Ministers a power to make regulations that may specify the circumstances in which (a) an elected member must vacate office before the end of the period that a member holds

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¹ Delegated Powers Memorandum
² Section 1(5) inserts a new paragraph 10A(2) into Schedule 1 of the 1978 Act.
office, and (b) the Scottish Ministers may determine that an elected member is to vacate office before the end of that period.

7. Section 1(6) amends the 1978 Act to provide that such regulations may specify circumstances in which Scottish Ministers may determine that appointed and councillor members shall vacate office. This clarifies on the face of the Act that Scottish Ministers may determine when a member (elected or appointed) shall vacate office and that this function is to be exercised by regulations. The regulations would be subject to negative procedure.

8. It is a general principle that the scope of a new delegated power to make subordinate legislation ought to be drawn no more widely than is necessary. The Committee was concerned that this delegated power enables any circumstances to be prescribed within which Ministers would have a discretion to determine that a member shall vacate office.

9. The Committee therefore wrote to the Scottish Government to ask

- why it considers it necessary to provide Ministers with the power to prescribe circumstances within which they have a discretion to require members to vacate office; and

- how they envisage exercising that power and the discretion provided.

10. The Scottish Government’s response is set out in full in the Annexe. The response stated that the Scottish Government intended to retain current Ministerial powers relevant to retaining control over Health Boards, including the power to terminate a Health Board member’s membership, where that seemed to be justified in the interests of the National Health Service (NHS).

11. The response also emphasised the intention that there be a consistency of approach between all types of Board member, whether elected or appointed, and for the line of accountability to be the same in all cases. It was considered appropriate to delegate this power to subordinate legislation since specifying circumstances in what an elected member should vacate office may need amendment from time to time.

12. The Committee explored this issue further in evidence with Government officials at its meeting on 11 November, in particular, members questioned whether it would be possible for the circumstances when Ministers have a discretion to dismiss members (e.g. when it is in the interests of the national health service) to be set out on the face of the Bill.

13. In evidence to the Committee, Beth Elliot of the Scottish Government Legal Directorate stated “The existing power on which the proposed power is based is in subordinate legislation. The power to remove an appointed member, if the Scottish Ministers consider that to be in the best interests of the national health service, is in subordinate legislation, which is why we have decided to put the proposed power into subordinate legislation.” (Col 414)
14. Robert Kirkwood of the Scottish Government’s Health Delivery Directorate also stated “We already have a power to remove appointed members of health boards if it is in the interests of the national health service to do so. The proposal is to extend the power to cover elected members.”

15. However, the Committee notes that the scope and extent of the delegated power is wider than this. It permits a very wide discretion to put in future regulations any circumstances under which Ministers may determine that members should vacate office early.

16. (NB not sure whether we need/want this following para – grateful for views.) The delegated power in section 1(5) and (6) in one sense involves (in law) a particular clarification of the current general power that is already contained in the existing law. The existing provision allows regulations generally to make provision as to vacation from office. The new delegated power makes clear that regulations may specify the circumstances in which Scottish Ministers may determine that an elected member is to vacate office early, equally with appointed and councillor members. On the other hand, in another sense, the substance of this delegated power is new and significant, in allowing regulations to prescribe such circumstances for elected members.

17. The Committee therefore wishes to draw the attention of the lead committee to the following concerns—

(a) the Scottish Government evidence indicated an intention to apply the same criteria in relation to elected members, as with appointed and councillor members. However, as the Bill is drafted, future Regulations could set out different criteria for different types of member;

(b) the decision to allow Ministerial discretion to require early vacation from office in yet-to-be-prescribed circumstances applying to publicly elected members is a significant issue, which has the potential to be controversial,

(c) the Scottish Government in its written response and evidence have indicated that the “best interests of the national health service test” will be applied for all types of members, but as drafted, the Bill will allow future regulations to change that criteria. (However, initial draft Regulations have been produced (amending the Health Boards (Membership and Procedure) (Scotland) Regulations 2001, which reflect that criteria.)

Type of Procedure

18. Were the Parliament to conclude that this (NB: do we need “delegated”) power should be exercisable by regulations the question arises as to what type of procedure would be most appropriate.

19. In considering this issue members have taken into account;

• that the existing powers are in negative regulations, and it is proposed to put the power into place by amendment of those regulations;
• the significance of this power, including its application to elected members;
• whether it should be necessary for the subject to be debated in committee or Parliament, as would apply for affirmative regulations.

20. The Scottish Government has indicated in evidence that a policy decision has been taken that the same powers to terminate office apply to elected members, as with appointed and councillor members.

21. The Committee has noted that the current general powers in the 1978 Act, in relation to vacation of office of Board members, are subject to negative procedure already. The power to terminate membership in the interests of the health service has already been exercised, for appointed members, by negative procedure regulations. The Scottish Government has advised Parliament that the current intention is that this new delegated power will be arranged by an amendment to those negative regulations.

22. However, in favour of affirmative procedure, there is the general view that the application of these powers to vacate office to elected Board members may be viewed as a significant power and a significant change. Give the potential controversy that appears inherent in the policy of dismissing elected members by Ministerial discretion, affirmative procedure would permit the greatest level of Parliamentary scrutiny of the conditions in which such discretion will operate (although of course it will not permit scrutiny of individual cases of the exercise of that discretion).

23. Accordingly, should the Parliament conclude that this power should be exercisable by regulations, the Committee considers that it should be subject to affirmative procedure.

Section 2: (inserting schedule 1A to the 1978 Act – election regulations)

24. Section 2(2) of the bill inserts a new Schedule 1A into the 1978 Act which makes provision for Health Board elections. Paragraph 13 of the Schedule gives the Scottish Ministers powers to make “election regulations”. A substantial amount of the detail in relation to elections is to be set out in these regulations.

25. In addition paragraph 13(2) – (4) provides extremely wide supplementary powers in relation to elections. Paragraph 13(2) permits “further provision” about Health Board elections. Paragraphs 13(3) and (4) permit the application of enactments with or without modifications to elections.

26. The Scottish Government has stated that it is appropriate to delegate these powers to subordinate legislation as their content is “technical detail” concerning the mechanics of conducting elections which may require to be amended from time to time. The Scottish Government considers that the use of subordinate legislation strikes the right balance between the importance of the provisions and providing flexibility to respond to changing circumstances. (SMcK to insert ref)

27. Paragraph 10(1) of Schedule 1A gives the franchise for elections to persons aged 16 and over. In addition election regulations may specify “any further criteria”
which is used to define the franchise. For example conditions may be imposed as to residency, registration in an appropriate register, disqualification criteria such as criminal convictions, being detailed in a mental hospital or whatever criteria Ministers may determine from time to time may be applied.

28. The Committee notes that this approach differs substantially from that taken in sections 1 to 7C of the Representation of the People Act 1983 governing general and local elections. In that Act much more detail of the franchise qualifications are set out in primary legislation, as are the circumstances in which persons are disqualified. The Committee has also noted that there is no attempt on the face of the bill to define the franchise by reference to the local government franchise as the Scottish Government has stated is the current intended policy (Shelagh McKinlay to insert ref)

29. In the Committee’s view there is little doubt that some flexibility in relation to operational matters is required. Technical and procedural arrangements for the conduct of elections are likely to change over time. Such details are appropriate for subordinate legislation. However, the Committee wished to explore further the scope and intended use of this power given that it would cover significant matters such as the entitlement to vote and powers to ascertain who is entitled to vote.

30. The Committee therefore took evidence from Scottish Government officials on the intention to use regulations to define, in part, the franchise. Members queried whether setting the franchise was not a matter of principle that should be set by Parliament in the Bill itself and whether it would be possible to restrict the power to make future changes to the franchise to any made in relation to local government elections. (Col 415 – 417)

31. In response, officials pointed out that certain key policy decisions such as the reduced voting age of 16 years and above, single transferable voting (STV) appear on the face of the Bill and commented that flexibility was required, as it is proposed to test the arrangements by the pilot in 2 Health Board areas.

32. However, Beth Elliot went on to state; “We are aware that there are other examples of elections in which the franchise, if the local government model has been used, is prescribed in the Bill. We have not, to date, taken that approach, but we can consider it further.” (Col 417)

33. In addition, following the Convener’s observation that the proposals might be clearer on the face of the Bill the Government agreed to consider this further.

34. The Committee therefore wishes to draw to the attention of the lead committee that the Government has undertaken to consider these matters further.

35. The Committee also draws to the attention of the lead committee the Scottish Government’s undertaking to put forward an amendment at Stage 2 that would require affirmative procedure for these regulations. The Committee proposes to review the proposed amendments at Stage 2.
How entitlement to vote is to be ascertained

36. The Committee asked the Scottish Government questions in relation to how these entitled to the franchise were to be identified – in particular those aged 16 and 17; and what information might be required to facilitate registration or assessing entitlement to vote.

37. The Scottish Government responded that it was envisaged that electoral registration officers (ERO’s) would be responsible for identifying eligible voters and that discussions were ongoing in relation to this role. The response stated that it was not considered appropriate to make specific provision for such matters in the Bill or within the scope of the election regulations since this would be too prescriptive.

38. The Committee notes that it does not appear to be intended that election regulations will specify how individuals aged from 16 years are to be ascertained or registered in order to be entitled to vote. The Bill also does not appear to make any specific provision for the obtaining of any information from persons aged from 16 years.

39. The Committee has noted the Scottish Government’s evidence on the role of EROs, but also notes that no detail is offered on how current legislation will enable this, or on how information is to be obtained from 16/17 year olds. The Committee considers that the identification, registration and verification of who shall be entitled to vote is a matter of some practical importance and the Parliament might therefore expect that such matters should be added to the list of matters in the Bill that elections regulations either may or must contain.

40. The Committee therefore highlights matters in relation to how entitlement to vote is to be ascertained for those voting aged 16 and 17 years, and draws the attention of the lead committee to whether further explanation is required.

“Further provision” in election regulations - Paragraph 13(2) of Schedule 1A to the 1978 Act (as inserted by the Bill)

41. Paragraph 13(2) of Schedule 1A provides that election regulations may make further provision about Health Board elections (in so far as not already provided for in the Schedule 1A). The Committee raised a number of questions with the Scottish Government on the breadth of these supplementary additional powers in relation to election regulations.

42. The Committee was initially concerned that the new paragraph 13(2) made no attempt to limit the delegated powers beyond making any further provision in relation to Health Board elections. The Scottish Government response indicated that given that an initial pilot scheme and subsequent “roll-out” is the policy proposal, it is in the nature of the election regulations that there should be a power to make supplemental provision on elections. The response confirmed that the regulations would be subject to affirmative resolution procedure – whereas other supplemental provisions in regulations under the 19778 Act are subject to negative procedure.
43. Accordingly the Committee is satisfied with the Government’s explanation as to the proposed use of paragraph 13(2) of Schedule 1A to the 1978 Act (as inserted by the Bill).

Section 4(1) (elected members: pilot scheme) – Powers to make the “pilot order”

44. This power (to make the pilot order) is in effect a power to commence the substantive provisions in the Bill in relation to one or more Health Board areas in order to pilot elections. This power should be read in the context of sections 5 and 6 which provide for a report to Parliament after a pilot scheme and for revocation of the pilot order if the scheme is not rolled out across Scotland within 7 years of the first election. (Roll-out orders are considered under section 7 below.)

45. The Committee welcomes the Government’s undertaking in evidence that amendments would be lodged at Stage 2, to make a pilot order that modifies the Bill subject to affirmative procedure, and also where an amending order modifies the Bill. (insert refs)

46. However, the Committee also had concerns over the provisions which would enable Ministers to revoke a pilot order. Section 7 provides for the automatic revocation of the pilot order 7 years after the first election if the scheme has not been rolled out and if the pilot order has not previously been revoked. If the pilot order is revoked by Ministers before that date then the provisions in the Bill enabling Health Board elections are automatically repealed.

47. Accordingly, Ministers are able to abandon Health Board elections through revocation of a pilot order. This revocation order would be subject to no procedure.

48. The Committee had asked, following its second consideration of the Bill, if the Government could justify why Ministers should be empowered to revoke a pilot order (and so repeal the substantive provisions in the Bill) by order which is subject to no Parliamentary procedure. This is given that Parliament will have approved the introduction of elections in principle. Also, if the Government could reconsider whether any order revoking a pilot order should be subject to affirmative procedure. (Col 418)

49. In evidence to the Committee Beth Elliot stated; “The pilot order allows for pilots to take place – it is akin to a commencement order in that respect. Once the pilot order is made, we do not consider that it is possible to uncommence the pilot process merely by revoking the pilot order. … Once the pilot order is made, either there will be a roll-out, in which case the order will not be needed, or nothing further will happen in which case revoking the pilot order will simply be a matter of tidying up the statute book.”

50. The Committee is not persuaded that revoking the pilot order will simply “tidy up” the statute book. By section 6(2) a revocation will have the substantive effect of repealing the Bill provisions. The Committee also considers that since a roll-out order (or orders) would commence the provisions for areas not stated in the pilot
order, there is a separate implementation by areas – meaning that the pilot order is not necessarily superseded or made redundant by a roll out order (NB not sure if you want to go into this level of detail…)

51. A decision to revoke the pilot arrangements, which could be at any time before the expiry of 7 years, would be a significant step to reverse the implementation of the election arrangements, and could be made at some point during that period.

52. Accordingly, the Committee wishes to draw the attention of the lead committee to the power contained in section 4(2) which permits the Scottish Ministers to revoke a pilot order. This power is considered to be novel and unusual. It enables the Scottish Government to revoke the pilot arrangements and repeal Bill provisions without further Parliamentary procedure (within 7 years after the date of the first Health Board elections.)

53. The Committee considers that this power should be subject to affirmative procedure.

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

54. Section 7(1) of the Bill gives the Scottish Ministers powers to make a “roll-out order” to appoint a day on which sections 1 to 3 are to come into force, in respect of Health Board areas not specified in the pilot order. When such an order is made the automatic repeal mechanism contained in section 6 is repealed. Health Board elections would then be in place permanently in terms of the pilot and roll-out orders.

55. Section 7(3) provides that a roll-out order may not be made unless a report has been published under section 5(1) by Ministers. The Bill currently proposes that the order be subject to negative resolution procedure. More than one roll-out order may be made. (This allows for a staged approach to commencement following evaluation of the pilot schemes.) However, there is nothing on the face of the Bill that requires a roll-out order (or a number of orders) to extend to the whole of Scotland.

56. A roll-out order can make such amendment or modifications to primary legislation as Ministers consider appropriate. While that is not a power without limit, it is extremely broad.

57. The Committee put questions to the Government on the breadth of this power and asked it to reconsider whether any order made under section 7 containing modifications of enactments should be subject to affirmative procedure.

58. The Committee welcomes the confirmation by the Scottish Government that it shall bring forward an amendment at Stage 2 to provide that if a roll-out order in terms of section 7(3) contains modifications, it will be subject to affirmative procedure. The Committee will monitor the amendments at Stage 2.
59. However the Committee considers that a “Henry VIII” power, one which amends primary legislation, should not be framed more broadly than necessary, even where it is subject to affirmative procedure. The Committee therefore still had questions as to whether it would be possible to restrict any modifications to those that drive the Bill’s purpose.

60. Kenneth Hogg, Deputy Director of Health Delivery, reiterated the Scottish Government’s commitment to the use of affirmative procedure but no evidence was given as to the scope for restricting the power.

61. Accordingly the Committee wishes to draw to the the attention of the lead committee that—

(a) the Parliament is being asked through the Bill to approve delegated powers which contain this degree of flexibility to modify enactments at the time of a “roll-out”, by affirmative procedure regulations; and

(b) the Scottish Government has not to date clearly addressed the question as to why this power to modify enactments could not be drafted more narrowly. For example, by permitting only such modifications necessary to deliver the objectives of the Bill (on a roll-out).

62. The Committee had further questions on whether, if a decision is made to roll-out elections, this would be done across the whole of Scotland and within a certain period.

63. Robert Kirkwood confirmed in evidence that the intention was that any roll-out would apply to the whole of Scotland stating “If the Government of the day decides to roll out the scheme, the decision will automatically apply to the whole of Scotland.” (Col 420) However, the Committee notes that the Bill allows for more than one roll-out order with different areas, and there is nothing specified that requires the orders in total to eventually cover all Health Board areas.

64. The Committee therefore draws to the attention of the lead committee that the Bill allows for more than one roll-out order, and that section 7 of the Bill as drafted does not appear to make clear that if the Government determines to roll-out the proposals all Health Board areas would require to be included.