

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 24 January 2006

Session 2

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## SUBORDINATE LEGISLATION COMMITTEE

3<sup>rd</sup> Meeting 2006, Session 2

### CONVENER

\*Dr Sylvia Jackson (Stirling) (Lab)

### DEPUTY CONVENER

\*Gordon Jackson (Glasgow Govan) (Lab)

### COMMITTEE MEMBERS

\*Mr Adam Ingram (South of Scotland) (SNP)

\*Mr Kenneth Macintosh (Eastwood) (Lab)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

Murray Tosh (West of Scotland) (Con)

### COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Stewart Stevenson (Banff and Buchan) (SNP)

\*attended

### CLERK TO THE COMMITTEE

Ruth Cooper

### SENIOR ASSISTANT CLERK

David McLaren

### LOCATION

Committee Room 5



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 24 January 2006*

[THE CONVENER *opened the meeting at 10:33*]

### Delegated Powers Scrutiny

#### Scottish Commissioner for Human Rights Bill: Stage 1

**The Convener (Dr Sylvia Jackson):** I welcome members to the third meeting in 2006 of the Subordinate Legislation Committee. I have received apologies from Murray Tosh. I remind all members to switch off their mobile phones.

Agenda item 1 is scrutiny of the delegated powers in the Scottish Commissioner for Human Rights Bill at stage 1. Section 6(6)(d) deals with restrictions on the scope of any inquiry that the commissioner may carry out under section 5(1). It will allow any future human rights treaties that are ratified to be recognised by the commissioner. Do members have any points to make on that provision or are we content with it?

**Members:** We are content.

**The Convener:** Section 11 concerns the power to intervene. Under section 11(7), the commissioner will be allowed to intervene in certain civil court cases, either with the leave of the court or at its invitation. Do members have any points to raise?

**Members:** No.

**The Convener:** Section 19 is on the short title and commencement of the bill. Once the bill has been agreed to, the power to commence it will be exercisable by an order in council. As is customary, there is no parliamentary procedure attached to that. Are members happy with that?

**Members indicated agreement.**

**The Convener:** In addition to delegated powers, the bill contains other direction-making powers. The relevant powers are conferred by provisions in section 12(3) and in paragraph 14(1) of schedule 1 to the bill. Do members have any comments on those provisions?

**Members:** No.

#### Human Tissue (Scotland) Bill: as amended at Stage 2

**The Convener:** Agenda item 2 is consideration of the delegated powers provisions in the Human Tissue (Scotland) Bill, as amended at stage 2. Members will wish to note that the Executive has fulfilled a number of the undertakings that it gave to the committee following the committee's comments at stage 1 and that it has made a number of amendments to the bill.

The bill includes several new delegated powers. First, we will deal with section 15(3). The Executive has agreed with the committee that, in view of the public interest in the subject, the regulations that are made under the provision in that section merit more detailed scrutiny. Section 53(3) of the bill has therefore been amended to provide that regulations that are made under the provision are subject to the affirmative resolution procedure, which is what we asked for. Are members content with that?

**Members indicated agreement.**

**The Convener:** Section 15, "Restrictions on transplants involving live donor", contains new powers in subsections (3A) and (3B). Members will note that the Executive has given no indication of the type of additional condition that might be included in the regulations. As the Executive does not know the types of condition at the moment, we can therefore possibly accept that it is appropriate to deal with such matters in subordinate legislation. However, members will see that any regulations must contain provision for appeals. Do members want to comment on the matter?

**Mr Stewart Maxwell (West of Scotland) (SNP):** You are correct to say that what conditions will be included in the regulations will have to be decided in future, but even a rough idea of what the Executive intends would have been helpful to us. However, the bill prohibits commercial transactions and, generally speaking, we should be satisfied. We should certainly welcome the addition of the provision for appeals.

**The Convener:** New section 15A is on "Meaning of adult with incapacity for purposes of section 15(1)(c) and (2)(c)". Section 15A(2) is a new provision that will give Scottish ministers powers to prescribe in regulations the form in which a certificate under new section 15A(1) is to be issued. The regulations are subject to the negative procedure.

The committee previously noted that the power to define by regulations a term that is used in primary legislation gives a very wide discretion to ministers, who may, by use of the power, have a considerable effect on the legislation's scope, which may not necessarily be what we want.

However, the power of ministers is limited to some extent by the definition of "incapable" in section 15A(3). Do members have any comments on that?

**Mr Maxwell:** The issue is awkward, as ministers would have a fairly wide power, but that power would, as you said, be partially restricted. On balance, that is probably the best that we could have expected.

**The Convener:** Okay. We welcome Adam Ingram to the meeting. We are about to deal with section 16, "Records, information etc.: removal and use of parts of human bodies for transplantation etc."

The powers in sections 16(1)(a) and 16(1)(b) were amended at stage 2 to extend the scope of regulations that were made under the provisions so that they may apply to the maintenance of records and the making available of specified information on the removal, use and retention of parts that have been removed from the bodies of living and deceased persons. Members will remember that the regulations were previously confined to deceased persons only and might remember that we raised issues to do with confidentiality. Do members have any comments to make?

**Mr Maxwell:** I have no comments on the extension of the regulations to cover living persons, but the issue that we raised related to data protection and we have not received an answer to what we asked. I would have liked an explanation from the Executive about how it will deal with confidentiality issues. It is rather disappointing that we have not received such an explanation.

**The Convener:** Shall we write to the Executive again?

**Mr Maxwell:** Is there enough time to do so?

**The Convener:** Yes.

**Mr Maxwell:** In that case, I would like us to write again.

**The Convener:** We will ask the question that we previously asked about confidentiality and data protection.

I now welcome Gordon Jackson, who has just joined the meeting.

Section 36 is on "Notice under section 33(2) or 35(2)(a): further provision". Section 36(2)(c) was amended at stage 2 to enable Scottish ministers to specify by order the manager of a university for the purposes of sections 33(2) and 35(2)(a) in terms of the receipt of fiscal notices. Are we content with the amended provision, which is subject to the negative procedure?

**Members indicated agreement.**

**The Convener:** We now move on to sections 47(a) and 47(aa), on the "Power to prescribe forms and descriptions of persons who may act as a witness". Section 47(a) was amended at stage 2 following questions from the committee about whether it would be mandatory for forms to be used when they are prescribed under this provision or whether their use would be optional. New section 47(aa) was inserted at stage 2 to distinguish the circumstances in which the form prescribed under this provision will or will not be mandatory. The Executive has done what we asked it to do. Are we content with that?

**Members indicated agreement.**

**The Convener:** Section 48(9) will insert new section 6A(1A) into the Anatomy Act 1984. That will give Scottish ministers the power to specify the persons responsible for the operation or control of specified museums by order. Are there any comments?

**Members:** No.

**The Convener:** We are happy with the provision.

Sections 48(12)(b) and 48(12)(c) will amend the existing regulation-making powers under section 8 of the 1984 act so that it applies to bodies as well as body parts. Are we content with the new provision, which is subject to the negative procedure?

**Members indicated agreement.**

## Executive Responses

### Public Contracts (Scotland) Regulations 2006 (SSI 2006/1)

10:41

**The Convener:** We had two questions for the Executive. The first was whether an “and” should have been an “or”. The Executive agrees that it should have been, but says that it will not affect the validity of the regulations.

The second question was about the origin of the threshold amounts. We asked why they did not tally with the directive. I am sure that someone will comment on that.

**Mr Kenneth Macintosh (Eastwood) (Lab):** It was just because they did not send us the right information.

**The Convener:** Exactly. If the directive has been amended a number of times, it is pretty important that we get those amendments so that we are kept up to date.

**Mr Maxwell:** Given the history of the relationship between the committee and the Executive, it should have been clear that if it does not supply all the information, we are going to question that. All that the Executive has done is create unnecessary work for everyone; it should be a bit more careful in future.

**The Convener:** We can pass that information on to the lead committee and the Parliament. Is that agreed?

*Members indicated agreement.*

### Utilities Contracts (Scotland) Regulations 2006 (SSI 2006/2)

**The Convener:** This is a similar point to that which we have just discussed. It is about the threshold figures in regulation 11(2). Are members agreed that we should again make the point about the supply of correct information if there are amendments to a directive?

*Members indicated agreement.*

**The Convener:** We will pass on to the lead committee and the Parliament that we have asked for and received the information.

### Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3)

**The Convener:** We sought explanation of the legal basis of regulation 24 and the restriction in paragraph 1(1)(c) of schedule 2 to the enabling power—the European Communities Act 1972. Kenny Macintosh had a point to raise here.

**Mr Macintosh:** It was not me, but our legal advisers, who were concerned that the guidance effectively has legislative character. Although the Executive says that it is merely guidance, it is clear that it is enforceable, so there are questions about its vires.

**The Convener:** Are we therefore agreed that we are still concerned about that point and that we should pass it on to the lead committee and the Parliament?

10:45

**Mr Maxwell:** We should do that. This is an on-going debate with the Foods Standards Agency Scotland. Given that, I wonder whether we can do anything else. Clearly, there is a disagreement. It is fairly obvious in a commonsense way that if the FSAS issues such regulations it intends to enforce them. Therefore, the code of practice is legislative in character. I am not quite sure where the FSAS is coming from and what its reasons are. Can we seek further explanation from the FSAS as to why it takes that view? There is no point in continually going over the same ground. Perhaps we could move forward if we understood why it has that view.

**The Convener:** We should also look back and find some other examples. Is that okay? Ruth Cooper says that that would be a good idea. Is it agreed that we write to the FSAS, given that this is a recurring theme? We will obviously pass it on to the lead committee and the Parliament.

*Members indicated agreement.*

### Older Cattle (Disposal) (Scotland) Regulations 2006 (SSI 2006/4)

**The Convener:** The legal advisers recommended that we ask the Executive several questions about the regulations, the first of which was to do with the drafting of regulation 10(a). Ken Macintosh wanted to ask about this.

**Mr Macintosh:** The Executive has clearly made a mistake in confusing the standard scale with the statutory maximum. Our legal advisers have given a helpful explanation that I am sure we could—and have—learned from. I am sure that the Executive would be grateful if we sent it a full copy of the advice.

**The Convener:** Paragraph 93 of the legal brief explains:

“When the power in section 2(2) of the 1972 Act is used, as here, the Consequential Provisions Act is quite clear: the maximum penalty is to be the statutory maximum not the standard scale.”

The explanation continues into paragraph 94. Those two paragraphs in particular are important.

**Mr Maxwell:** There seems to be a clear mistake here, although most of the time there is just a difference of opinion. When do the regulations come into force, or are they already in force?

**The Convener:** They came into force on 23 January 2006.

**Mr Maxwell:** Yesterday?

**The Convener:** Yes.

**Mr Maxwell:** That reinforces my point, which is effectively that regulation 10(a) clearly looks defective. What are we going to do if the regulation is defective but already in force? Will we do more than note it or mention it to the lead committee? This is one of those times when we have to say something quite strong.

**The Convener:** It appears that the Executive is thinking about an amending instrument, although it has not said that to the committee. To get that information we should write back to the Executive and say that we are still very concerned about the regulations, even though they are in force. We will hopefully then get the information, which we will obviously pass on to the lead committee.

**Mr Maxwell:** I would like those assurances to be on the record rather than just having an understanding. That would be helpful.

**The Convener:** Yes, because we did not know the Executive's intentions.

The second question in the legal brief is about the drafting of regulation 9(1) and how that relates to regulations 5(4) and 7(2). The Executive has acknowledged the consequences of the wording of regulation 9(1), and it intends to make an amending regulation. The other part of the question is about the defective drafting of regulation 7(1). Again, there is obviously a difference of opinion. Stewart, do you want to comment?

**Mr Maxwell:** We should just report it. Nothing else needs to be said about it.

**The Convener:** I do not think that it is of the same order as the issues with the previous regulation.

Regulation 4 uses the word "occupier", while the schedule uses the word "operator". The Executive has acknowledged the defective drafting in this instance, but it does not think that the validity of the regulations will be affected.

**Mr Maxwell:** The Executive has also said that it will rectify the error.

**The Convener:** We move on to question 4. Members will remember that we discussed the United Kingdom Government's different approach to the drafting of its regulations, which seem better

drafted than the equivalent Scottish regulations. We asked the Executive why the Scottish regulations were drafted differently. I invite members' comments on the Executive's explanation.

**Mr Maxwell:** The Executive seems to suggest that the differences are about differences between Scots and English law, but that was not what we were talking about. There are of course such differences, but we deliberately laid that aspect to one side. We were talking about best practice, which in this case appeared in the English regulations. Frankly, we should seek best practice wherever it comes from. In my opinion, we did not get an answer to our question. What we do about that—other than report it to the Parliament—I do not know.

**The Convener:** I think that all that we can do is report that it appears, from the information that our legal adviser gave us, that the English regulations are an example of best practice and that certain aspects of the Scottish regulations could have been improved if they had followed that example.

**Mr Macintosh:** As I remember, Murray Tosh made a suggestion, with which I assume Stewart Maxwell agreed, that we should celebrate the Britishness of the best practice.

**Mr Maxwell:** So that there is no misunderstanding, I put it on the record that I do not agree with that.

**The Convener:** Okay. We will report the regulations on the grounds that we have discussed. The final point is the breaching of the 21-day rule. The main point here is why the Executive was not able to lay the regulations before Christmas, as the UK Government did for its regulations.

**Mr Macintosh:** The Executive's response is slightly unclear. The point that we were trying to make was that Westminster received the information in time to act. The Executive may or may not have received the information in time to act—that is not clear. That is the point that we were trying to elucidate. We have not actually got information on that point, so I do not think that we can do much with it.

**The Convener:** Given the timescale within which the regulations had to be drafted, we should perhaps concentrate on the most problematic issue, which is the first one.

**Mr Maxwell:** Ken Macintosh is right; the issue is not the 21-day rule. It is why the English regulations were made on 22 December but the Scottish regulations were not made until 9 January. Perhaps it is just me, but I detect a common theme, particularly this week, whereby we write to the Executive and ask certain



questions, but the answers that we get back are about something else, not about the questions that we asked. Is there a slight communication problem between ourselves and the Executive whereby, for some reason, we are not getting direct answers to direct questions? Perhaps we should ask the Executive, talk to the officials or put it down as one of the things with which we have an issue. We have a long list of such things. If we ask about something, we should get a direct answer. I do not see why the attempt is made to move it on to grounds that we are not asking about.

**Gordon Jackson (Glasgow Govan) (Lab):** I have a question on the common theme to which Stewart Maxwell referred. I do not know whether Margaret Macdonald, our legal adviser, knows about this. Are the questions that we ask the Executive all answered from one place or do individual departments deal with particular questions? It is the latter, obviously.

**The Convener:** It is the latter.

**Gordon Jackson:** For a minute there, I wondered whether the same person answered all the questions, but that is not the case. If there is a common theme, it is perhaps for another reason.

**Mr Maxwell:** That is a reasonable point, which might have answered my question, but the answers do not all come from one place. Perhaps it is a style of answering that more than one department has taken up.

**The Convener:** There is no harm in our writing again to the Executive on that point, because we are writing to it again on the first point. The issue is co-ordination with what the UK department was doing, so we could ask the Executive to clarify why it did not lay the regulations before Christmas.

**Mr Maxwell:** Yes, because we did not get an answer to our original question.

**The Convener:** Let us ask the question again. There is no problem with that.

**Gordon Jackson:** It is a matter of policy. If we ask a question, we are due a straight answer. If we do not get that answer, we should ask the Executive again.

**The Convener:** We will ask the straight question this time.

**Gordon Jackson:** Absolutely.

**Mr Macintosh:** We were discussing the point that Gordon Jackson raised before the meeting started. We talked about the fact that the committee has relationships with many different parts of the Executive, which can itself lead to confusion. Perhaps we should address that in our report.

**The Convener:** Yes, that is a good point. We will obviously put all those points to the lead committee and to the Parliament.

### **Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2006 (SSI 2006/5)**

**The Convener:** There was no formal Executive note for the rules. If I remember correctly, that is because the Executive thought that we did not need one. Members will see from the legal advisers' briefing that the difference between an explanatory note and an Executive note is spelled out quite clearly; it would be only rarely that we would not want both.

**Mr Maxwell:** It is odd that the Executive has given us that answer, given the clear explanation that we have in our legal advice of the difference between an explanatory note and an Executive note. Perhaps we should send the Executive a copy of that explanation, just to be helpful.

**The Convener:** We could say that we want to clarify our understanding of the aim of an explanatory note and of an Executive note, and ask the Executive to explain why, in this case, it felt that an Executive note was not needed.

**Mr Maxwell:** I will take your guidance on that, convener.

**The Convener:** Do members agree to that?

**Members indicated agreement.**

**The Convener:** This is quite important. The fact that we have not had Executive notes is one of the issues that we have flagged up a number of times. The clerk has pointed out that we need to report to the lead committee and to the Parliament. We are simply reporting that there has been a failure to follow proper legislative practice in this case.

**Gordon Jackson:** In this case, would the Executive note have contained the same information as the explanatory note?

**The Convener:** That is what we will ask the Executive.

**Gordon Jackson:** I just thought that our legal adviser might be able to say that, in this case, it would have contained the same information.

**The Convener:** I thought that it was implicit from our legal advice that the information would not be the same, and I see that the adviser concurs with that.

**Gordon Jackson:** I see that. I am just thinking out loud.

**The Convener:** We will report to the lead committee and to the Parliament.

## Draft Instruments Subject to Approval

### Transfer of Functions from the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive to the West of Scotland Transport Partnership Order 2006 (draft)

10:58

**The Convener:** A minor point has been brought to our attention in relation to the order. If members do not wish to make any other points, we will deal with that minor point in an informal letter. Is that agreed?

**Members** *indicated agreement.*

### National Bus Travel Concession Scheme for Older and Disabled Persons (Scotland) Order 2006 (draft)

**The Convener:** A number of minor points arise in relation to the order. Do members have any other points to raise?

**Mr Maxwell:** Are we going to ask whether it is possible for an operator to decide not to enter the scheme? That is an important point.

**The Convener:** You are right to remind me of that point, which refers to article 7 of the order, does it not? We need to know whether it is possible for an operator not to enter the scheme, because that is certainly not clear. Is that agreed?

**Members** *indicated agreement.*

## Instruments Subject to Annulment

### Bail Conditions (Methods of Monitoring Compliance and Specification of Devices) (Scotland) Regulations 2006 (SSI 2006/7)

### Restriction of Liberty Order (Scotland) Regulations 2006 (SSI 2006/8)

### Mental Health (Recall or Variation of Removal Order) (Scotland) Regulations 2006 (SSI 2006/11)

### Mental Health (Form of Documents) (Scotland) Regulations 2006 (SSI 2006/12)

10:59

**The Convener:** I have only minor points to raise on these instruments, so I shall go quickly through them. No points at all have been raised on the Bail Conditions (Methods of Monitoring Compliance and Specification of Devices) (Scotland) Regulations 2006 (SSI 2006/7) or on the Restriction of Liberty Order (Scotland) Regulations 2006 (SSI 2006/8). Minor points have been raised on the Mental Health (Recall or Variation of Removal Order) (Scotland) Regulations 2006 (SSI 2006/11) and the Mental Health (Form of Documents) (Scotland) Regulations 2006 (SSI 2006/12), and we can deal with the Executive informally on those points. Is that agreed?

**Members** *indicated agreement.*

### Intensive Support and Monitoring (Scotland) Regulations 2006 (SSI 2006/15)

### Feeding Stuffs (Scotland) Amendment and the Feeding Stuffs (Sampling and Analysis) Amendment (Scotland) Regulations 2006 (SSI 2006/16)

**The Convener:** No points arise on the regulations. Is that agreed?

**Members** *indicated agreement.*

## **Instrument Not Laid Before the Parliament**

**Housing (Scotland) Act 2006  
(Commencement No 1) Order 2006  
(SSI 2006/14)**

**The Convener:** We will now move into private session to discuss the report of our regulatory framework inquiry.

11:00

*Meeting continued in private until 12:58.*

11:00

**The Convener:** No points of substance arise on the order, but there is a minor point that we can raise informally. Is that agreed?

**Members** *indicated agreement.*



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