

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 31 January 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

4th 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 2

Scottish Parliament

Subordinate Legislation Committee

Tuesday 31 January 2006

[THE CONVENER *opened the meeting at 10:30*]

Delegated Powers Scrutiny

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

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

Members will recall that the committee sought reassurance from the Executive that no specific provision in relation to confidentiality was needed in the Human Tissue (Scotland) Bill. I think that it was Stewart Maxwell who pointed that out. The Executive has provided a summary of the legal background and the reasoning behind its view that confidentiality issues are already adequately covered elsewhere and that, as a result, no specific provisions are required in the bill.

Mr Stewart Maxwell (West of Scotland) (SNP): The Executive's explanation was useful. It would have been helpful if it had produced it in the first place, or even the second place—it should not have taken the Executive until the third place to provide it. That is the issue here. The reasons that the Executive has given are fine, and I accept what it has said, but to have had such a flurry of correspondence on the matter has not been helpful.

The Convener: So we are pleased enough with the reply that we have now got.

Mr Maxwell: Yes.

Local Electoral Administration and Registration Services (Scotland) Bill: Stage 1

The Convener: Part 1 of the Local Electoral Administration and Registration Services (Scotland) Bill covers local government elections; section 1 is on "Setting of performance standards". During its consideration of the bill the lead committee, the Local Government and Transport Committee, expressed some concern about the lack of parliamentary scrutiny to which performance standards will be subject.

Mr Kenneth Macintosh (Eastwood) (Lab): Part 1 does not have enough explanation accompanying it to make it satisfactory for our purposes. A number of questions arise throughout part 1, and one of them is on the setting of performance standards. It is perhaps an issue of policy as much as anything else. It is not clear what the Executive intends to do with the code on performance standards that it intends to draw up. Because that is not clear, it is not easy for the committee to judge whether the appropriate level of scrutiny is being applied or whether the appropriate type of instrument is being used.

It is difficult to decide exactly what to do, but I suggest that we write to the Executive and request further information and draw the matter to the attention of the lead committee. The issues are more to do with policy than with the appropriateness of the level of scrutiny that is applied or the statutory vehicle that is used.

The Convener: As I understand it, the only current statutory requirement is that ministers lay a copy of the final published performance standards before the Parliament. Therefore, the Parliament will have no opportunity to debate them. The question is whether or not we think that the matter is sufficiently important for us to do more.

Mr Macintosh: That is why it is really a matter of policy. I cannot imagine that the Parliament will want to get particularly involved in most of the issues that are covered in this part of the bill. The standard of returning officers in Scotland is important, but I cannot imagine that it is really necessary to treat the matter as other than an Executive, administrative process. It does not require parliamentary debate. At the same time, local government elections are of considerable political and parliamentary significance.

At this stage, I think that we should draw it to the attention of the lead committee that the nature of the subordinate legislation is such that there will not be as full parliamentary scrutiny as its members might think, and that it is up to them to judge whether the matter is important or not.

The Convener: I was at the Local Government and Transport Committee meeting when the bill was discussed and I would say that part of the issue was about understanding what will happen in relation to the various standards. I think that you are saying that there is not much concern for this committee as far as subordinate legislation is concerned, compared with the concern about the clarity of the policy and what is actually going to happen.

Mr Maxwell: I will not disagree with what has been said, but I do not think that there are only policy issues to consider here. Section 1 seems to cover the grey area that we sometimes discuss

about whether or not something is legislative in character. We have discussed such examples here at the committee and with the Executive. It appears that the performance standards will be enforceable, which suggests that they are legislative in character.

I do not think that this is just about policy. There is a genuine issue about whether there should be parliamentary scrutiny. If we agree that the standards are legislative in character, there should be that scrutiny, and it will not be sufficient simply to lay a copy of them before the Parliament. That is the question for us. How to judge the standard or performance of returning officers is a policy matter for the lead committee. The legislative character of the performance standards is for this committee, however. There is an argument to be had on that.

The Convener: If you think that it would be safer to be cautious, we should write to the Executive.

Mr Maxwell: I thought that we had already agreed to write to the Executive.

The Convener: Yes.

Mr Maxwell: We should also include the point that I have just discussed. That is the issue for us.

The Convener: Yes. We can ask about that grey area and about the slightly legislative nature of the performance standards, given that they are enforceable.

Mr Maxwell: That is the point that we must ask about. It is not absolutely clear whether the standards are or are not enforceable. As I think both you and Ken Macintosh said earlier, there is an issue of clarity. If the Executive had explained the matter earlier, we would not be having this debate about it. If the Executive can tell us whether or not the standards are enforceable and what its intention is, with a bit more explanation, we might be able to answer those questions.

The Convener: Do you have anything to add, Murray?

Murray Tosh (West of Scotland) (Con): No, I am quite happy with that recommendation.

The Convener: Good. Is that agreed?

Members indicated agreement.

The Convener: Section 2 is on directions concerning performance reports. The provision enables ministers to

"issue directions to returning officers to provide the Scottish Ministers with such reports regarding their level of performance against the standards ... as may be specified in the direction."

Are members quite happy with that?

Members indicated agreement.

The Convener: Section 4 is on "Access to election documents". The lead committee voiced some concern about the provision. The delegated powers memorandum gives no indication of the sorts of restrictions that ministers may wish to impose on the use of information in what is a potentially sensitive area. The exercise of the power is subject to the affirmative procedure, but we might want to ask the Executive a little more about it.

Mr Maxwell: We should ask about it. This brings us back to the subject of clarity. We can guess what ministers would probably do, but we should ask the Executive about the circumstances, and what restrictions are envisaged. Those are the questions that the Executive should have answered in the first place, but I think that we should ask them now.

The Convener: Okay. Section 6 is entitled "Access to election documents: supplementary". A couple of things have been highlighted that we might wish to clarify with the Executive.

Mr Maxwell: The Executive is rather hedging its bets here. It does not seem entirely sure. The phrase from the memorandum on delegated powers that is highlighted in our legal briefing is:

"likely to be subject to negative resolution procedure".

That seems an unusual phrase to use. Powers either are or are not subject to the negative procedure.

Murray Tosh: Perhaps the Executive is anticipating that the rules will be changed to give the committee the right to determine that.

Mr Maxwell: Perhaps.

The Convener: Perhaps not. That point is highlighted in paragraph 24 of the legal brief, which covers the difficulty of the phrase:

"likely to be subject to negative resolution procedure".

The question is what procedure will apply to orders under section 3(1) of the Local Governance (Scotland) Act 2004, which are affected by the bill.

There is a second point. Why has the Executive chosen to draft section 6(10) of the bill using a cross-reference to section 3(1) of the 2004 act? That would seem to add to the confusion that is already created in relation to section 3 of the act. How does the Executive consider that that will work in practice? Those are the two main points that we should raise. Is that agreed?

Members indicated agreement.

The Convener: Section 9 is on the power to make a code of practice regarding the attendance of observers at elections. The lead committee expressed concerns about the lack of scrutiny of the proposed code of practice. If I am correct, this

is the point that is not included in the delegated powers memorandum. Section 9(1) of the bill simply states:

“The Scottish Ministers must prepare a code of practice”.

The code requires only to be laid before the Parliament, so the Parliament will have no formal opportunity to debate it or to influence its scope and content. Ministers are not obliged to consult on the content of the code, but answers given by officials to the Local Government and Transport Committee suggest that they intend to do so. The code is being drafted in close consultation with Whitehall, where the Electoral Administration Bill is currently being considered and in respect of which a similar code is being drawn up. Do members have any views?

Mr Maxwell: I am in danger of repeating myself because we are talking about the same problem. The issue is sensitive and many people will be concerned about these matters. We should at least ask the Executive for its reasoning, and whether it is not more appropriate to lay a draft before the Parliament, as the legal brief suggests, so that the Parliament can consider it before it is approved. There is a variety of possibilities; if it came forward with one of those, the Parliament might have more confidence in the Executive's intentions.

The Convener: The second suggestion that we might consider is that ministers could make the code, but they would need to make an order that would be subject to procedure before the code could come into force. Perhaps we should just write back to the Executive and say that because of the sensitive nature of the issue, it should consider those possibilities. Is that agreed?

Members indicated agreement.

The Convener: Section 17 is entitled “Return as to election expenses”. Given the nature of the subordinate legislation involved, there is a question mark over whether an order might be a more suitable legislative vehicle than regulations in this case. Is it reasonable that we should write to the Executive to ask that?

Members indicated agreement.

The Convener: No points arise on section 19, “Personal identifiers: piloting etc” or on section 22, “Details to appear on election publications”. Do members have any further comments?

Members: No.

The Convener: Section 25 is on “Miscellaneous amendments”. The power being conferred allows ministers fairly wide discretion to prescribe in regulations the circumstances in which ballot papers may be cancelled or removed. There are two questions that we might ask. In what

circumstances is it envisaged that the power will be used, and why, on such a sensitive issue, did the Executive not feel able to put conditions on the exercise of the power into the bill?

Mr Maxwell: This is probably one of the most sensitive issues in the bill. I am sure that it is perfectly all right and that the Executive's intention is to deal with voter fraud, which is admirable, but given the extent and scope of the power, limits should have been included in the bill.

I do not know what the current position is, but I think that if someone wants to make a challenge, they will have to go to court. It might be that the new power will allow returning officers—I am not sure—effectively to cancel ballot papers. That is a big change. If that is what is happening, the Parliament will want to be fully aware of it and take a view on it. Again, I am not sure from the bill or the delegated powers memorandum if that is what is happening. The Executive must provide clarity in that area.

Mr Macintosh: Correct me if I am wrong, but the existing power is subject to the affirmative resolution procedure.

The Convener: Yes, it is, but the big issue is the clarity of the provision.

Mr Macintosh: I agree with that.

The Convener: Good point. Keep checking.

We move on to the schedule, on the meaning of election expenses. There are some concerns about the delegated powers memorandum and some confusion about whether the power is an order-making power that is subject to the affirmative procedure or the negative. It is considered that it should be subject to the affirmative procedure. That is the first point.

The second point is that the scope of the power is very wide, but the delegated powers memorandum is unfortunately short on detail about the policy background. It is hard to tell how the Executive envisages using the power. Again, the issue is one of clarity.

Mr Maxwell: I thought that the phrase in our legal brief that it is “clearly and unhelpfully inaccurate” summed up the delegated powers memorandum.

The Convener: Yes. So we are seeking much greater clarity on those two points. Is that agreed?

Members indicated agreement.

The Convener: We move on to part 2 of the bill. Several delegated powers on which no particular points have been raised are listed in the memorandum. Does anyone have any comments?

Members: No.

The Convener: Part 2 also went through the Local Government and Transport Committee more easily than part 1.

No points arise on the sections in part 3 of the bill. Does any member have any points?

Members: No.

The Convener: Likewise, no points arise on section 52, "Ancillary provision" or section 53, "Short title and commencement". Is that okay?

Members *indicated agreement.*

Executive Response

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

10:46

The Convener: This is the only Executive response we have today. Members will recall that we tried to find out whether an operator can decide not to enter the scheme. The response is very much about Scottish ministers admitting or refusing to admit someone to the scheme. I do not think that it answers the question. What do members think?

Mr Maxwell: No, it does not. Last week we had a discussion about asking questions and the Executive answering questions that we did not ask. We still seem to be in a sort of "Yes Minister" otherworld. The question is clear and I would have thought that the Executive could have answered it clearly rather than wandering all over the place and not coming to any conclusion. I presume that we just have to ask again.

The Convener: Unfortunately we cannot, because we have to report on the draft order this week. All that we can do is report to the lead committee and the Parliament and say, "We asked the question, but we did not get an answer."

Mr Maxwell: I accept what you say about the timescale, but I wonder whether it would be reasonable for us to pursue the matter and ask the question again anyway. The order will go through the Parliament and be published, but if the question is not answered, no one will be any the wiser.

The Convener: I am quite happy to do that. We will report to the lead committee and the Parliament that the meaning of the draft order could have been a lot clearer, and we will write to the Executive to ask for an answer to that little question that we keep asking.

Draft Instrument Subject to Approval

Budget (Scotland) Act 2005 Amendment (No 2) Order 2006 (draft)

10:48

The Convener: The draft order makes further revisions to the Budget (Scotland) Act 2005, and amends amendments made by an earlier order. This is the one where two draft orders are in progress at the same time. Is it agreed that we write to the Executive to ask why it has taken that approach and why there are two draft orders progressing at the same time?

Mr Maxwell: This might just show my lack of understanding of the legal brief, but does this draft order amend the first draft order that amends the Budget (Scotland) Act 2005, or does each draft order amend different bits of the act?

The Convener: We will ask Margaret Macdonald to explain that.

Margaret Macdonald (Legal Adviser): The first draft amendment order amends the act by putting in new figures. This draft amendment order amends some of the figures that were in the first draft amendment order; it does not actually amend the first draft amendment order. Both draft amendment orders amend the act.

Mr Maxwell: It is "Yes Minister" is it not?

The Convener: There is an overlap, and it is certainly confusing. As we keep saying, we want to try to make sure that these things are as clear as possible.

Mr Maxwell: It is as clear as mud.

The Convener: Do members agree that we will ask those questions?

Members indicated agreement.

Instrument Subject to Approval

Local Government Finance (Scotland) Order 2006 (SSI 2006/29)

10:49

The Convener: No points arise on the order.

Instruments Subject to Annulment

Electricity (Applications for Consent) Amendment (Scotland) Regulations 2006 (SSI 2006/18)

10:50

The Convener: Although no substantive points arise on the regulations, one minor point is that the drafting with regard to generating capacity could have been better. Do members agree to write informally to the Executive on the matter?

Members indicated agreement.

Ethical Standards in Public Life etc (Scotland) Act 2000 (Codes of Conduct for Members of certain Scottish Public Authorities) Order 2006 (SSI 2006/26)

The Convener: No points arise on the order.

Potatoes Originating in Egypt (Scotland) Amendment Regulations 2006 (SSI 2006/27)

The Convener: Do members wish to ask the Executive why it did not take this opportunity to update the principal order's references to the Plant Health (Great Britain) Order 1993 (SI 1993/1320), which was revoked and replaced by the Plant Health (Scotland) Order 2005 (SSI 2005/613)? That would have been helpful.

Members indicated agreement.

Private Landlord Registration (Information and Fees) (Scotland) Amendment Regulations 2006 (SSI 2006/28)

The Convener: No particular points arise on the amendment regulations. However, members will have received Johann Lamont's letter, which gives a rather full explanation of why the 21-day rule was breached and provides information that the Communities Committee received with regard to the deadline. As members will see, the Executive tried very hard to minimise the period during which the higher fee would be applicable.

Do members have any questions? I am sure that we can at least welcome the fact that we have received quite a full explanation of the breach.

Murray Tosh: I like the way in which the legal brief asks us “to consider whether” we are “prepared to forgive the breach”.

It would have been nice if the Executive had also asked for forgiveness.

Instrument Not Subject to Parliamentary Procedure

Crofting Counties Agricultural Grants (Scotland) Scheme 2006 (SSI 2006/24)

10:52

The Convener: No points arise on the scheme.

Instrument Not Laid Before the Parliament

Environmental Assessment (Scotland) Act 2005 (Commencement and Savings) Order 2006 (SSI 2006/19)

10:52

The Convener: No points arise on the order.

Executive Correspondence

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

10:52

The Convener: We wrote to the Executive about two instruments. Do members have any comments on the correspondence that we have received on the regulations? As you will recall, our legal advice stated that, with regard to summarily triable offences, the regulations would impose the statutory maximum penalty instead of the standard scale and suggested that, as a result, the Executive had interpreted things wrongly. The Executive response says:

"After considering the Committee's further helpful comments, the Executive will bring forward an amendment."

That is good news.

We also asked the Executive why it could not have laid the regulations earlier. To be fair, it has explained that because it had only a very short period before Christmas it would have had to rush matters and that, when it came back after Christmas, it still had two weeks to work on the regulations.

Mr Maxwell: I am speaking a little bit from memory, but am I right in saying that the English laid their regulations on 22 December?

The Convener: Yes.

Mr Maxwell: So is the Executive saying that it knew about and had sight of those regulations and could have laid its own regulations at the time, but decided otherwise?

The Convener: Yes, because it thought that it would be able to do a better job if it waited until after Christmas.

Mr Maxwell: That is fine. At least we now understand that it made a conscious decision in that respect.

The Convener: The Executive has provided a fairly full explanation. Are we content with that as far as we can be?

Mr Maxwell: Well, no. Because the English regulations were laid before Christmas, they did not breach the 21-day rule. However, the Executive made a conscious decision to wait until after Christmas and breached the rule when it was not necessary to do so.

The Convener: From what I can gather, the Executive would have breached the rule anyway. It says in its response:

"It was considered that rushing consideration of the EU legislation and the final stages of the drafting process was not justified."

That is the other major point.

Mr Maxwell: Fair enough. I must have misremembered.

The Convener: I think that we were wondering why the English had got on to the matter more quickly than the Executive had.

Mr Maxwell: That explains things.

Murray Tosh: Another case for forgiveness, perhaps.

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

The Convener: As members will recall, we raised concerns that, although a press release was issued with the amendment rules, they were not accompanied by an Executive note and we felt that they required some kind of policy statement.

Do members have any views on the Executive's response? It does not seem to be clear about the fact that the Executive note is a policy statement. Instead, its opinion is

"that the effect of this instrument is fully explained in the Explanatory Note"

and that there is no need for an Executive note.

Mr Macintosh: Perhaps we should simply write back to the Executive, saying that we do not agree with that opinion and that we feel that it is good practice to issue an explanatory note and an Executive note. After all, they have different functions. In fact, I thought that we had agreed that with the Executive.

The Convener: The Executive is arguing that, in this case, the effect is fully explained in the explanatory note. However, our point is that the explanatory note and the Executive note serve two separate functions. Moreover, someone who accesses the legislation on the website will not find an Executive note. Even though a press release containing the relevant information was issued, it will not necessarily be included with the amendment rules.

Mr Maxwell: So the explanatory note will not be on the website.

The Convener: No. The explanatory note will be on the website, but the Executive note will not be. I am sorry—did I say the wrong thing?

Mr Maxwell: So the explanatory note will be on the website.

The Convener: Yes.

Mr Maxwell: I know that the explanatory note and the Executive note serve different purposes, but if the explanatory note will be available on the website and will provide exactly the same information—

The Convener: Well, that is what the Executive is arguing.

Mr Maxwell: Yes, I know.

The Convener: However, our advice certainly suggests that, in this particular case, having a policy statement would have been quite helpful. After all, the Executive issued a press release with the rules.

Mr Maxwell: I have just seen the explanatory note. I have not counted the words in it, but there seem to be about 12. It does not look as if it explains very much.

The Convener: There was certainly a feeling that, in this case, an Executive note would have been useful not only for us but, more important, for members of the public to allow them to read it alongside the rules. After all, it was thought necessary to issue a press release for the rules.

Mr Maxwell: Yes.

The Convener: Does the committee wish to seek a response from the Executive or does it wish to leave the matter at that?

Murray Tosh: Having taken us through all that, convener, I think that it would be appropriate to raise the matter properly and seek a response from the Executive.

The Convener: So, do members agree to ask again about those matters, particularly with regard to the public information that will be available?

Members indicated agreement.

The Convener: Before we move into private session, I should welcome Adam Ingram to the meeting.

10:59

Meeting continued in private until 12:39.

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