

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 7 February 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

5th 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 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 7 February 2006

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

Delegated Powers Scrutiny

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

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

Members will recall that we raised a number of points with the Executive on part 1 of the Local Electoral Administration and Registration Services (Scotland) Bill. As you will have seen in the legal briefing, part 1 mirrors some of the changes that are set out in the United Kingdom Electoral Administration Bill. The overall policy intention is to retain as much consistency as possible between election procedures.

On section 1, "Setting of performance standards", we asked the Executive to explain why there is no provision for the performance standards to be subject to any parliamentary scrutiny. You will have noted the comments that the Executive made in its response. Do members think that we should be considering any further provision with some degree of formal parliamentary scrutiny?

Mr Kenneth Macintosh (Eastwood) (Lab): I did not feel particularly strongly about the matter. We should draw the Executive's explanation to the attention of the lead committee, for its information. The Executive is trying to improve standards using a voluntary rather than a statutory approach. It would be worrying if the Parliament were totally out of the loop on the performance standards. The Executive has suggested that, as the code of practice or the best practice guidelines—or whatever it has called them—will be published, the Parliament will have an opportunity to comment on and discuss them. It is a matter of debate whether we should have a more formal procedure. I do not feel particularly strongly about it, but the lead committee might do.

The Convener: You are correct to say that the guidance will be published and put before the Parliament.

Murray Tosh (West of Scotland) (Con): Section 2 obliges returning officers, if so directed, to report to the Scottish ministers on the level of performance. That is a bit heavier than a voluntary arrangement. I agree that many of the proposals are administrative rather than legislative, but there is an element of compulsion and direction dressed up in them. It would be appropriate for the process to involve a degree of parliamentary scrutiny.

The Convener: You think that it should involve more than is being suggested.

Murray Tosh: Yes.

The Convener: What would you suggest, then?

Murray Tosh: I do not know—perhaps the negative procedure, with the option of a motion to annul.

The Convener: Okay. The minister will be addressing the Local Government and Transport Committee on 21 February, so we do have some time.

Mr Macintosh: It is only stage 1. There is plenty of time.

The Convener: Yes.

Murray Tosh: It is normal for the committee to take a pretty robust line with bills at this stage, and to push the Executive. As Ken Macintosh says, where there is a debate, it is appropriate for us to take a fairly strong position on the issues and to invite the Executive to re-examine several of them.

The Convener: Yes. The legal brief says:

"The standards are therefore 'voluntary' only in so far as they are non-statutory and there appears to be no direct sanction for failing to attain those standards, though the 'name and shame' provision could have serious implications for the individual."

Ken, are you happy that we write back to the Executive suggesting that, on balance, we think that there should be some formal procedure for those provisions?

Mr Macintosh: Yes. As I said, I do not feel particularly strongly about the matter, but Murray Tosh's argument is quite right. It is certainly an important matter, and it would do no harm to recommend to the Executive that we adopt some parliamentary procedure.

The Convener: Okay. That is agreed.

On section 4, "Access to election documents", we asked the Executive what kind of restrictions would apply to the use of information and under what sort of circumstances those restrictions would be used. The legal brief says that they are

intended, for example, to prevent the use of information for “direct marketing purposes”. The question is whether that should be stated in the bill.

Murray Tosh: I thought that the point about direct marketing was salient; it could be included in the bill. I would like to explore that further with the Executive. It strikes me that the Executive’s answer to our question was the obvious one. It would be interesting to see whether it can think of any other restrictions that might be applied. That could form the basis of a bit of discussion about whether we want more detail in the bill, or simply some provision to allow specific restrictions to be introduced as appropriate and as time passes. It is a question of balance.

The Convener: It is. It is indeed being suggested that there could be

“a power to add other restrictions so that flexibility was not lost.”

That is what you are saying, Murray. Ken, do you agree that we should write back to the Executive, saying that the instance that it has cited should be covered in the bill and that there could be a power to add other restrictions as the need for them becomes apparent?

Mr Macintosh: Yes; although having read the Executive’s response, I get the impression that its motivation was to introduce a parallel regime to that which would be overseen by the Electoral Commission in other respects. The Electoral Commission does not have competence in local government elections in Scotland. That is the Executive’s driver, as it were.

Murray Tosh: That adds to the sensitivity of all this. The Electoral Commission and the Scottish Executive are entirely different creatures. I am not saying anything adverse about the Scottish Executive and how it would handle the matter, but it is an elected political Administration, whereas the Electoral Commission is a politically neutral body. I do not know what the basis is for handling it differently, but, given that it is being directed politically, the Executive has to be as hands-off as possible and submit as much as is reasonable to scrutiny and it should allow Parliament the maximum input.

Let us face it; Parliament is not going to be involved in considering information in any detail unless, when instruments start to come in, we discover that there are issues of concern to us. It is really just a question of observing the form and ensuring that everybody knows what the rules are and how the process works and ensuring that the standards applied by this elected, political Administration are applied as rigorously and fairly as we would expect them to be applied by the

Electoral Commission south of the border. It is about covering the Executive’s back.

The Convener: Yes. I know that the aim is to achieve consistency with the UK Electoral Administration Bill. Surely there should be a two-way process. We do things differently, so there might be examples of good practice here that the UK would want to consider.

We should pursue the matter of access to election documents as we have suggested. Is that agreed?

Members indicated agreement.

The Convener: Give me two seconds while Ruth Cooper tells me something. Are you suggesting that we send a letter to the lead committee telling it what we are doing?

Ruth Cooper (Clerk): Yes. The committee can report formally to the lead committee. Obviously, however, members want a dialogue with the Executive, so one option is to report formally on what you discussed this morning and to write to the Executive in advance of stage 2. Another option is to hold back on producing a formal report—there is time to do so—and to highlight the main issues to the lead committee before it speaks to the minister. Members might feel that the committee is ready to report formally or they might want to leave it until the committee has had correspondence back from the Executive.

The Convener: I suggest that we send an interim letter to the lead committee telling it what points we are taking up. We will then produce a fuller report when we have the answers. Is that agreed?

Members indicated agreement.

The Convener: I welcome Adam Ingram to the committee. We are just moving on to section 6 of the Local Electoral Administration and Registration Services (Scotland) Bill, which is on access to election documents.

The meaning of various terms will be defined by an order made under section 3 of the Local Governance (Scotland) Act 2004. The Executive, in its original memorandum, was uncertain of the procedure to which that order would be subject, but it suggested that it is likely to be subject to the negative procedure.

This is quite a complicated issue, so I refer members to the legal brief, which points out:

“if the Executive intends section 6 to be an order-making power it should not feed into powers that appear to be defectively drafted but should provide free-standing procedural provisions. Alternatively, it could tidy up the procedural provision in the 2004 act ... which is clearly defective.”

Our advice suggests that section 6 is not an order-making power and that in that case the wording of section 6, particularly section 6(10), is misleading and would benefit from clarification. However, it would seem from the Executive's response that it is uncertain what it means in this regard. We have quite a few decisions to make.

10:45

Murray Tosh: The Executive, the legal advisers and the committee do not understand section 6. A moment ago you suggested that it might be appropriate to write an interim letter to the lead committee. Your sagacity in so doing is underlined by this episode. It is clear that a lot of dialogue is necessary to sort the matter out. The options that you outlined are predicated on the big "if" with which you introduced your explanation and which might not apply. That must be resolved before we are in a position to give the lead committee a substantive report. The Executive still has a lot of work to do on section 6.

The Convener: Do members agree that we should write to ask the Executive its view? We will mention that in our letter to the lead committee.

Members indicated agreement.

The Convener: On section 9, "Code of practice on attendance of observers at elections", we asked why the code could not be laid as a draft for approval by the Parliament or be the subject of an affirmative or negative order. The Executive considers, given the administrative nature of the content, that it is more appropriate for the arrangements to be in the form of a code of practice rather than legislation. The guidance and the code will be published and laid before the Parliament. One of the points in question is that codes could require further parliamentary control. We have to consider whether they should come under such control in this case.

Mr Macintosh: This goes back to the point that Murray Tosh made earlier. If the matter was in the hands of the Electoral Commission, that would be one way of dealing with it. These issues are not necessarily controversial, but are potentially politically sensitive and there are different ways of handling them. Given that they are being handled by an Executive body rather than an independent one, an extra layer of parliamentary scrutiny might help. Then again, having that extra layer might make the matter more political. On the basis that we are trying to ensure even-handedness, Executive power should be balanced by parliamentary scrutiny. In this case, we should further discuss the matter with the Executive.

The Convener: Yes. I did not suggest this earlier, but we could go a layer higher, so to

speak, and have a statutory instrument rather than simply a code of practice.

Murray Tosh: What Ken Macintosh said was all fair comment. What struck me in the Executive's response was the comment that

"Codes of Practice are not, by their nature, subject to any form of parliamentary procedure."

The briefing makes the salient point that

"it is ... not correct to say that Codes of Practice are not subject to procedure."

That indicates a lack of clarity in the Executive's thinking and its rationale. I am not saying that it is wrong, but it needs to have the points that are made in the legal brief put back to it for further comment and elaboration. That way we would be clear about what it means and we would be clear that what it is suggesting is the appropriate level of scrutiny. It is likely that we will feel that, in the long run, more intensive scrutiny is required than is proposed.

The Convener: Yes. Are Adam Ingram and Gordon Jackson happy with that suggestion?

Mr Adam Ingram (South of Scotland) (SNP): Yes. The subject matter of the code is observers at elections. One of the arguments put is that the Executive might wish to change the code, but I do not see that as an argument for not having statutory control of it. The Executive has not thought through the matter to its full extent, so I agree with Murray Tosh that it needs to reconsider.

The Convener: Do you agree, Gordon?

Gordon Jackson (Glasgow Govan) (Lab): Yes.

The Convener: Okay. Ruth Cooper has enough information on that.

On section 17, "Return as to election expenses", we asked whether, given the nature of the subject, an order might be a more suitable form of legislation than regulations. The Executive's response was that clarifying whether to have one or the other is a drafting point. I gather from the legal brief that this is not a big issue and it need not delay us. However, another point about making regulations is that that would be more consistent with the Representation of the People Act 1983 and the UK bill. Are members happy to leave the section as it is?

Murray Tosh: I am quite sure that we are right and they are wrong, but in any meaningful negotiation, it is appropriate to concede something. Since this is a drafting point, it would be a suitable hit for the Executive. We should give way.

The Convener: We will leave that one then.

On section 25, “Miscellaneous amendments”, members will recall that although we recognised that the motive behind the provision was to combat fraud, we were concerned about the potential width of the power and how it might be used to disqualify votes. We asked if more detail could be included in the bill. The Executive has explained that the drafting of section 25 follows that of the parallel provision in the UK bill and that it would be more appropriate to leave it to secondary legislation in order to be more flexible about future needs. Again, the legal brief suggests that this is not a particularly big issue. Do members have any further thoughts?

Murray Tosh: If the order that defined the prescribed circumstances were subject to the affirmative procedure, that might be a reasonable position for the Executive to take. It is difficult to imagine how the prescribed circumstances could be defined to cover all possible circumstances, now and in the future, if they were included in the bill. I would be happy to give the Executive the flexibility that it seeks, as long as it is subject to the most rigorous procedure that we can apply.

The Convener: We can check that out. If it is not clear, we will confirm it with the Executive. Is that agreed?

Members indicated agreement.

The Convener: We now come to the schedule, which is on the meaning of election expenses. The committee asked for clarification of a couple of points. Members will note that on the first point, on the reference in the delegated powers memorandum to an order being subject to the negative procedure, the Executive has confirmed that that was a drafting error and that it will be subject to the affirmative procedure. That one seems to be cleared up.

That is everything on delegated powers in this bill. With the committee’s agreement, we will write a letter to the lead committee to say where we are up to at the moment, and we will ask the Executive the additional questions. Is that agreed?

Members indicated agreement.

Budget (Scotland) (No 3) Bill: Stage 2

The Convener: As is customary, the bill contains one power to make delegated legislation that is subject to the affirmative procedure. Do members agree that we are content?

Members indicated agreement.

Legislative Consent Memorandum: Company Law Reform Bill

10:53

The Convener: This is interesting. The bill is extremely large, but only five provisions deal with devolved matters and only one of those confers a power on Scottish ministers to make subordinate legislation—clause 469 on the specification of public sector companies to be audited by the Auditor General for Scotland. Having read all the documentation, I think that this seems to be perfectly okay, unless members have any extra points.

Gordon Jackson: I am not certain that I have read the documentation properly. Give me an example of a Scottish public sector company.

Murray Tosh: Scottish Water.

Gordon Jackson: Is that the sort of thing to which the clause will apply?

The Convener: If you look through the legislative consent memorandum you will see that there are many such companies, including charities.

Gordon Jackson: So they come into it as well.

The Convener: Yes.

Gordon Jackson: Okay. I was just curious.

The Convener: Two of the provisions to which the legislative consent memorandum applies confer powers on the secretary of state to make subordinate legislation in a devolved area. The question of who is to exercise the delegated powers seems to be more a matter of policy, and therefore it is for the lead committee and the Parliament, unless members have any other points.

Members: No.

The Convener: Clause 496 of the bill, “Guidance for regulatory authorities: Scotland”, contains a power that does not appear to be of a legislative character and is therefore not within our remit. Are members agreed that we should report that to the lead committee?

Members indicated agreement.

The Convener: As I said, what the memorandum suggests seems to be perfectly reasonable, certainly in relation to charities.

Executive Responses

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

10:55

The Convener: The committee will recall that two draft orders amending the Budget (Scotland) Act 2005 are currently under parliamentary scrutiny. We asked the Executive to clarify why it had not been possible to put the two orders together so that they would take up less parliamentary time. Members have read the response. The Executive has given us the various timescales for the autumn and spring budget revisions.

Murray Tosh: We should report the instrument on the ground of failure. It is not the most heinous offence that has ever been committed but, in the interests of consistency, we should underscore the fact that we think that it could have been done better.

The Convener: Are we agreed that we should draw the attention of the Parliament and the lead committee to the order on the ground of failure to follow proper legislative practice, and that we should include the explanation that has been given?

Members indicated agreement.

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

The Convener: We asked the Executive why it had not taken the 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). The Executive said that that was an oversight and that the regulations would be updated at the next legislative opportunity.

However, that means that there are still outdated references that might be confusing for any reader of the regulations. I suggest that we report the regulations on the ground of unduly limited use of the power, if members are agreed.

Members indicated agreement.

Draft Instrument Subject to Approval

Renewables Obligation (Scotland) Order 2006 (draft)

10:57

The Convener: Unless members have additional points to make, are we agreed that no points arise on the order?

Members indicated agreement.

Instruments Subject to Annulment

National Health Service (Variation of the Areas of Greater Glasgow and Highland Health Boards) (Scotland) Order 2006 (SSI 2006/33)

10:57

The Convener: No substantive points arise on the order, but some minor points listed in the legal brief could be passed on via an informal letter.

Police Grant (Variation) (Scotland) Order 2006 (SSI 2006/39)

The Convener: Are we content with the information that the Executive provided or do we want to ask for further information on why orders for years prior to 2005-06 could not have been made earlier? Members will have noticed that article 2 of the order goes as far back as 1997. Should we ask that question?

Members indicated agreement.

The Convener: Could we also ask the Executive to explain the delay in laying the instrument?

Members indicated agreement.

National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2006 (SSI 2006/42)

The Convener: No substantive points arise on the regulations, but some minor points could be dealt with in an informal letter. Is there anything else?

Members: No.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (No 2) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/38)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 15) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/41)

10:58

The Convener: No points arise on the orders.

Instruments Not Laid Before the Parliament

Gaelic Language (Scotland) Act 2005 Commencement Order 2006 (SSI 2006/31)

10:58

The Convener: No points arise on the order.

National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2006 (SSI 2006/32)

The Convener: There are quite a few points to discuss here. The amendment order will dissolve the Argyll and Clyde NHS Board on 1 April 2006. Questions have arisen about vires and about the procedure to which the order should be subject.

Should we ask the Executive to explain the vires for article 2(1) and seek its views on whether section 2(3) and section 2(4) of the enabling act—the National Health Service (Scotland) Act 1978—might have been more appropriate powers? I gather that the issue is do to with the lack of clarity about whether there are in fact vires for dissolving what already exists. Is that agreed?

Members *indicated agreement.*

11:00

Murray Tosh: This subject is fascinating. Many of the issues are policy matters for the Health Committee, but the order is a good example of the sort of issue that was highlighted by Sarah Boyack, I think it was, in relation to agricultural support. She questioned the use of the negative procedure for an instrument that she cited in the context of our inquiry into the legislative framework. She felt that the significance of the

issue merited far greater scrutiny. The situation with this order is similar.

I should declare an interest as an MSP for the region in question. The reorganisation is significant for the health service in the area. Most of the points that I would wish to make are related to policy or to the work of the Health Committee, rather than to subordinate legislation, but the order highlights the occasional weakness of the procedures in so far as something so significant can be proposed to be dealt with essentially without procedure. I would have thought that, at the very least, an opportunity ought to have been provided to lodge a motion to annul, should anyone disagree with what are significant proposed changes. For the amendment order not to be laid before the Parliament is a bit worrying.

I am very much in favour of the proposed questions, first, on the powers under sections 2(3) and 2(4) of the 1978 act. The second proposed question is also significant: why, in view of the specific terms of section 105(4) of that act, has the Executive chosen not to lay the order before the Parliament? Instruments such as this should be laid before the Parliament. Even if everybody agrees in the end, it would be appropriate for the order to come before the Parliament.

Gordon Jackson: My instinct is to agree with that. This is a biggie for an instrument that is not laid before the Parliament: it dissolves a health board. At a policy level, that is not our business, but nothing causes more fuss than changing health boards. With respect, I am not hugely interested in the other point. I cannot believe for a minute that it is ultra vires to dissolve a health board. There is a power to put boards in place and, as Margaret Macdonald has mentioned in the legal brief, it is envisaged for the functions of a board to terminate.

There might be a slight gap there, in that the parent legislation does not specifically mention the dissolution of boards. However, there is a principle that the obvious things that must be there, for commonsense reasons, will be read in by the courts. I cannot believe that the power to dissolve something would not be read in where it is envisaged that its functions may terminate. An argument could be made that sections 2(3) and 2(4) of the 1978 act could be used for an order, rather than section 2(2). The direct power to dissolve a board is not given anywhere, however, and has to be read in somewhere, so I suspect that it does not matter very much.

I am quite interested in the approach that has been taken in this instance. Even after all these years, the logic is not clear to me when certain things are not laid before Parliament although, on the surface, they seem to be more important than some of the rubbish that is laid before

Parliament—not, of course, that there is any rubbish, I hasten to add, for those who are concerned about paralytic shellfish.

Mr Macintosh: I echo the comments of my colleagues. It is interesting to note the gap between what I am sure the Executive would like to have done and the procedure, which has failed to mark the political and parliamentary significance of the order. It is worth commenting in passing that the Executive had at least one parliamentary statement on the subject of the order, as well as a full-blown consultation, which was far bigger than those that are undertaken for many bills. There have been several layers of Executive and parliamentary scrutiny, yet the measure lacks formality when it comes to the actual process of introducing it. The Executive is not trying to avoid parliamentary scrutiny—far from it—yet the procedures do not reflect that.

Murray Tosh: I wish to reinforce the procedural aspect, although this might be a slightly political point.

The Convener: Never.

Murray Tosh: I try not to be political in this committee, and often not at all in public. The report on the public consultation that was given to the minister was savagely critical of the consultation's quality, particularly in relation to the level of evidence that was given to the public. The sense is compounded that, although what has been done was the right thing and was done for good reasons, the whole process has been poorly managed. As Ken Macintosh said, for the final, formal part of the process to evade parliamentary scrutiny, as the order does, almost justifies conspiracy theories. Why would the Executive handle the process in this way?

The Convener: We have said a lot about the second point, which we can put forcibly to the Executive. In addition, there are a few minor points, which we can put informally by letter.

The order will not be discussed by the Health Committee, so our report will simply go to the Parliament. Is that okay?

Members *indicated agreement.*

Water Services etc (Scotland) Act 2005 (Commencement No 2) Order 2006 (SSI 2006/40)

The Convener: No points arise on the order.

Before closing the meeting, I will mention the fact that this is the last meeting with us for Catherine Fergusson, one of our clerks. We wish her well, wherever she goes next.

Murray Tosh: It is particularly tragic for her that she will miss the final stages of our inquiry report.

An engraved manuscript of the final report should be forwarded to her.

The Convener: I know that a lot of Catherine's work has been on the inquiry, supporting David McLaren. We thank her very much.

Murray Tosh: We wish her all the best for the future.

Members: Hear, hear.

The Convener: Absolutely.

The next meeting of the committee will be on Tuesday 21 February, when Gordon Jackson will be chairing the meeting, because I will be travelling back from Malawi.

Gordon Jackson: Colleagues will need to be in early, or they will miss it. [*Laughter.*]

The Convener: I thank members very much for their attendance.

Meeting closed at 11:07.

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