SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 February 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

6th 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 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 February 2006

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

Delegated Powers Scrutiny

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

The Deputy Convener (Gordon Jackson): This is the sixth meeting in 2006 of the Subordinate Legislation Committee. Our convener, Sylvia Jackson, has sent apologies. She is on a foreign trip, so I take it that her apology is not entirely sincere. Never mind—no doubt she is enjoying herself.

It would be helpful if members would switch off their mobile phones.

I am told that we have already agreed to take in private the final item on the agenda, which is on our draft report for our regulatory framework inquiry.

The Committee has raised further questions with the Executive about the Local Electoral Administration and Registration Services (Scotland) Bill. This is the third time that we have considered the bill, so we will have to agree the terms of our report. The Local Government and Transport Committee is to meet the minister next week, and we would normally report in advance of such a meeting.

Section 1 deals with "Setting of performance standards". We considered that there should be a degree of parliamentary scrutiny of the performance standards for returning officers that will be produced, given that there is to be an element of compulsion and direction in them. The Executive takes the view that the performance standards to be set are akin to those set by Audit Scotland and the Accounts Commission under the Local Government Act 1992, which attract no parliamentary scrutiny. Are we content with that response, or should we have the opportunity to undertake more detailed scrutiny of the standards?

Do not all rush to speak at once.

Mr Kenneth Macintosh (Eastwood) (Lab): I welcome the fact that the Executive has given us a comparison. That gives us a bit of context so that we can understand the Executive's intention in setting the performance standards. Perhaps because of our involvement in election proceedings, I suspect that we are sensitive to such matters and so we take a great interest in them. I suggest that we forward the Executive's comments to the lead committee. The Executive has explained why it is setting the standards, so it is now a matter of discussing whether we think that there should be another layer of parliamentary scrutiny. The Executive has given an example of something similar where there is no parliamentary scrutiny, and at least I am happy with its explanation.

The Deputy Convener: I do not feel strongly about the matter. I am content to forward our comments and the Executive's answer to the lead committee and leave members of that committee to make of them what they will. Do members want to do more than that?

Murray Tosh (West of Scotland) (Con): An interesting philosophical concept is involved. If the Executive throws up a parallel situation in which there is no scrutiny, the logical consequence is that there should be no scrutiny in this situation either. However, there is an equally plausible argument that perhaps there should be scrutiny of the area that the Executive has thrown up as an example, if it is such a close parallel.

The level of scrutiny does not need to be particularly intensive. It would be reasonable for there to be some form of scrutiny and it might be adequate simply for the necessary instrument to be laid so that it could be picked up by a parliamentary committee that wished to do so. That is probably unlikely to happen in practice, because I am sure that the standards will work as scrupulously as the Executive has said they will. It is just a question of what is appropriate, and it would be appropriate if something that involves such a degree of compulsion and pressure were to be laid before Parliament.

The Deputy Convener: It will be laid, so Margaret Macdonald tells me.

Murray Tosh: It will not be subject to the negative procedure, and I am happy that it will be laid before Parliament.

The Deputy Convener: Is Stewart Maxwell content?

Mr Stewart Maxwell (West of Scotland) (SNP): This is one of those situations where I could go either way. I can see the reasons for having some parliamentary scrutiny, and we have been advised that the published performance standards will be laid before Parliament.

Ken Macintosh made a good point about the examples of similar standards. Perhaps it is just

our closeness to the subject that makes us slightly uneasy.

The Deputy Convener: So we will report along the lines that Ken Macintosh suggested. We will show the lead committee what we asked the Executive and what the answer was.

Adam Ingram has just joined us, and I advise him that we are still dealing with the first item on the agenda.

Section 4 deals with "Access to election documents". We asked for further details about the restrictions that would apply to the use of information and the circumstances under which they would be applied. We took the view that certain conditions, such as the use of information for commercial purposes, perhaps ought to be included in the bill. The Executive has repeated that the intention behind the use of restrictions is to limit the use of information to electoral or related purposes and that it is not therefore possible to provide a comprehensive list of circumstances, as those might evolve over time.

Are we content with that response, or do we consider that certain conditions, such as the use of information for commercial purposes, ought to be included in the bill?

Murray Tosh: We reached a view on this issue at our previous meeting. We thought that this would be the particular issue that would arise, and it is interesting that the Executive has not suggested any other grounds. The argument made in our legal brief about developments since 1983 is a sound one, and it would be perfectly possible for the restriction to be in the bill, accompanied by some other provision that allows further restrictions to be introduced on a case-by-case basis, given that ministers proposed that the power should be extended to cover other restrictions. The suggestion is not unreasonable and would not go against the Executive's purposes. I am not really clear about why it is not prepared to do that.

The Deputy Convener: You are right. Just because we cannot think of all possible circumstances, there is no reason why we cannot put the ones that we think of into the bill. Shall we recommend that that should happen?

Members *indicated agreement*.

The Deputy Convener: Section 6 is headed "Access to election documents: supplementary". We asked the Executive for further clarification of the purpose and effect of section 6(10) and the lists mentioned in other subsections. The Executive has acknowledged the committee's concern and has agreed to look at the provisions again and to bring forward any amendments that might be required to clarify matters. As the bill is still at stage 1, we should leave it at that and give the Executive the chance to do what it has said it will do.

Section 9 is on the "Code of practice on attendance of observers at elections etc". We were and remained unconvinced by the Executive's argument that the administrative nature of the content and the need for flexibility in the light of experience indicated that a code of practice for observers would be more appropriate than legislation. The Executive is still of that view and has reiterated its intention to ensure consistency of practice across all elections by means of United Kingdom-wide standards and guidance. Should we accept that or press for some more formal means of parliamentary scrutiny of the code of practice?

Mr Maxwell: I can accept some of the Executive's arguments about a UK-wide code of practice; there does not seem to be much point in having different rules for a UK election. However, when it comes to elections that are not UK-wide, such as local government elections, could there be differences of opinion, or different ways of acting that would not be UK-wide? For example, from next year we will be using a different electoral system. Might it be the case that the code of practice should be open to scrutiny? Although an argument has been made about UK-wide elections, not all elections are UK-wide and some local government electoral systems are devolved to the Scottish Parliament. I am not sure that I agree completely with the Executive's arguments.

The Deputy Convener: What type of scrutiny would you have?

Mr Maxwell: I was not here last week, so I was not involved in the discussion on the issue.

Mr Macintosh: One possibility is that the code should somehow be laid before Parliament.

Murray Tosh: Is it proposed to lay the code?

Mr Macintosh: As with most codes, that is up to the Executive. Codes fall into a grey area. An example is codes of practice in education matters.

The Deputy Convener: I am informed that the code will be laid before Parliament.

Mr Macintosh: Although the matter is a sensitive one for anybody who is involved in elections, I do not feel strongly about it because, ultimately, the code will probably not be controversial. As the code will be laid before Parliament, if it was controversial, parliamentarians would be able to raise issues if they chose to do so.

The Deputy Convener: As the code is not likely to be hugely controversial and is to be laid before

Parliament, does that give Stewart Maxwell comfort?

Mr Maxwell: As I said, I was not involved in the discussion last week but, in my experience of elections over many years, I have seen different practices in different areas in relation to who is allowed to observe and what they are allowed to record or ask. Therefore, we may well want a parliamentary procedure to allow consideration of the code if such anomalies arise. The subject is extra sensitive, although that is perhaps because we are so close to it. Given the variations that may arise, it would not be unreasonable to have a procedure under which a committee could examine the code of practice if it so wished.

Murray Tosh: The existence of variations is an argument for having a code rather than for any procedure by which the code might be introduced. I agree with Ken Macintosh that, if the code is laid before Parliament, members will be able to consider it if they feel that that is necessary. Stewart Maxwell made the valid point that we will have two electoral systems for this country that do not exist for United Kingdom elections: the additional member system for the Scottish Parliament and the local government system. As that may be a policy matter, we should alert the lead committee to it to ensure that, in whatever consultation procedures are built into the bill or recommended to the Executive, due regard is paid to the distinct electoral systems that operate in Scotland so that the code covers any variations in practice.

The Deputy Convener: Are members content to pass that suggestion on?

Members *indicated agreement*.

Bankruptcy and Diligence etc (Scotland) Bill: Stage 1

10:45

The Deputy Convener: Agenda item 2 is delegated powers scrutiny of the Bankruptcy and Diligence etc (Scotland) Bill at stage 1. My next few words will please members: the bill contains 90 powers to make subordinate legislation. [*Laughter.*] I knew that that would cheer members up—I can always tell. Many of the powers should present no concerns for the committee, as they are to be given to the Court of Session to make provisions by way of acts of sederunt. However, given the number of powers, we will deal with the bill in bits and will cover only part 1 today. I do not know how many parts there are. [*Interruption.*] I am told that there are sixteen, so members will grow old with the bill.

Section 1, on "Discharge of debtor", contains a Henry VIII power to prescribe the minimum discharge period following sequestration. The period is to be one year instead of the existing period of three years. In the past, the relevant period has been prescribed by primary legislation, with no provision to amend it through subordinate legislation. The Executive considers that Parliament should have a high degree of scrutiny over any instrument that changes the period and that the affirmative procedure would be appropriate. The committee should note that the period could be lengthened or shortened without restriction.

We must consider whether the matter is an appropriate one for subordinate legislation. I say right away that, at the least, the use of the power should be subject to the affirmative procedure, as the Executive says. Any change in the period would be an important issue that relates to the public interest. The length of time for which people have to wait for discharge—or that they can get, depending on from whose side we consider the issue—is a big issue. Any decision to change it would not be just technical tweaking. I put down a marker that the power to make such a change through subordinate legislation would be a serious one.

Mr Macintosh: I agree. I was surprised to hear that such a power is to be given, because the policy of reducing the period of discharge to one year is at the heart of the bill. The period should therefore simply be stated in the bill. If the period needs to be changed, that should be done by primary legislation. I do not suggest that ministers ever make changes on a whim, but the measure is not something that ministers should tweak after a couple of years. The change to the period is one reason why we are introducing the bill, so we should simply agree whether one year is the right period. We will deal with a couple of similar powers, but this is the one about which I feel most strongly. I do not see why the matter should be covered in subordinate legislation at all.

The Deputy Convener: You will have gathered that that is my view, too. I am just trying to work out whether that is our business, although I suppose that it is. We can say that the power is not suitable for subordinate legislation, although I suppose that that is a policy decision. However, I believe that the power is not appropriate for subordinate legislation.

Mr Maxwell: The deputy convener and Ken Macintosh have stated my opinion fairly clearly. The discharge period is central to many concerns about bankruptcy—people on both sides of the argument argue about it—so it is entirely appropriate to set the period in the bill. Any future changes should not be done through subordinate legislation, even if that was done using the affirmative or super-affirmative procedure. If the

Executive wanted to change the period, that should be done through primary legislation. If the policy decision is that the period should be one year, that is fine, but from then on, any policy decision to change it should be introduced through primary legislation.

Mr Adam Ingram (South of Scotland) (SNP): The provision perhaps shows that the Executive lacks confidence in its policy. If the suggestion is that changing circumstances are likely to require the Executive to change its mind, that raises the question of how sound the Executive's thinking is in introducing a shorter period. The provision is odd. I agree totally with the deputy convener and other members that we should say to the Executive that the power to alter the period should not be in the bill.

The Deputy Convener: We will say to the Executive that the committee is of the strong view that the issue is so important to bankruptcy legislation that it should not be the subject of subordinate legislation. Do members agree?

Members *indicated agreement*.

The Deputy Convener: Section 5 inserts proposed new section 71B into the Bankruptcy (Scotland) Act 1985, which will give a power to make orders in relation to disqualification provisions. The proposed new section contains another Henry VIII power that will allow ministers to make an order in relation to any disqualification provision, as defined in proposed new subsection 71B(2). The Executive considers that the Parliament should carry out a high degree of scrutiny of any instrument that makes or varies a disqualification provision and that it should be subject to the affirmative procedure. The question is whether that is acceptable.

I will kick off again. I would allow that to happen by order under the affirmative procedure. The issue is not quite as crucial as the previous one, which should be dealt with in primary legislation. There is always a line to draw, because eventually we could say that everything should be done through primary legislation. I believe that the proposal is just within what can be done under the affirmative procedure.

Mr Macintosh: Taking my lead from you, convener, I feel less strongly about this issue than I feel about the period for discharge of debtors. However, I still question whether the matter should be one for subordinate legislation.

The Deputy Convener: Fine.

Mr Macintosh: I certainly think that we should ask the same question that we agreed to ask in relation to the discharge of debtors.

The Deputy Convener: We have a doubt about this one.

Mr Macintosh: Yes. Again, it is fairly central to the way in which we treat bankrupts. In some ways, we are trying to put through a piece of primary legislation that makes it absolutely clear what our view is about bankruptcy and what it is that we are trying to achieve. Therefore, we should come to an informed and decisive view on the matter. However, by dealing with this matter in subordinate legislation, we are saying, "We are going to make this change but we are not 100 per cent sure, and we might change it again." I do not think that that is a good message to send. I think that we should make up our minds about what the disqualification provisions are going to be. However, as I said, I do not feel as strongly about this proposed power as I do about the proposed power that we discussed previously.

Mr Maxwell: I agree. I do not feel as strongly about this matter because the change from three years to one year, which we discussed earlier, is a more fundamental change. We hear about that issue quite a lot more than we hear about the subject that section 5 deals with. However, I think that the nature of the issues is the same. The issue that we are talking about at the moment is fairly central to the bill. The Executive's policy should be clear on it and should therefore be included in the bill. I do not think that it is reasonable to say, "We think that this is the policy but we might change our minds and use subordinate legislation to sort it out later." I am not saying that that is exactly what the Executive is saying. However, I am uncomfortable with the matter being dealt with through subordinate legislation.

Murray Tosh: I agree with Ken Macintosh and Stewart Maxwell.

The Deputy Convener: Shall we indicate that we are uncomfortable and say to the lead committee that we have doubts about the matter? In that way we would make a distinction between the previous issue, which we feel strongly about, and this one, which we have reservations about.

Members *indicated agreement.*

Ruth Cooper (Clerk to the Committee): Do you want us to write to the Executive about it?

The Deputy Convener: Whatever you think.

Section 14 relates to "Debtor applications". Regulations under this section will be subject to the negative procedure. Debtor applications are administrative and are not covered by court rules that prescribe procedure, forms and costs when debtors petition sheriff courts for sequestration.

It is not clear, however, that the powers conferred by proposed new subsection 8A(3) of the 1985 act can be regarded as a matter of administration or procedure. The Executive has

provided no explanation for the difference in treatment and it is not clear why delegated powers have been thought to be appropriate in this instance.

It strikes me that we should just raise this issue with the Executive, say that we are not clear about it and ask it to explain the situation. Is that agreed?

Members *indicated agreement.*

The Deputy Convener: Section 17 inserts into the 1985 act proposed new section 39A, which relates to the issue of the debtor's home ceasing to form part of the sequestrated estate. Again, the powers here are Henry VIII powers and are subject to the negative procedure.

Proposed new subsection 39A(4) allows ministers, by regulation, to add, remove or vary any of the matters referred to in proposed new subsection 39A(3). In theory, that would allow ministers, by regulation, to delete all the conditions, therefore depriving a trustee of any power to dispose of a family home. Are delegated powers okay for that? If so, might the affirmative procedure be more appropriate?

Mr Maxwell: I think that that would be appropriate, at the very least. I am not quite sure why the negative procedure has been chosen in this case. Again, however, I must say that I am uncomfortable with the fact that the power is quite sweeping.

The Deputy Convener: There are some questions that we could ask the Executive. For example, which, if any, of the conditions might it wish to remove, given the possible effect on the powers of a trustee? Why are delegated powers necessary at all in some instances, given the discretion that is conferred on the court by paragraph (7)(b) of the proposed new subsection? Other questions are raised in the briefing, and it might be appropriate to ask them in the context of saying that, at the very least, the affirmative procedure should be used because we have reservations about the matter. We could ask those questions and come to our final decision in the light of the answers that we are given.

Murray Tosh: As long as our letter to the Executive is weighted towards asking the fundamental question whether the delegated powers are appropriate, I am happy with your suggestion.

The Deputy Convener: Absolutely.

Murray Tosh: That would be better than getting caught up in the issue of whether the affirmative or the negative procedure should be used. That is a fallback argument that we can use when we have received the response.

The Deputy Convener: We can intimate that we have reservations about the issue of the delegated powers and ask for answers to our questions before coming to a conclusion. Is that agreed?

Members *indicated agreement.*

The Deputy Convener: Section 18 relates to "Modification of provisions relating to protected trust deeds". The power here is partly a Henry VIII power. Are we content with that?

Murray Tosh: Perhaps it is a Henry VI power.

The Deputy Convener: I am afraid that this is getting a bit esoteric for me, given that it is a Tuesday morning.

Mr Macintosh: I believe that, in relation to this issue—unlike the other issues relating to the bill—we will see a copy of the regulations before the bill is passed. We should perhaps reserve our comments until we see them.

Murray Tosh: However, it would be fair to note that there is a concern about whether the affirmative procedure would be more appropriate than the negative procedure. In reserving judgment, we should make the point that we might want to return to that issue.

The Deputy Convener: That is fair.

Section 19 relates to "Modification of composition procedure". Regulations under schedule 4 to the 1985 act will be subject to the negative procedure. Are we content with that?

Mr Maxwell: This is another wide-ranging Henry VIII power. I am not sure whether we want the procedure to be negative. As we have said, the bill contains a lot of powers to make subordinate legislation and a lot of the Henry VIII powers are extremely wide. I think that the same concerns exist in relation to almost every issue that has been raised so far.

Again, we have to question the Executive a little further on its motivation for dealing with this issue through subordinate legislation and for wishing to use the negative procedure. It has to come up with some strong arguments in support of those decisions if it wants us to agree with it.

The Convener: What is the specific question that you want to ask? Tell us and we will ask it.

Mr Maxwell: I would like further detail on the Executive's motivation for wanting to deal with this issue through subordinate legislation and for using the negative procedure rather than the affirmative procedure. If it comes up with a solid argument, that might be fair enough. However, I am not sure that it will be able to.

Mr Macintosh: When I read this part of our briefing, I noted that, although the powers are wide ranging, they are to do with changing the nature of the forms, how things are published and so on. For example, at the moment, an offer of compensation must be published in the *Edinburgh Gazette* and the powers would allow ministers to change that, if necessary. I think that such matters are for subordinate legislation. However, I am not sure whether policy can be fundamentally changed through the use of Henry VIII powers. For example, could section 19 be used to change the rate of 25p in the pound? That would be a fundamental policy change.

Mr Maxwell: In effect, that is the point that I was making. The ability to vary or delete is wide ranging.

Mr Macintosh: So the answer to my question is that section 19 could be used to change the rate of 25p in the pound.

Ruth Cooper: We will have to check that.

The Deputy Convener: Do you have enough information to know what to ask?

Ruth Cooper: Yes.

Mr Macintosh: If the matter is simply one of how the procedures are administered, I am relaxed about subordinate legislation being used. However, if policy could be affected, perhaps subordinate legislation should not be used.

The Deputy Convener: Section 22 relates to the modification of offences under section 67 of the 1985 act. Again, this is a Henry VIII power for which the negative procedure is proposed. Normally, the committee is fairly relaxed about the use of subordinate legislation for the purpose of reflecting changes in the value of money and considers that the negative procedure is normally appropriate in that instance.

The only slight problem might be that there is nothing in the bill that would restrict the use of the power to reflecting a change in the value of money. We should say that, before we are content that the negative procedure can be used in this regard, we would like to be sure that that purpose is what the power is required for. Do we agree to ask the Executive to confirm that?

Members *indicated agreement.*

11:00

The Deputy Convener: Section 23 is entitled "Creditor to provide debt advice and information package". Regulations made under section 5 of the 1985 act will be subject to the negative procedure. I take it that members have no comments to make on this section.

Murray Tosh: The briefing suggests that we could ask why the bill does not specify the period in question. Perhaps members were able to resolve that in the briefing session before the meeting, but I think that we have to ask whether the period is likely to be subject to change. There was a suggestion that the matter had been left for the moment as the Executive had not yet determined what the position was to be. Is there more information on that? Have members reached a different decision in the light of information that is not in the briefing paper?

The Deputy Convener: No.

Murray Tosh: Would it be reasonable, then, for us to ask whether the period could be specified in the bill?

The Deputy Convener: Okay.

Section 26 of the bill inserts into the 1985 act proposed new section 43A, which is entitled "Debtor's requirement to give account of state of affairs". Regulations made under proposed new section 43A will be subject to the negative procedure. Do members have any comments to make or do we believe that that provision in is appropriate?

Murray Tosh: I accept that the Executive got that provision right.

Legislative Consent Memorandum: Legislative and Regulatory Reform Bill

11:01

The Deputy Convener: Item 3 relates to an entirely routine and uncontroversial bill, which we can quickly pass over. [*Laughter.*] Perhaps not.

The Legislative and Regulatory Reform Bill is a United Kingdom bill that is, in anyone's view, pretty dramatic. It gives to UK ministers powers under UK statute that will be, I imagine, highly controversial in Westminster.

To put a marker down, if I were in Westminster—heaven forfend—I would be extremely uneasy about the bill. However, the question for us is the extent to which we can get involved in the matter, given what our role is and what we are supposed to be reporting on. I know that members will have strong views on the theoretical or practical—I do not mean to use the word "theoretical" in a pejorative sense—effect that the powers could have on Scotland. I do not think that we would agree entirely on that issue, of course. However, I am not sure of the extent to which that has anything to do with the committee or whether, in our report, we should go beyond those matters that may be less controversial but which directly bear on what the Scottish Executive does by subordinate legislation.

I appreciate that members will, at least, have comments that they wish to place on the record. With that in mind, we will start with Stewart Maxwell.

Mr Maxwell: I wonder why.

You have been clear about the effects of this Sewel memorandum and the fact that it affects Scottish ministers only in relation to the making of subordinate legislation to implement European Union obligations under the European Communities Act 1972. However, I think that we have to comment on how the legislation will impact on us.

There is no doubt that the bill is controversial and I hope that it has caused controversy at Westminster. It changes the nature of what Governments can do. Whereas, previously, they would have to use primary legislation to change, repeal or vary other acts of the Westminster Parliament, the bill will enable them to do so through subordinate legislation. That is a fundamental change.

The Scotland Act 1998 is reserved to Westminster and, under the bill, it would be theoretically possible for a Westminster Government to change, repeal or alter that act using subordinate legislation. It seems entirely inappropriate that that could be done. If a Government wants to change the devolution settlement, it should have to do so through primary legislation. I understand the difficulty that the committee has in reporting on this matter, but I think that we have a right and a duty to report on issues that affect this Parliament and that are to do with subordinate legislation. It is entirely appropriate that we comment on this and I want to put on record my strong objections to the bill and the possible impact that it might have on this Parliament in the future.

Murray Tosh: That is a perfectly fair comment, but it does not address the issue for us, which is the matters that are the subject of the Sewel memorandum and the areas within the competence of Scottish ministers that are affected. That is all that we can report on. Stewart's views are Stewart's views and I quite agree with most of what of what he said about the nature of the powers that are being taken at Westminster, but that is an issue for the House of Commons, not us.

The Deputy Convener: Stewart Maxwell knows my position, which is that I can see the theoretical point. I understand that the bill would allow ministers to make huge variations to the Scotland Act 1998. I hope that Stewart understands that I am not accusing him of this, but I would not want the committee to give the impression that it is scaremongering. We should not be writing the headline that the Subordinate Legislation Committee says that the Scotland Act 1998 is in danger from Westminster subordinate legislation. Although he is right that that danger exists, I would describe it as theoretical because the political reality would have to be quite other than it is for a piece of subordinate legislation that would change the devolution settlement to come before Westminster next month. That is fanciful; the threat is not real and we should not give the impression that it is.

Clause 8 states:

"An order under section 1"—

which is the huge power in the bill—

"may not",

except in relation to some minor technical matter,

"make provision which would be within the legislative competence of the Scottish Parliament".

Therefore we are specifically excluded. Stewart Maxwell might say, "Ah, but, oddly enough, the Scotland Act 1998 is not within the legislative competence of the Scottish Parliament." However, the fact that the bill contains a provision to say that UK ministers cannot interfere with devolved matters means that the possibility that they would

use regulations to destroy the Scotland Act 1998 is just theoretical and not practical.

Although Stewart Maxwell is quite entitled to make his comments, I am entitled and obliged to say that I do not think that there is a genuine danger. The bottom line is, of course, that Westminster could repeal the Scotland Act 1998.

Murray Tosh: Yes, but at the moment it could do that only through primary legislation.

The Deputy Convener: I do not like it at all.

Murray Tosh: Although I agree that that is theoretical and unlikely to happen and that it is not on anyone's radar, the point is that UK ministers are taking these powers. Were it within the competence of the Scottish Parliament, we would be entitled to ask a series of searching questions and make recommendations about the bill. The point is that the areas that are of concern to us are not within our competence and we cannot pursue them through the powers that have been given to this committee.

The Deputy Convener: Of course UK ministers are taking these powers. What I am about to say might come back to haunt me, but if the Executive did this, I would be the first to the barricades. I would not like it at all. I may be offering a hostage to fortune.

Murray Tosh: That is immensely reassuring.

The Deputy Convener: You would not like it either. I do not think that the Parliament would like these powers to be taken here. I might be wrong because I do not know what the Executive's plans are; it might turn up with a bill tomorrow and I will find myself whipped out of this position. I do not like it, but we cannot report on that aspect of it, although we can make comments.

Mr Maxwell: There is a fundamental point here. We can report to the lead committee that is dealing with the legislative consent memorandum on our concerns about the nature and possible impact of the powers. I know that the deputy convener thinks that the danger to the Scotland Act 1998 is fanciful and theoretical and that the bill will not be used in that way, but the fact is that UK ministers are taking these powers and can use them if they so wish. I know that we disagree fundamentally about this but, as parliamentarians, we have a duty to point out any possible danger to the Scotland Act 1998. We have a responsibility to say that, irrespective of what we report on under the rules of the committee.

Within the rules under which the committee operates, we should report to the lead committee about the nature of the powers contained within the proposed legislation. Surely the lead committee could ask questions of Westminster on the basis of these proposed powers.

The Deputy Convener: Oddly enough, I would have no problem with the lead committee asking those questions, but that is its business. Reporting the issue is not our business. I can see why superficially it seems attractive to do so, assuming that we all agreed on the matter, but we have no entitlement, in examining the non-policy, practical aspects of subordinate legislation, to report on a bill's provisions that do not have subordinate legislation effect in Scotland. I know that the bill will affect Scotland, but the UK Parliament could pass a bill to do with anything and the committee still would not have a right to comment on it. I will take guidance from the clerk or the legal adviser, but I do not think that it is within our competence to make the comment that Stewart Maxwell wants us to make in our report.

Mr Maxwell: Could we not attach a copy of the *Official Report* of our discussion?

The Deputy Convener: Yes; the lead committee can read that. I ask the clerk whether I am right or wrong.

Ruth Cooper: The standing order that we work under allows the committee to report on powers to make subordinate legislation that are conferred on the Scottish ministers. That is what can be done within the confines of the report. However, there is nothing to stop the committee attaching a copy of the *Official Report* of our discussion, if members want to keep the lead committee ahead of the debate.

Mr Maxwell: If that is all that we can do, we should do it.

The Deputy Convener: I have no objection to our doing that. We have aired the issue and we are not trying to hide it. I just do not think that the matter can form part of our report.

Mr Maxwell: Okay—that is the rule.

The Deputy Convener: We now come to the issue with which we are actually meant to be dealing, which is slightly less controversial. To summarise, clauses 26 and 27 will give powers to the Scottish ministers, but only to tidy up European legislation. Do members have any problems with those procedures?

Mr Maxwell: Not particularly.

The Deputy Convener: So, oddly enough, we do not have problems with that which doth concern us; we are just horrified by the things that do not concern us. That seems a fair summary of our position.

Murray Tosh: We will have that comment included in the excerpt from the *Official Report*.

The Deputy Convener: Absolutely.

Executive Responses

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

11:12

The Deputy Convener: Item 4 is Executive responses. We asked the Executive why orders for years prior to 2005-06 could not have been made earlier and we asked for an explanation for the delay. The Executive has provided an explanation but, given the timing that is involved, there seems to be an unusual use of the power. Should we simply draw the order to the attention of the lead committee and the Parliament on the ground of the unusual or unexpected use of the power, bearing in mind that it has no adverse effect in practice?

Mr Maxwell: The use of the power is unusual and unexpected, so we should report it.

The Deputy Convener: We will also draw the lead committee's attention to the Executive's explanation for the delay.

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

The Deputy Convener: We asked the Executive about the vires of article 2(1) and why the Executive has chosen not to lay the order before the Parliament. Are we content with the response or do we wish to draw the order to the Parliament's attention on the basis that there is a doubt as to whether it is intra vires in its terms and on the ground of incorrect procedure? Shall we mention our doubts, as we always do?

Members *indicated agreement*.

Draft Instrument Subject to Approval

Risk Assessment and Minimisation (Accreditation Scheme) (Scotland) Order 2006 (draft)

11:13

The Deputy Convener: The draft order will create a scheme of accreditation to be administered by the Risk Management Authority for the purpose of ensuring the effective assessment and minimisation of the risk that certain offenders pose to the safety of the public at large. Are we content with the drafting of articles 5 and 7 with regard to the obligation to give reasons, or do we want to pursue the matter further?

Murray Tosh: Is there not an argument that we should seek express provision in the interests of consistency, on the basis that that would be helpful to the reader?

The Deputy Convener: Are we agreed on that?

Members *indicated agreement*.

Instruments Subject to Annulment

Foot-and-Mouth Disease (Slaughter and Vaccination) (Scotland) Regulations 2006 (SSI 2006/45)

11:15

The Deputy Convener: The regulations, together with others, provide for vaccination, preventive eradication and additional powers of slaughter if foot-and-mouth disease is suspected or confirmed on European Union territory. Similar regulations have been made in England, but a number of points are not replicated there. A number of issues have been raised by our legal advisers; we will simply ask the Executive about those.

Members *indicated agreement*.

TSE (Scotland) Amendment Regulations 2006 (SSI 2006/46)

The Deputy Convener: The regulations amend—

Murray Tosh: You are not going to try to pronounce what TSE stands for, are you?

The Deputy Convener: No, I am not. The regulations amend earlier ones and bring up to date the references to relevant European Community legislation. They also reduce the rates of compensation payable for female sheep and goats and for lambs and kids that are slaughtered following confirmation of TSE in a flock or herd. Similar provisions have been introduced in England and Wales.

This is the sixth amendment to the principal regulations and the Executive does not appear to have any plans to consolidate, unlike in England and Wales. We might ask the Executive whether it has any plans to consolidate, and there are a couple of other issues that we could ask about. Is that okay?

Members *indicated agreement*.

Perth (Pilotage Powers) Order 2006 (SSI 2006/49)

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2006 (SSI 2006/51)

Solway Firth Regulated Fishery (Scotland) Order 2006 (SSI 2006/57)

Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Order 2006 (SSI 2006/58)

The Deputy Convener: No points arise on the orders.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2006 (SSI 2006/52)

11:16

The Deputy Convener: There is a minor drafting point that can be mentioned in an informal letter.

Instruments Not Laid Before the Parliament

Foot-and-Mouth Disease (Scotland) Order 2006 (SSI 2006/44)

11:16

The Deputy Convener: There is nothing substantive to raise on the order, although there are a couple of minor points that we could raise in an informal letter.

Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No 3) Order 2006 (SSI 2006/47)

The Deputy Convener: No points arise on the order.

Management of Offenders etc (Scotland) Act 2005 (Commencement No 1) Order 2006 (SSI 2006/48)

The Deputy Convener: We will ask why the order does not entirely commence section 15(5) of the act.

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 4) Order 2006 (SSI 2006/55)

Vulnerable Witnesses (Scotland) Act 2004 (Commencement No 3, Savings and Transitional Provisions) Order 2006 (SSI 2006/59)

The Deputy Convener: No points arise on the orders.

We now move into private to discuss matters to do with the committee's draft report.

11:18

Meeting continued in private until 11:33.

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