SUBORDINATE LEGISLATION COMMITTEE

Tuesday 13 June 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
20th 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)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)
Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Ms Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Patrick Layden (Scottish Executive Legal and Parliamentary Services)
Gordon McNicoll (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 13 June 2006

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

Executive Response

Management of Offenders etc (Scotland) Act 2005 (Supplementary Provisions) Order 2006 (draft)

The Deputy Convener (Gordon Jackson): I open the 20th meeting in 2006 of the Subordinate Legislation Committee. Sylvia Jackson has sent her apologies, as has Mr Stone; I think that Mr Tosh might join us in due course.

I welcome the Executive officials who have been good enough to come and help us. We were expecting Patrick Layden, who, for all I know, might still be coming, but we do have Gordon McNicoll and Sheila Tait with us. We asked the witnesses to come because we have many real concerns about the statutory instrument, to such an unusual extent that we want some specific Executive help. If it is okay, I would like to ask Gordon McNicoll to say something about the order, but first I will remind members where we are at.

Our concerns are threefold. We are worried, first of all, about what we called a sweeper clause—the supplementary provision—and about whether or not what is in the SSI could genuinely, on any view, be called supplementary.

Good morning, Patrick.

Patrick Layden (Scottish Executive Legal and Parliamentary Services): Good morning. I am sorry to be late.

The Deputy Convener: That is all right. I was just welcoming you and your colleagues and, before hearing the Executive's position, outlining some of the committee's concerns.

First, we are concerned that the order contains powers that are more than is reasonable for a supplemental provision. Secondly, and more particularly, we are concerned that some of its articles, on one view, seem to contradict the express terms of section 4 of the Management of Offenders etc (Scotland) Act 2005—the parent act—in respect of the powers given to others under that section. Thirdly, we have a more technical concern about the final article, as we had reservations as to whether or not it was in a Scottish competence at all. I would like one of the officials to outline the Executive's position on those matters, and then I will allow members to ask questions as they see fit.

Patrick Layden: The essential question in relation to the use of the power in the Management of Offenders etc (Scotland) Act 2005 is whether the provision that is being made in the order is supplementary to that in the 2005 act. The 2005 act sets up provisions for employing a chief officer for a community justice authority; the provision in the draft order supplements that with various general factors that apply to that chief officer. Article 2 states:

"The post of chief officer … is a politically restricted post".

Article 3 states that a person may not be appointed as chief officer if he

"holds a paid office or employment with … any local authority in Scotland".

Under article 4, any person who is going to be a chief officer must have a criminal conviction certificate. Finally, article 5 states that the chief officer is ineligible for jury service.

We take the view that those provisions do not conflict with the provisions relating to community justice authorities in the act, setting out terms and conditions of employment for chief officers, because the kind of provisions that are in the order are, first of all, provisions that it would be outside the power of the community justice authority to put into a contract of terms and conditions.

Secondly, they are not matters that could be left to individual community justice authorities to impose. We could not have a situation in which one chief officer was, for example, politically restricted, but another chief officer who was doing the same job in another area was not. The provisions ought to apply to all chief officers and are the sort of provisions that the Government ought to make. It would not be possible for a community justice authority to say that its chief officer would be ineligible for jury service. That is not a decision for community justice authorities; it must be a decision for ministers with the Parliament's approval.

That is my first point. The provisions can only properly be made by the Government and must be made in relation to all chief officers. They could not be made in particular or in general by a community justice authority. Therefore, we take the view that there is no conflict between the draft order's contents and the 2005 act's provisions.

The other point that the committee raised was about the extent of the provision. It is an important thing to say that somebody is in a politically

restricted post or that they are ineligible for jury service. However, for the sort of job about which we are talking—chief officer of an authority—those are quite common provisions; they are standard form. Indeed, the committee pointed out in its letter that the policy—accepting that that is not a matter for the committee—is not surprising but ordinary. The sort of provision that we are making in the draft order is precisely the sort of provision that one would expect to find in relation to the chief officers of community justice authorities. That is what one might expect supplemental provision to be in relation to those posts.

I had better stop talking now and allow members to ask questions about that if they wish to.

The Deputy Convener: There is one other point, about the last article, but we will come to that as a separate issue.

I thought that your initial point was good—that community justice authorities could not have included such provisions in their chief officers' conditions of service. However, I have difficulty with the idea of supplemental provisions. When I listen to you, you almost seem to define "supplemental" in a circular, tautologous way: anything that is extra to what is in the act is supplemental. Of course, that is literally true, but as I understand it in this context, the word "supplementary" is used in the sense of that which is required to implement the act, not just supplemental in the sense of anything that can be added to the act. I am not sure why the draft order is supplemental in the sense of being necessary to implement the 2005 act.

I hope that I am not doing you a disservice, but the impression that I get is that you accept that the order's provisions are quite sweeping—it is quite a big thing to say that somebody is ineligible for jury service—and that, if the policy matters were contentious, you would not get away with it; but because they are not, it makes good common sense to allow the provisions to be made. However, the committee's concern is not with that because, technically, it has no interest in policy. Therefore, we have to leave aside the policy requirements and determine whether the provisions are really something incidental that is necessary to make the act work, rather than a pretty big decision, such as eligibility for jury service.

Patrick Layden: First, I am not making any points about the provisions not mattering because they are not contentious policy matters. Instead, I am observing that, in the context of this exercise of the power, I understand from what the committee wrote that the policy is not contentious. I have suggested—you can agree or disagree—that in the context of chief officers of authorities, this sort of provision is to be expected. However, I am not saying that it is legitimate because it is not contentious. I accept your point on that entirely, convener.

It follows that, if a provision is properly supplemental—in addition to, supplementary to or in supplement of something—it could be politically contentious or policy contentious. In that case, it would be for the Parliament to decide whether to approve the policy and pass the instrument.

The Deputy Convener: Are you suggesting that "supplemental" just means "in addition to"? Surely it does not mean that. Anything could be considered to be "in addition to". "Supplemental" must have a more restricted legal meaning.

Patrick Layden: There are one or two things that it has to mean and one or two things that it could mean. Something being "supplemental" does not mean that it is required for the purposes of giving effect to the legislation: "supplementary" does not carry the same meaning as "necessary". It is possible to conceive of chief officers who would not be subject to the order. I am aware that in the case of Daymond v Plymouth City Council, Viscount Dilhorne said, in the context of the provision that he was considering, that he took supplemental to cover provision that was required for the purposes of the act.

The Deputy Convener: That is why I used the word "required".

Patrick Layden: I thought so. In that case, old legislation on water and sewerage charges was being replaced with new legislation. Under the old legislation, someone could be made to pay sewerage rates even if their house was not connected to the sewerage system. In the new legislation, that link was not made specifically, so all the council had the power to do was impose water charges. The secretary of state said in his order that people had to pay sewerage charges, including those who did not have sewerage services. The House of Lords decided—only by a majority—that in the absence of clear words in the parent act, subordinate legislation could not be used to make people pay sewerage charges if they were not getting sewerage services.

That does not sound like an unreasonable decision. It was made in the context of the imposition of a charge for which no return was being given by the authority. That is a different situation from that which we have here, where we are in a true sense supplementing the provision in relation to the appointment of a chief officer with general provisions of an entirely ordinary and expected kind, which simply round out the sort of general conditions that go to the appointment of chief officers. We are in quite a different situation from that of Viscount Dilhorne in the case of Daymond v Plymouth City Council.

Mr Stewart Maxwell (West of Scotland) (SNP): We have no objections to the policy. It seems entirely sensible to me that the terms and conditions of chief officers should be the same. I refer to the point about jury service. Our advice is that provision in relation to exemptions from jury service has invariably been made by primary legislation. Given the importance of a rule that someone is not allowed to sit on a jury, why would we allow provision in this case to be made in subordinate legislation?

10:45

Patrick Layden: As I am sure I have said to the committee before, someone who is looking to provide a particular legal package looks to a range of ways in which it could be done. I concede that one of the ways in which it could have been done would have been to include a provision in the primary legislation. However, it does not follow that it is not competent to put the provision into an order of this sort—an affirmative resolution order—where all the provisions in relation to chief officers are gathered together in one convenient place.

Mr Maxwell: Has it been done in this way previously?

Patrick Layden: I do not know. [*Interruption.*] I am told that it was done in this way in an order under the Scotland Act 1998. A change to jury service was made by subordinate legislation.

On any view, this is the kind of subordinate legislation that can amend any enactment, including primary legislation. The power was deliberately framed widely so as to enable it to do this sort of thing. It is not surprising that it should be used for these purposes.

Mr Maxwell: You make the reasonable point about all the terms and conditions being the same throughout Scotland, but it does not necessarily follow that provision should therefore be made by subordinate legislation. It could be done in primary legislation.

Patrick Layden: It could.

Mr Maxwell: So it is not the case that this is necessarily the way that it should be done.

Patrick Layden: I have not suggested that that is the case. It could certainly be done in primary legislation.

Mr Maxwell: I will move on to section 4(3) of the 2005 act, which provides that the terms and conditions of the chief officer and any staff or other persons appointed by the community justice authority are to be

"such as the community justice authority may determine".

Although it says that in the act, it appears that the Executive is now bringing in regulations to deal with appointments. Is that not a contradiction?

Patrick Layden: No. You would expect me to say that and I do so. As I tried to explain, the kind of provision that we are making here is not the kind of provision that you would expect to find in the terms and conditions of employment between an employer and an employee. Some of the provisions that we are making could not be inserted into terms and conditions of employment by an employer. The sort of thing that we suggest is covered by section 4(3) are matters such as salary, pension entitlement, hours of service, working patterns and location of employment. Those are the ordinary things that you would expect to find in a contract of employment. It would be an odd contract of employment between two private bodies—a person and a private employer—that said that the post was politically restricted. That is possible, but unlikely. The same applies to the other provisions in the order. It would not be within the competence of a private employer to declare that his employee would be ineligible for jury service.

Mr Kenneth Macintosh (Eastwood) (Lab): I will go back to the discussion about the term "supplementary". I am not sure that I fully understand the point that you are making about the use of the word "required". A measure is being introduced that will require political officers not to be eligible for jury service and require them not to participate in political activities. Although that is not the same as charging for a service that someone is not receiving, you are using a statutory instrument to place a requirement that is not in the original legislation.

Patrick Layden: Yes, I am supplementing the provision in the original legislation.

The Deputy Convener: We were using the term "required" not in relation to a requirement placed on the chief officer, but in the sense of whether the provision is required in order to implement the 2005 act. When we discussed the term "required", we were using it in a different context.

Mr Macintosh: In other words, the 2005 act will work, whether or not the order is passed.

Patrick Layden: Yes.

Mr Macintosh: As you said, although the requirement is quite common and fairly ordinary, it is nonetheless quite important. If you start using subordinate legislation to introduce supplementary duties or requirements, where do you draw the line?

The Deputy Convener: That is the question.

Mr Macintosh: Indeed. It is important to consider the political contentiousness of such a provision. No one will object to its content, but the

committee is worried about the principle behind it. After all, the term "supplementary" is used in a lot of legislation and, instead of simply accepting that it will be applied in a narrow and limited way, the committee will have to examine exactly how it is being used. I would have thought that the two fairly important matters under discussion would not have been left to subordinate legislation. In that light, will you expand on your comment that ineligibility for jury service has already been dealt with in subordinate legislation?

Secondly, given that restriction on political activity has always been and will continue to be contentious, I would have thought that you would have wanted to address it in primary legislation and to allow Parliament to take a view on it. I feel that we are going a step further than we have ever gone before, so I would like you to give us evidence that this line has been crossed before with regard to ineligibility for jury service and to assure us that, if the line is being moved, this is as far as it goes.

Patrick Layden: I will deal with the general question and Gordon McNicoll will highlight the previous instruments that have taken a similar line.

I entirely agree that the term "supplementary" will take us only so far. The courts have given us some guidance on the matter. I have already mentioned the case of Daymond v Plymouth City Council, on water and sewerage charges, but I should also highlight the case of Regina v Commissioners of Customs and Excise. The customs and excise acts gave the secretary of state power to make regulations on the provision of dutiable goods—in other words, goods on which customs and excise duty is payable. In an order that was made under the incidental and supplementary provisions of the legislation, the Commissioners of Customs and Excise required accounts to be provided of all goods passing through a warehouse. In this particular case, although the company concerned had a certain amount of dutiable goods, it had quite a lot of non-dutiable goods that were the result of purely internal United Kingdom transactions and therefore not subject to customs and excise duty. As a result, the company argued that the Government could not, in an order made under an act relating to dutiable goods, impose a requirement in relation to goods generally, and say that that was supplementary to the provision in the act. The court agreed, because the nature of the goods on which the commissioners sought information was completely different to that of the goods covered by the act. The information might well have been useful or necessary to the commissioners in obtaining a proper picture of the business; however, the primary legislation did not cover that issue. That is an excellent example of the sort of area into which you could not go. There are limits on the power.

However, that case is very different from the one that we are discussing. Although the provision is significant, in that it imposes restrictions on the community justice authorities who employ people and on those who are employed, in this field it is fairly ordinary and, indeed, the sort of provision that you might expect. It is not surprising to find such a provision being used to supplement the provisions on the appointment of chief officers of community justice authorities. We have to consider the facts and circumstances of each case and make a value judgment about whether what we are doing can reasonably be called supplementary.

Mr McNicoll has the details of the previous order.

Gordon McNicoll (Scottish Executive Legal and Parliamentary Services): Sadly, this is the one question that I did not fully anticipate, so I cannot produce the details of the previous instrument at the moment.

As you will see from the footnote reference on the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, all the amendments that have been made to group B in part I of schedule I to the 1980 act were made by primary legislation. The previous instrument amended a different part of the schedule. It was not to do with group B, which is what we are concerned with. That is why it is not mentioned in the footnote.

I had a quick flick through the documents yesterday and I identified one occasion on which an amendment was made to schedule I to the 1980 act by subordinate legislation. If the committee wants further details of that, I can provide them. I do not think that we would make a big issue of it and say that there is a precedent for amending the schedule in that way. It is clear from the footnote that most of the amendments are made by primary legislation, but we would come back to the point that the schedule can be amended by subordinate legislation and, as I said, has been so amended on one occasion.

The Deputy Convener: I will bring the discussion to a halt fairly soon, but I will let Adam Ingram in, as he has not commented yet, and then Stewart Maxwell.

Mr Adam Ingram (South of Scotland) (SNP): To summarise, you are saying that the provision in the draft order is not required to implement the 2005 act, but it will alter the provisions of the enabling statute because it defines eligibility for jury service and so on. Is that not a prima facie case that the order is not intra vires? At a previous meeting, the deputy convener described the notion of supplemental provision as something of a blank

cheque—I think that that was the phrase that he used. You could argue that anything that you propose would be supplemental, but the committee has to draw a line somewhere. You have not convinced me that we should take the approach that you suggest.

Patrick Layden: I do not concede that the provision in the draft order alters the provision in the enabling act. What we are doing is supplementing, adding to or expanding on the provision in the enabling act. The enabling act provides for the appointment of chief officers. We are supplementing that provision by making additional provision, or supplementary provision, on chief officers. We are saying that they are politically restricted, that they are ineligible for jury service and so on. To my mind, those things add to but do not alter the existing provision in the act. They do precisely what they say they are going to do, or what it says on the tin. They supplement the general provision in the act in a way that is no more than one might expect. The provision does not introduce a new concept into the act. It simply adds a bit of detail to the references to chief officers.

On the question of whether what we are doing is intra vires or ultra vires, I am reminded of something that Francis Bennion states in his book, which is an excellent authority. At the end of the day, someone's opinion on the vires of an order is interesting but academic, because only the courts can actually say whether it is intra vires or ultra vires. For the reasons that I set out, we believe that the courts would consider the order to be within the powers conferred on ministers by the 2005 act.

11:00

Mr Maxwell: I kind of agree with that.

You could not reasonably say that you would expect that, just because the chief officers of the community justice authorities are mentioned in the 2005 act, you can effectively do whatever you like about their terms and conditions in a piece of subordinate legislation. That seems to me to be hitting the point that we were concerned about, which is that you can effectively push the envelope of this power almost to the n^{th} degree if you so wish. That is what we are concerned about. In a sense, you are pushing the scope of the power beyond what was expected. You set up a chief officer, but you do not say anything about the post. The bill is passed by Parliament, and then you introduce subordinate legislation that says, "By the way, we'll politically restrict the post and we'll ban them from jury service" and whatever else. Many parliamentarians would find it surprising that you were doing that in subordinate legislation rather than in the act.

I would like clarification on the jury service example that we were discussing earlier. Was the example that you gave the same as that under the draft order, in the sense that it was caught up in the sweeper clause, or was there an express power?

Patrick Layden: It was a power in the Scotland Act 1998 to make consequential amendments. I can provide the committee with further details if it wishes.

Mr Maxwell: Clearly there is a difference between the two; the example that you gave may or may not be relevant to what we are discussing.

Patrick Layden: Indeed.

The Deputy Convener: I will draw this part of the discussion together before we move on.

I do not think that we can take this any further. My view, for what it is worth, is that I am quite impressed by the answer in terms of contradicting the 2005 act. If the power under the draft order is genuinely supplemental, then I have no problems with how it contradicts the act. The real question is whether it is genuinely supplemental—that is not a word I like much. Back on 28 October 2003 in this committee—that shows how sad I am—I called supplemental provisions a blank cheque. Listening to Patrick Layden, I am persuaded of that more than ever. There might be a little bit of a blank cheque.

Patrick Layden: No. It is the type of cheque one sometimes signs that says, "Not more than £50."

The Deputy Convener: Or, "Not more than £1 million." Of course it is not a blank cheque, but I have always felt that there was that danger. Patrick Layden is right. What we think and what the Executive thinks does not matter; at the end of the day, it would be for the courts to test, which is why I made the somewhat cynical comment earlier that, as the draft order is not politically contentious and in some ways is a matter of common sense, I suspect that it is unlikely that the courts will ever be asked to test it.

It may well be that the draft order is towards the outer edge of supplemental. Patrick Layden uses the words "add-on" and "additional"; the committee tends to look at it in terms of the Bennion definition of requirement. At the end of the day, whether the draft order is supplemental is moot. All that the committee can do is draw to the lead committee's attention our reservations about the vires of the order in terms of it being what is meant to be supplemental. I do not know whether there is anything else that we can technically do with it, because at the end of the day it is for the Executive to continue or not.

My reason for saying that is that it is difficult to see why the provisions in the draft order could not

just have been included in sections 3 or 4 of the Management of Offenders etc (Scotland) Bill. I can see why certain issues need subordinate legislation, for example when you are going to give a local authority lots of detailed regulations on how to implement care for the elderly—to be topical for a moment—but I find it difficult to accept this order as supplemental. However, I accept that it is a matter of judgment. There is not much that the committee can do, other than send the order to the lead committee.

The other point that interests me is the vires of the data protection/intellectual property article, which, for the avoidance of doubt, is article 6 of the draft order. What is the answer to that?

Gordon McNicoll: Patrick Layden has asked me to deal with that point. Our position is that the subject matter of the Re-use of Public Sector Information Regulations 2005 (SI 2005/1515) and the directive that they implement is concerned with the use and sharing of information rather than with data protection or intellectual property. Consequently, we do not consider that the reservations in the Scotland Act 1998 would apply to what is proposed in the order.

We consider that it would be competent to amend the 2005 regulations. It should be noted that all that we seek to do is to add community justice authorities to the list of public bodies that are covered by the regulations. Even if the data protection or intellectual property reservations were relevant, it is questionable whether we would be amending the law on either of those topics and thereby straying into reserved territory.

Principally, our view is that the 2005 regulations are not about data protection or intellectual property. Indeed, it is perhaps worth noting that the provisions of the regulations expressly do not apply to documents in which

"a third party owns relevant intellectual property rights in the document",

so the operation of the regulations would not affect the intellectual property rights of third parties. That provision is contained in regulation 5(1) of the 2005 regulations.

The Deputy Convener: I just want to check that I am not misunderstanding you. The parent regulations that you seek to amend are United Kingdom regulations.

Gordon McNicoll: They are UK regulations that implement a European Commission directive.

The Deputy Convener: I suppose that some of us thought that the fact that the title of the regulations uses the word "reuse" suggests that they have a copyright or an intellectual property dimension.

Gordon McNicoll: All that I can say is that the regulations permit public sector bodies to reuse information that they hold—they do not require them to do so. I suppose that it is implicit that such bodies cannot reuse the information for any unlawful purposes. The regulations specifically do not apply to a document in which

"a third party owns relevant intellectual property rights in the document",

which are defined to include copyright rights.

The Deputy Convener: That information could be material the copyright of which is held by public sector bodies.

Gordon McNicoll: Indeed.

The Deputy Convener: Their copyrighted material would be being reused.

Gordon McNicoll: But such reuse by public sector bodies is permitted—although is not required—under the regulations. By adding community justice authorities to the list of public sector bodies that are covered by the regulations, all that we are saying is that they, like other public sector bodies, may reuse information that they hold.

It is also worth noting that there is probably quite a strong argument that community justice authorities would already be caught under regulation 3(1), which defines what a public sector body is. The definition includes a corporation—in other words, a body corporate such as a community justice authority—

"financed wholly or mainly by another public sector body".

As the committee will be aware, community justice authorities will be financed largely by the Scottish ministers, who are themselves public sector bodies under regulation 3. We are merely making it explicit in the order that the 2005 regulations will apply and that community justice authorities will be public sector bodies. Given the structure of the regulation that defines what a public sector body is, it seems entirely appropriate to refer to the class of public sector body, rather than simply to rely on the operation of the catch-all provision.

The Deputy Convener: Do any of the members who are still awake want to ask a question? That comment sounded rude—I did not mean it to sound that way. I was not suggesting that what Gordon McNicoll said might have sent members to sleep; I was alluding to the topic, which is quite technical and difficult.

Mr Macintosh: I think that the matter is open to interpretation, but the Executive has advanced its argument.

The Deputy Convener: I have to say, I have no view. I am so far out of my legal depth that I have

no view whatever. It is a subject of which I know nothing. I think that, again, we could simply thank the Executive for giving us its interpretation of the matter and say that we have some reservations. We can send the draft order to the lead committee just for its information. I suspect that we could not reach a view on this matter even as much as we could reach a view on the other matter. Do members agree?

Members *indicated agreement*.

The Deputy Convener: In other words, we are all out of our depth on this one. We will send the draft order to the lead committee.

We are grateful to the Executive officials for their help on the subject.

I understand the arguments about— [*Interruption.*] I am reminded that I am chatting away and that we are still in a public meeting. I apologise.

Mr Macintosh: Every comment is noted, convener.

Delegated Powers Scrutiny

Local Electoral Administration and Registration Services (Scotland) Bill: as amended at Stage 2

11:11

The Deputy Convener: We do not have a huge amount of time to deal with this item. We can write to the Executive today and consider a response from the Executive next week; the stage 3 debate will be held next Thursday. As always, we are squeezed away from any proper process at all.

On section 6, "Access to electoral documents: supplementary", we reported our concern to the lead committee at stage 1 about the drafting of section 6(10). The Executive has amended the section as suggested by the committee and has provided for a free-standing order-making power rather than seeking to extend an existing power in another enactment. That means that orders that are made under section 6(10) will be subject to open procedure. I take it that the committee simply notes that change.

Members *indicated agreement*.

The Deputy Convener: Section 18A, "Absent vote applications: provision of personal identifiers", and sections 18B to 18D introduce the collection and use of personal identifiers for absent voting only at local government elections in Scotland. They reflect changes that were made to the United Kingdom Electoral Administration Bill and ensure that those anti-fraud measures will also apply to local government elections in Scotland. It is assumed that annulment will provide adequate scrutiny.

Members *indicated agreement*.

The Deputy Convener: In section 18B, "Provision of fresh signatures", subsection (3) gives ministers powers to make regulations that allow registration officers to require electors who vote by post or proxy to provide a fresh signature in certain circumstances. There is a lack of information about the intended exercise of that power, and there are concerns about the meaning and scope of "consequences" in section 18B(3)(b). Would it be worth our asking the Executive to clarify its thinking in relation to the power and, in particular, what is meant by "consequences"?

Mr Maxwell: Perhaps there is a penalty involved, but we do not know. The bill seems to suggest that there might be.

The Deputy Convener: Okay.

Section 18C provides for the disclosure of personal identifiers that are kept by registration

officers. The power could be quite wide and involve the disclosure of personal information, yet it is subject only to the negative procedure. No explanation is given for the power to prescribe the "purposes" for which the information is disclosed. We might want to ask for further information on the intended exercise of the power and, in particular, what "purposes" the Executive has in mind. I think that it would be worth asking that, to see what is meant.

Mr Maxwell: The Executive has said that the power is limited to electoral purposes, but it has refused to put that in the bill, although that would have cleared the matter up entirely. Given the concern that exists, it would be helpful if the Executive could clear up any doubts in correspondence to the committee.

11:15

The Deputy Convener: I think that our earlier discussion will make us even more nervous about allowing things not to be specified on the face of the bill.

In section 18D, "Power to require existing absent voters to provide personal identifiers", ministers are given a power to make regulations to enable registration officers to require existing absent voters to provide a signature and date of birth. That is pretty much the same as the situation that we considered earlier and we should ask the Executive to clarify its thinking in relation to this power and what is meant by "consequences" in the context of the power.

Section 19A concerns the piloting of the idea of having photographs on ballot papers. Stewart Maxwell immediately shakes his head, but my graciousness prevents me from asking why. The provision extends an existing delegated power and mirrors a power that was in section 19, which we were content with at stage 1.

Are we content with the power and with the fact that it is not subject to parliamentary procedure, except where the pilot is extended by order to the whole country, in which case it would be subject to affirmative procedure? In other words, are we happy for the Executive to conduct the pilot on a test basis, regardless of whether we like the policy, which is a different question?

Members *indicated agreement.*

The Deputy Convener: Are we content with section 19B, "Encouraging electoral participation", which gives returning officers powers to encourage participation at local government elections?

Members *indicated agreement.*

The Deputy Convener: In section 34, "Indexing of registers and the provision of registration information", a new subsection has been inserted, which is intended to provide authority for a district registrar to issue, on payment of the prescribed fee, an extract of an entry in the registers. The fee is prescribed in regulations. Are we content that the power be subject to negative procedure?

Members *indicated agreement.*

The Deputy Convener: On section 47, "Keeping of central register for health and local authority purposes", the committee was content with the power as originally drafted. The amendment extends the power to allow a "class of person" as well as "such persons" to be prescribed in regulations made by the Registrar General. That seems to be only an administrative change to what we agreed already. Are members content with the power and that it be subject to negative procedure?

Members *indicated agreement.*

The Deputy Convener: Under section 2A, "Provision of information about expenditure on elections", ministers may issue directions to returning officers to provide them with such information about expenditure on elections as the directions may specify. The directions that are issued under the provision are entirely administrative in nature. Are we content with the provision?

Members *indicated agreement.*

Draft Instrument Subject to Approval

Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006 (draft)

11:17

The Deputy Convener: The order replaces one that we considered earlier. No points arise on the order. Are members content with the order?

Members *indicated agreement.*

Instruments Subject to Annulment

Robert Gordon University (Scotland) Order of Council 2006 (SSI 2006/298)

11:17

The Deputy Convener: A large number of points are raised on this instrument, which is one of a package on this subject.

It is suggested that we seek clarification of the Executive's intention in relation to the definition of "Independent Governor"; that we ask why the Executive considers it necessary to define the "1981 Regulations" and the "1988 Regulations" as both terms arise only once; that we seek clarification of why article 2 has a paragraph (1) and no subsequent paragraphs; that we ask the Executive to explain the purpose and effect of paragraphs (3) and (4) of article 7; that we ask the Executive to clarify the reference to "appointment" of a governor in article 9(1); that we ask the Executive to explain why paragraph (1) in article 14 is subject to the provisions of articles 5(2) and 5(4); that we ask the Executive to clarify article 5(4) in relation to elections to select the governors; and that we ask the Executive to explain the purpose and effect of article 14(3), with particular reference to the effect on the 1981 regulations.

I assume that we will follow our normal procedure by asking the Executive those questions and reconsidering the instrument when it has answered them. Do we agree to do that?

Members *indicated agreement.*

The Deputy Convener: Do you have one question in particular that you would like to ask, Ken?

Mr Macintosh: Before the meeting started, I said that the legislative history of the regulations is interesting and complex. The substantive point is to do with the number of governors, how they are appointed and how they are removed. Those issues are unclear. How will that happen and who will do it?

The Deputy Convener: We will be happy to ask all those questions. Some are, no doubt, more important than others. There are also a couple of minor points that we can raise with the Executive informally.

Contaminants in Food (Scotland) Regulations 2006 (SSI 2006/306)

The Deputy Convener: Do members wish to ask the Executive to explain why the sampling requirements that were provided for in SSI 2005/606 have been omitted from the present regulations and why there is no explanation in the explanatory note of that change of substance? Do we agree to ask the question formally?

Members *indicated agreement.*

National Health Service (Superannuation Scheme and Additional Voluntary Contributions) (Scotland) Amendment Regulations 2006 (SSI 2006/307)

The Deputy Convener: We might want to ask the Executive to explain the references in new regulation T2A(4), (5) and (6) to "the information referred to" in paragraphs (7) and (8), given that those provisions do not appear to contain any such information. We will ask that question of the Executive and see what the answer is.

This set of regulations is the 14th amendment to the principal regulations. We should draw to the attention of the lead committee and Parliament the Executive's undertaking to consolidate the principal regulations.

Mr Macintosh: The Executive has said that it is in the middle of such a consolidation. We should note that.

The Deputy Convener: We will note that and ensure that everyone else notes it.

Mr Maxwell: I do not think that the Executive is in the middle of a consolidation. It has only started consultation on a draft consolidation. Progress has not been as fast as we had hoped it would be.

Mr Macintosh: The Executive is working to lay a consolidated instrument.

The Deputy Convener: We can say, perhaps, that the Executive is in the middle of the beginning of the consultation.

Teachers' Superannuation (Scotland) Amendment Regulations 2006 (SSI 2006/308)

The Deputy Convener: A couple of minor points arise in relation to the regulations.

Human Tissue (Specification of Posts) (Scotland) Order 2006 (SSI 2006/309)

The Deputy Convener: No points arise.

Approval of Research on Organs No Longer Required for Procurator Fiscal Purposes (Specified Persons) (Scotland) Order 2006 (SSI 2006/310)

The Deputy Convener: One minor point—but nothing of any substance—arises in relation to the order.

Common Agricultural Policy (Wine) (Scotland) Amendment Regulations 2006 (SSI 2006/311)

The Deputy Convener: A number of points arise on the instrument, including a number of minor points that can be raised with the Executive informally.

The more substantive points that have been identified are: whether the omission in regulation 11 of a reference to the further amendment to regulation 1622/2000 is deliberate; the need for further clarification of the amendment made to schedule 5 of the principal regulations by regulation 12; the references in schedule 11 to regulations 1574/2002 and 0715/2003, which appear no longer to be in force; and whether the omission in schedule 12 of the most recent amendments is deliberate. That is all fairly technical stuff, so we might get the answer back that the Executive has simply missed out or forgotten things. However, we should ask those questions.

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/312)

The Deputy Convener: No points arise.

Seed (Registration, Licensing and Enforcement) (Scotland) Regulations 2006 (SSI 2006/313)

The Deputy Convener: Perhaps we can ask why Council directive 2004/117/EC is being implemented later than the date specified in the directive. We should also ask why no transposition note was submitted with the regulations.

Mr Macintosh: Given the volume of work currently facing our committee, it is important that we emphasise that point. The lack of such a note makes what is already a very difficult job more onerous.

The Deputy Convener: I totally agree.

Plastic Materials and Articles in Contact with Food (Scotland) Regulations 2006 (SSI 2006/314)

The Deputy Convener: Two questions have been identified about the regulations. First, why does regulation 9(4) refer to

"proceedings for an offence under this regulation"

when regulation 9 does not create any offence? Secondly, why does regulation 23 not contain a similar amendment to regulation 10(2) of the Materials and Articles in Contact with Food (Scotland) Regulations 2005 as is made by regulation 23(6) of the English regulations to the equivalent English provision?

Those are a couple of interesting questions, to which we await the answer with bated breath.

Home Detention Curfew Licence (Prescribed Standard Conditions) (Scotland) Order 2006 (SSI 2006/315)

Education (Student Loans) Amendment (Scotland) Regulations 2006 (SSI 2006/316)

The Deputy Convener: No points of substance arise on the instruments.

Plant Health (Potatoes) (Scotland) Order 2006 (SSI 2006/319)

The Deputy Convener: About nine points, all of which are technical matters, have been raised about the order. I will not read them all out. Are members content that we ask about the points that have been identified?

Members *indicated agreement*.

National Health Service (Pharmaceutical Services) (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/320)

The Deputy Convener: No points arise.

National Health Service (General Dental Services) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/321)

The Deputy Convener: Are these the regulations that deal with denturists?

Mr Macintosh: They are.

The Deputy Convener: My reason for asking is that the regulations are probably, oddly enough, politically rather contentious. I think that we have all received representations on them. However, such matters are not the business of this committee, so let us move swiftly on from matters of politics and policy.

Mr Macintosh: Although the committee might be slightly abusing its position in doing so, we should alert the Executive and the lead committee to the fact that the regulations will undoubtedly attract a level of scrutiny that subordinate legislation does not normally attract.

The Deputy Convener: We should ask the Executive about the reference in regulation 2(2) to

"regulation 4(1) of the National Health Service (Discipline Committees) (Scotland) Regulations 2006",

which does not appear to be correct. We should also mention that the regulations are due for

consolidation. The Subordinate Legislation Committee's job is to ask such questions.

Mr Macintosh: We are considering the Scottish version of regulations that implement an approach that was agreed at United Kingdom level, so can we ask the Executive what scope there is to amend the regulations, for example to make dispensation for denturists, or to delay implementation of the regulations? Will such matters depend on the new regime for denturists, who will be subject to a professional body?

The Deputy Convener: There is no scope to amend the regulations; they can only be annulled. One of the reasons why the committee proposed a new procedure was to allow for amendment. However, I am a little afraid that we are entering into policy matters that I am sure the lead committee will be zealous in pursuing.

Mr Macintosh: I did not phrase my question properly. I was not suggesting that the regulations be amended; I meant that, given that the regulations reflect UK-wide measures, we should ask what scope the Executive has to vary the approach in Scotland. I suspect that the Executive has no room to vary the approach, but perhaps it has.

The Deputy Convener: I see. I think that the rules can be different in Scotland. I am trying to remember an occasion that is in the back of my mind, when political representation was made and a health measure that was implemented in England was not implemented in Scotland. Perhaps Stewart Maxwell remembers the occasion.

Mr Maxwell: I cannot remember it, but surely the general point is that the Scottish Parliament has the right to decide to annul the instrument, which would mean that there would be a different approach in Scotland.

The Deputy Convener: I am trying to dredge up the example that is in the back of my mind. I remember that an approach was taken countrywide to a health matter, but representations were made—was Frank McAveety the Deputy Minister for Health and Community Care at the time? He has been minister for everything else.

Mr Macintosh: I appreciate that the Parliament has the power to annul the regulations—if we did not have that power, we would not be considering them. However, I am trying to ascertain whether the Executive has the scope to vary a measure that has been drawn up and consulted on at national level.

The Deputy Convener: The statutory instrument is entirely the Executive's.

Mr Macintosh: Yes.

The Deputy Convener: The Scottish Parliament might agree to a Sewel motion on a parent act that would be passed at Westminster, but implementation of the approach in Scotland through regulations would remain the business of the Scottish Parliament. In other words, by allowing a power to be conferred on it through Westminster legislation, the Scottish Executive does not lose its ability to do what it wants when it comes to making regulations—I think that that is the legal position. There is a UK statute and the Westminster Government is implementing measures in the rest of the UK, but the Executive may or may not implement the same measures in Scotland. The situation arose in a health context in the past—the example will come back to me.

Mr Macintosh: Would the Executive have to carry out a consultation and revisit the process that was carried out—on its behalf, as it were—at UK level?

The Deputy Convener: Perhaps that is a matter for the lead committee.

Mr Maxwell: The regulations are subject to annulment and are a good example of a point that we made in last week's debate in the Parliament about our draft report on the regulatory framework in Scotland. Sometimes instruments that are subject to the negative procedure are much more important than is suggested by their being subject to annulment.

The new procedure that is suggested in the draft report of our inquiry into the regulatory framework would allow committees to discuss and debate such instruments properly. The regulations are another good example of such an instrument. We dealt with a similar instrument recently on the funding of less favoured areas.

The Deputy Convener: That is a fair point.

Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment Regulations 2006 (SSI 2006/323)

11:30

The Deputy Convener: Several points have been identified. We will seek explanations on the drafting of a paragraph, on the references to regulation 13 and on the inclusion of the term "step child". We will also seek further information on the timing of consolidation of the remaining parts of the principal regulations. We will ask those questions, as we often do.

National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2006 (SSI 2006/329)

National Health Service (Discipline Committees) (Scotland) Regulations 2006 (SSI 2006/330)

The Deputy Convener: No substantive points arise on the regulations.

Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2006 (SSI 2006/335)

The Deputy Convener: We will ask the Executive whether, in new regulation 18 in the principal regulations, the reference should be to article 2.3 of the relevant Commission decision, not article 2.4.

General Dental Council (Professions Complementary to Dentistry) Regulations Order of Council 2006 (SI 2006/1440)

The Deputy Convener: No points arise on the order of council.

Instrument Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 3) (Risk Assessment Orders and Orders for Lifelong Restriction) 2006 (SSI 2006/302)

11:31

The Deputy Convener: No points arise on the act of adjournal.

Mr Macintosh: Convener, I believe that we may have had our discussion about denturists in relation to the wrong instrument. Our discussion applied to the General Dental Council (Professions Complementary to Dentistry) Regulations Order of Council 2006 (SI 2006/1440), rather than to the National Health Service (General Dental Services) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/321). That was my fault for misleading you, convener.

The Deputy Convener: I asked whether it was that one—I was not sure.

Mr Macintosh: I jumped in to confirm that it was but, actually, it was not.

The Deputy Convener: It is interesting that, although we considered the General Dental Council (Professions Complementary to Dentistry) Regulations Order of Council 2006, nothing arose and no one would have thought of the implications, but it is an important instrument. There is a dimension in the outside world that none of us would have noticed if constituents had not raised it with us.

Our next meeting will be next Tuesday, when we can expect lots of Executive responses and more instruments.

Mr Maxwell: I will not be here next week—I give my apologies now.

Meeting closed at 11:32.

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