SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 June 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
22nd 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 ALSO ATTENDED:

Bill Butler (Glasgow Anniesland) (Lab)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 27 June 2006

[THE CONVENER *opened the meeting at 10:34*]

Delegated Powers Scrutiny

Health Board Elections (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 22nd meeting in 2006 of the Subordinate Legislation Committee. Apologies have been received from Adam Ingram.

The committee considered the delegated powers in the Health Board Elections (Scotland) Bill on 6 June and asked the member in charge of it—Bill Butler—to clarify two points. He is here to answer any queries that we have, not only on the two points that we raised, but on anything related to them.

On section 13 of the bill, "Orders and ancillary provision", we asked why the power in section 13(1) was required and, in particular, how it might be used to modify schedule 1. We also raised a drafting point on the use of the word "such", in section 13(1), which appears to be erroneous.

Members have copies of Bill Butler's response, which states that while the bill allows for postal ballots on a wide scale, they have not been tested in practice before. He points out that, while the provisions in schedule 1 represent an effective procedure for such elections, it is sensible to allow ministers the flexibility, by order, to add to those provisions in the event that unanticipated operational issues arise. Do members have any questions for Bill Butler on that point?

Mr Stewart Maxwell (West of Scotland) (SNP): I wonder whether Bill Butler can explain the thinking behind a power that would permit rules of procedure only to be added to schedule 1, rather than having a power that would also permit the removal of rules of procedure, given the point that has been made about things being untried and untested and the possibility of administrative changes in the future. Surely it should be possible to add or remove rules of procedure. Why was the power restricted in such a fashion?

Bill Butler (Glasgow Anniesland) (Lab): I thank the committee for its consideration of the bill and for any advice that it can give today.

Stewart Maxwell has asked a good question. We think that the provisions in the bill will work, but it is obvious that unforeseen operational matters could arise in the electoral system. I acknowledge that a good point has been made and that it might be a good idea to amend the bill in a way that makes it clear that rules of procedure could be either added or removed. I accept the point that has been made.

Mr Maxwell: I am not suggesting that the bill should go one way or the other; I am simply asking a question. It seems to me that your argument was that changes may be necessary because the system is untried and untested, but it seems odd that the bill would want to provide the power only to add changes that cannot yet be envisaged.

Bill Butler: Perhaps we were overcome by having too positive a frame of mind and thought that the provisions were reasonable and that ministers could make additions and refinements. The bill may include provisions that people think will not be effective or are deficient in some way and may need to be omitted. I take the point that has been made, and we will proceed to insert words that take it on board at the appropriate juncture, if that is acceptable.

The Convener: Yes. Before we discuss the use of the word "such", are there any other aspects of the issue that members want to discuss?

Mr Kenneth Macintosh (Eastwood) (Lab): It is a question of giving the matter further thought. The bill outlines the arrangements for a type of election. The procedure is new and the rules can be changed by being added to. However, including the word "omit" would mean that the Executive could change the procedure for the elections altogether. The question is whether that should be done. Obviously, one does not need to omit anything. The procedure is described because it is necessary to run an election, but the word "omit" is unnecessary. If it is included, would not a procedure be opened up by which the Executive could change things altogether and entirely replace the type of election procedure that is outlined?

Mr Maxwell: I understand what Ken Macintosh is saying, but would have thought that the bill could be drafted in such a way that the system could be altered, rather than wholly removed and replaced by a new system, which would seem to be excessive.

Bill Butler: To use the words that are used in all the best committees, I will reflect on that point.

The Convener: The legal advisers nodded their heads at what Stewart Maxwell said, so what he suggested is possible. I take Kenneth Macintosh's point. Obviously, there are certain things that Bill

Butler would want to keep and we must ensure that that happens, but there could be procedures that he might want to add in the future.

Bill Butler: Or, rather, that the Executive may wish to add, with the Parliament's agreement.

The Convener: Absolutely. On the second, drafting point, I think that you have accepted that the word "such" could be omitted.

Bill Butler: Yes, convener. I am grateful to the committee for pointing that out. Whether the word "such" is omitted or the words "as they think necessary or expedient" are inserted after the word "provision", we accept the good advice from the committee and will act on it.

The Convener: Are members happy with the discussion and the points that were made in Bill Butler's response? Is the committee happy with the use of the affirmative procedure?

Members *indicated agreement*.

Mr Maxwell: Yes. Bill Butler makes a valid point about that.

The Convener: On section 13(2), we asked whether it is the policy intention that all orders made under the provision—even those that do not amend primary legislation and which might be minor and uncontroversial—be subject to the affirmative procedure. Bill Butler acknowledges that the power in section 13(2) is potentially wide and could be used to amend primary legislation. He indicates that such exercises of the power should be subject to the affirmative procedure, in the interests of parliamentary democracy.

I draw to members' attention paragraph 14 of the legal brief, which questions whether the bill can amend primary legislation using that provision. It is suggested that Bill Butler might use a procedure such as that used in the Adult Support and Protection (Scotland) Bill. Sections 68(2) and 70 of that bill deal with ancillary provision and orders. That approach would make it crystal clear that if changes to the bill were going to be made, the affirmative procedure should be used, but if only minor changes were going to be made, the negative procedure could be used.

Bill Butler: I take your point, convener. We did not want to fetter the Executive unduly, but we did want to ensure that there was a democratic check, which is why we suggested the use of the affirmative procedure. I take your point about matters that could be dealt with more easily and efficiently by the negative procedure. I am grateful for the advice from the legal adviser with regard to section 62 of the Adult Support and Protection (Scotland) Bill.

The Convener: It is section 68(2).

Bill Butler: I beg your pardon.

The Convener: You could make the changes that you wanted to make to the bill. The legal advice is that you might have difficulty amending the enacted bill in the way that you want, using the affirmative procedure, given the drafting. Something like the provision in section 68(2) of the Adult Support and Protection (Scotland) Bill would be clearer. The distinction is made between using the affirmative procedure to make changes to the face of the bill and the negative procedure to make minor changes.

Bill Butler: I take the committee's advice on dealing with minor matters by negative resolution for the sake of clarity and efficiency. I will reflect on the committee's wise words with my bill team. We will lodge amendments in due course, if that is agreeable.

Mr Maxwell: There might be confusion about the two points that are being made. The first is whether it is right to use the affirmative procedure in all cases or whether to use the negative procedure to deal with minor or uncontroversial matters.

There is a second point about whether there can be any amendment at all. You have section 68(2) of the Adult Support and Protection (Scotland) Bill in front of you, which states:

"An order under subsection (1) may modify any enactment, instrument or document."

That is a separate point. On which of those two points are you going to lodge an amendment? Or will it be on both?

10:45

Bill Butler: In terms of the incidental nature of some of the amendments that may be lodged, we will consider that particular point. I will reflect on whether section 68(2) of the Adult Support and Protection (Scotland) Bill matches in with or works with section 13 of the Health Board Elections (Scotland) Bill, and I will take some advice. At the moment, I am not sure.

Murray Tosh (West of Scotland) (Con): We should congratulate Bill Butler on the approach that he has taken to his bill. It is refreshing to find that the procedures that he has selected have been chosen in the interests of parliamentary democracy, bearing in mind what this process is all about.

We have asked the section 68(2) question in relation to several bills—it is pretty standard. We have become relatively comfortable with the power as it is defined, although we had a recent case in which the Executive's interpretation of it appeared to be extraordinarily wide and contrary to the advice that it had given us. In simple, parliamentary democracy terms, the committee

understands the need for words such as "transitional", and "supplementary". To reflect on that is fine, but I think that we will be quite comfortable with your trying to amend the bill along those lines.

Bill Butler: I take Murray Tosh's point and will reflect on that. With the bill team, I will seek to lodge amendments that will add to the clarity of the putative legislation.

The Convener: To help as much as we can, we can share with you the relevant paragraphs of our legal brief, just to make the two issues clear.

Bill Butler: I would be obliged if that were permissible, convener.

The Convener: That is permissible. We will put that information in our report.

Bill Butler: I am grateful to the committee.

The Convener: I gather that there is plenty of time with regard to the bill. We will simply report to you. Are there any further points on the bill before we finish this item?

Members: No.

The Convener: I thank Bill Butler for coming along.

Bill Butler: I am obliged, convener.

Adult Support and Protection (Scotland) Bill: Stage 1

10:48

The Convener: The bill contains a large number of delegated powers, the first of which is in section 3, "Adults at risk". Section 3(2) confers a power on ministers to amend the definition of adults at risk "as they think appropriate". That is a fairly significant power with a wide scope, although it is subject to the affirmative procedure. I would like members' views on the power. If you look at section 3(1), you will see how broad the definition is. The bill states that

"'adults at risk' are adults who … are affected by disability, mental disorder, illness, infirmity or ageing".

The definition is very broad.

Murray Tosh: The central issue in the section is addressed in paragraph 26 of our legal brief, which makes a comparison with the Adults with Incapacity (Scotland) Act 2000. The definition in that act is not amendable and does not require to be amended. In order for us to understand the thinking behind the proposal in the bill, the questions that we need to ask the Executive are why it is taking a different approach; why it does not think that the definition that is given in section 3 is sufficient; and what amendments to the definition it imagines might be possible. Otherwise, I would have thought that it should be an exercise in consistency and that the Executive should approach the bill in the same way that it approached the Adults with Incapacity (Scotland) Act 2000.

Mr Macintosh: The nature of risk is such that it is possible to envisage that the categories of adults who might be at risk might need to be changed. I can see why the Executive wants the power of amendment. However, the definition is crucial—it is the centrepiece of the whole bill—and it is rather worrying to open it to amendment in this manner. We should certainly ask the Executive why it has asked for the power and whether it thinks that it would be advisable to include a statutory duty to consult, given that the power is already subject to the affirmative procedure. That would give us an extra assurance that any changes to the definition would have the support of the wider community.

Mr Maxwell: If the definition is to be amended by subordinate legislation, I agree with Ken Macintosh about the need for a statutory duty to consult. However, I am not convinced at this stage that it should be dealt with by subordinate legislation at all. Ken Macintosh's point, and Murray Tosh's earlier point, was that that definition is the core of the bill. If you were to change that, it could create quite a serious policy shift, and I do not think that that is what subordinate legislation should be about, particularly given the fact that the definition is very wide. What would the Executive do? Does it envisage removing some of the categories? If so, that would mean a significant shift and change in policy, and it would not be right for that to be done by subordinate legislation. If that is done, it should be with primary legislation. Unless we get a further explanation, I suggest that the definition should not be amendable by subordinate legislation.

Gordon Jackson (Glasgow Govan) (Lab): I cannot for the life of me see any justification for the power. I am interested in what Stewart Maxwell said. I had been thinking, in my naive fashion, about adding other categories besides disabled, ill, mentally ill, infirm and aging, and I could not think of any other categories that there could be. However, as Stewart said, you could remove categories, which is a big policy issue. It strikes me that there is something in the Executive mindset—all Executives are like this—that makes it want to put a definition in a bill and then take a power to change it. There is a belt-and-braces mindset. It does not matter how basic the definition is; the Executive wants to take a power to change it. I do not think that subordinate legislation was ever meant for that. It is meant for regulation or for advising councils on how to do

things. The idea of changing a central definition is nonsense.

The Convener: There is great concern about changing the definition by subordinate legislation; we believe that it would have to be changed by primary legislation. We cannot envisage how such a wide definition would be changed, but we will ask the Executive how it thinks it might be changed. I suppose that the fallback is that, if such a change were to be effected by subordinate legislation, there should be a statutory duty to consult on a draft order, as Ken Macintosh said. As Murray Tosh said, we should also ask specifically about the parallel with the Adults with Incapacity (Scotland) Act 2000, which takes our preferred approach, and ask why a change from that is considered necessary.

Murray Tosh: It almost follows that if the Executive thinks that the facility to amend the definition is important in the context of the bill, it should use the bill to amend the Adults with Incapacity (Scotland) Act 2000 by including a similar provision in that act. If the Executive does not intend to do that, it would be interesting to know why. That gets to the heart of the apparent inconsistency between the bill and the 2000 act.

The Convener: You are absolutely right.

Gordon Jackson: Murray Tosh makes a fair point. Research would be needed to prove this, but I suspect that there are dozens of acts of the Scottish Parliament in which a central definition cannot be amended just because the Executive thinks that it is appropriate to do so. Murray Tosh has picked out the 2000 act, which is the best and most obvious example in this context, but there must be dozens of other definitions that it would not make sense to change by subordinate legislation.

The Convener: Section 5(1)(e) will confer on the Scottish ministers a power to extend co-operation duties to public bodies and office holders other than those that are mentioned in section 5. There are plenty of precedents for such an administrative power and orders made under the power would be subject to the negative procedure. Do members have comments?

Gordon Jackson: The provision offers a good example of how subordinate legislation is meant to be used.

The Convener: Exactly. Section 23(2)(a) will confer on the Scottish ministers a power to prescribe the type of documents to be served with any power of arrest that is attached to a banning order. Paragraph 10 of the delegated powers memorandum explains the provision. Our legal adviser says in the legal brief:

"the power to make rules of court … is generally regarded as an administrative matter for the Court of Session".

There are similar provisions in sections 24(1), 24(1)(b), 24(2) and 24(2)(b), which will confer on ministers powers to prescribe other classes of person who are authorised to serve notice to the police of a banning order with attached power of arrest, and to prescribe other documents to accompany such an order. Again, the provisions appear to deal with administrative matters and will allow the court to regulate how the police may be advised. The powers are not subject to procedure.

Gordon Jackson: In our massive inquiry report, we recommended that such matters should not be dealt with in subordinate legislation and that the court should be left to get on with it. We can hardly object to the provisions on the ground that the Parliament should have more control over the exercise of powers that our report would get rid of completely.

The Convener: Are members content with the provisions?

Members *indicated agreement*.

The Convener: Section 39(1) lists the statutory functions of adult protection committees. Section 39(1)(d) will allow ministers, by order subject to negative procedure, to confer on APCs additional administrative functions in relation to safeguarding adults at risk, which might emerge in the light of experience and practice. It is not unusual for ministers to take a power to add functions in such a way.

Section 39(3)(e) will confer on ministers the power to prescribe additional public bodies or office holders to which the functions of APCs are to apply. Again, the power is restricted to adding to the list and will be subject to the negative procedure. Do members have comments?

Members: No.

The Convener: Sections 41(2)(d), 42(2)(e) and 43(b)(vi) will confer on the Scottish ministers, respectively: the power to prescribe public bodies and office holders who are entitled to attend APCs; the power to prescribe public bodies and office holders who provide information to APCs; and the power to prescribe other recipients of the biennial report. The provisions are similar to the provision in section 39(3)(e) and orders made under the powers would be subject to the negative procedure.

If members have no comments, we move on to section 49, which will make provision for persons who are authorised to perform functions under part 1. Section 49(1) will confer on ministers the power to restrict the type of individual who may be authorised to perform functions given to councils. An order made under the power would be subject to the negative procedure.

Only a "health professional", as defined in section 49, will be able to conduct a medical examination, under section 8, of an adult at risk. The Executive thought that there might be circumstances in which, in the best interests of the adult at risk, another category of health professional might be a more suitable medical examiner. An order made under section 49(2)(d) will be subject to the negative procedure.

If members have no comments on those provisions, we move on to part 2 and section 54, "Applications for authority to intromit with funds". New section 26(3A) of the Adults with Incapacity (Scotland) Act 2000 will provide that

"The Public Guardian must refuse an application made by a body if he is not satisfied as to such matters in relation to the body as may be prescribed by the Scottish Ministers"

in regulations that will be subject to the negative procedure. Again, that is broadly procedural.

We now turn to section 55 and section 56(2), which respectively insert section 26A(3)(b) and section 26B(7) into the 2000 act. A couple of points arise here, I think. Are there any points that members would like to raise?

11:00

Mr Macintosh: The committee may wish to draw to the Executive's attention the definition of the word "prescribe" in the Adults with Incapacity (Scotland) Act 2000, which defines it as meaning to "prescribe in regulations", but does not say by whom the regulations should be made. Although the committee and others have accepted that it means by ministers, that could be made clearer, and perhaps we could suggest to the Executive that it should now take the opportunity to amend the 2000 act.

The Convener: It is a good opportunity to do that. Are members happy with that suggestion?

Murray Tosh: The alternative would be for you, convener, on behalf of the committee, to propose an amendment yourself, but I think that it is appropriate to give the Executive the opportunity to address the point in the first instance, with perhaps a strong steer to the effect that we would very much like to see the anomaly resolved.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: The second point is about the negative procedure. Are we happy with that?

Members *indicated agreement*.

The Convener: We now come to section 61, "Guardianship orders". This is similar to section 49, which we dealt with earlier, but that section was a little tighter. Section 61(1)(d) confers the power to prescribe additional categories of medical practitioners who may prepare the medical report that must accompany an application for a guardianship order, and it is very wide. A great deal of discretion is left to ministers to define a "relevant medical practitioner" as

"a person of such other description as the Scottish Ministers may prescribe"

and the power is subject only to the negative procedure.

Murray Tosh: The point is made well in the legal brief. A similar issue arose in relation to section 49, where the negative procedure was allowed, but there the power was circumscribed in the bill by the fact that ministers had to prescribe the type of individual by reference to skills, qualifications and experience. It might be appropriate in the context of section 61(1)(d) to ask why the Executive has not similarly qualified the width of the power that it is seeking in this case. On the basis of the answer to that question, it might be appropriate for the Executive to amend that section to include an explicit requirement. Again, it is an area where we might ultimately be interested in pursuing an amendment but where, if confronted with the logic of its approach, the Executive might see the wisdom of initiating that change itself.

The Convener: If the Executive is not, in fact, thinking of qualifying that power, I take it that we should be looking for the affirmative procedure.

Gordon Jackson: At least. It is quite a serious power; it is not a trivial one. I am sure that the Executive is not providing for that power in bad faith and that the provision is well meant, but it is quite a serious power—too serious to be provided without an explicit provision for consultation or to be dealt with by the negative procedure. The bill does lots of purely administrative things, but that power is not purely administrative.

The Convener: The legal brief also mentions consultation with the Mental Welfare Commission for Scotland and other key stakeholders, and we can add that to our report. Is that agreed?

Members *indicated agreement*.

The Convener: We now come to section 63, "Direct payments: sub-delegation to councils". The amendment to the Social Work (Scotland) Act 1968 allows ministers to make provision, in regulations made under section 12B of that act, to delegate their functions to local authorities. Are members content with the negative procedure?

Members *indicated agreement*.

The Convener: Section 64(1)(c) is on adjustments between councils in relation to social services. It inserts new subsections into section 86

of the 1968 act to extend the provisions for financial adjustments between local authorities. Are members happy with the power in new section 86(6), which is an administrative matter that will be subject to the negative procedure?

Members *indicated agreement*.

The Convener: Section 64(1)(c) also inserts new section 86(7) into the 1968 act, which provides for ministers to make regulations setting out the circumstances that must be taken into account or disregarded in determining a person's ordinary residence under section 86(1) of the 1968 act. Where the power is exercised to modify sections 86(2), (3) and (5)(b) of the 1968 act, it will be subject to the affirmative procedure; otherwise, it will be subject to the negative procedure. Are members happy with the provision?

Members *indicated agreement*.

The Convener: Finally, the legal brief also draws our attention to a minor drafting error in new section 86(6) of the 1968 act, as inserted by section 64(1)(c) of the bill. Do members agree to draw the Executive's attention to the error?

Members *indicated agreement*.

The Convener: Section 64(2) amends the meaning of "accommodation" in section 2 of the Community Care and Health (Scotland) Act 2002. Our legal adviser feels that the provision, which is subject to the affirmative procedure, is necessary and consequential. Do members have any further comments?

Members: No.

The Convener: Section 65, "Application of the Social Work (Scotland) Act 1968: persons outwith Scotland", inserts new section 87A(1) into the 1968 act. The power, which broadly replicates the power in section 5 of the Community Care and Health (Scotland) Act 2002, is subject to the affirmative procedure. Do members have any further points on that provision?

Members: No.

The Convener: The power in section 68(1), which relates to ancillary provision, is subject to the affirmative procedure when it amends primary legislation and to the negative procedure when it does not. We have already referred to this power.

Finally, on section 71, "Commencement", the power is—as is customary—not subject to any parliamentary procedure. Are members agreed?

Members *indicated agreement*.

Executive Responses

Civil Legal Aid (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/325)

11:06

The Convener: Agenda item 3 is Executive responses. As members will recall, we raised two points on these regulations. First, to our question of why section 36(3)(bb) of the Legal Aid (Scotland) Act 1986 had not been cited as an enabling power or its relevance indicated in a footnote, the Executive has said that it was not cited because it was not, in itself, an enabling power. However, it has acknowledged an oversight with regard to the footnote. I take it that members agree to draw the response to the attention of the lead committee and Parliament on the ground of failure to follow proper legislative practice.

Members *indicated agreement*.

The Convener: Secondly, we asked the Executive about the purpose of regulation 1(2), which contains definitions of terms that are not used in the regulations. The Executive accepts that regulation 1(2) is superfluous. Do members agree to pass its response to the lead committee and the Parliament on the ground of defective drafting?

Members *indicated agreement*.

Firefighters' Pension Scheme Amendment (Scotland) Order 2006 (SSI 2006/342)

The Convener: We asked the Executive three questions on this order. First, on the reference to "Firefighters' Compensation Scheme", the Executive has acknowledged defective drafting.

Secondly, on our request for clarification about the reference to paragraph 57 in schedule 1, the Executive considers that it is sufficiently clear to the reader.

Thirdly, on our request for clarification of whether the corresponding entry for rule K2 in schedule 2 was correct, the Executive has acknowledged defective drafting. Do members agree to pass the Executive's response on the three points to the lead committee and Parliament?

Members *indicated agreement*.

Adults with Incapacity (Removal of Regenerative Tissue for Transplantation) (Form of Certificate) (Scotland) Regulations 2006 (SSI 2006/343)

The Convener: With regard to these regulations, we asked the Executive, first, about the absence of a starting date for the certificate and, secondly, about the power to revoke the certificate. The Executive says that it intends to revoke and replace the regulations to take into account the points that we have raised.

Murray Tosh: We should report the regulations to the lead committee in those terms.

The Convener: I think so, too. We should also make it clear that we welcome the plans to replace the regulations.

Avian Influenza and Influenza of Avian Origin in Mammals (Scotland) Order 2006 (SSI 2006/336)

The Convener: We raised six points on the order and members have seen the Executive's response. Our legal advisers discussed a number of points with the Executive at an early stage, which enabled the Executive to amend the order before it was sent for printing and thereby avoid the need for an amending instrument. However, that should not detract from the fact that the order, which as we know has important consequences for those affected by it, contained—like previous instruments—many drafting errors. Members commented on those last week.

We can pass on three main points to the lead committee and Parliament. The first point that we raised with the Executive was that the instrument was not accompanied by a transposition note, but that has now been supplied. The Executive has acknowledged our second point, which was that the order's meaning could be clearer. Thirdly, the Executive has acknowledged the defective drafting that we raised in our other four points.

We do not have a timescale for amending the order.

Mr Maxwell: Do we not?

The Convener: I do not think that we do.

Sorry, that was my mistake.

Murray Tosh: So we have a timetable for amending the order.

The Convener: Many of the errors were corrected at printing.

Draft Instruments Subject to Approval

Fire (Scotland) Act 2005 (Consequential Modifications and Savings) Order 2006 (draft)

11:11

The Convener: The order is complex. Informal discussions have taken place between our legal advisers and the Executive on the three issues that arise. Would anyone like to comment?

Gordon Jackson: No, we will just go through the questions.

The Convener: Are members content that we ask the Executive for an explanation of the following three matters? The first question is whether paragraph 1 of schedule 1 to the Theatres Act 1968 ought to contain a cross-reference to the amendment made by paragraph 4. The second question is whether a further amendment is required to paragraph 7(3)(b) of schedule 1 to the Civic Government (Scotland) Act 1982 in relation to the reference to "conditions" contained there. Thirdly, we ask the Executive to confirm that the amendment made to the Capital Allowances Act 2001 by paragraph 15 of schedule 1 is within devolved competence. Is that agreed?

Members *indicated agreement*.

Fundable Bodies (Scotland) Order 2006 (draft)

The Convener: The order is part of the package of instruments brought about by the reconstitution of the Robert Gordon University. Are members content that we ask the Executive to explain the difference in effect between paragraph (a) and paragraph (b) of article 3? It is difficult to know what the difference is.

Members *indicated agreement*.

Instrument Not Laid Before the Parliament

East Lothian (Electoral Arrangements) Order 2006 (SSI 2006/359)

11:13

The Convener: No substantive points arise on the order, but we will raise a couple of minor points informally with the Executive.

Consolidation Bill Procedure Inquiry

11:13

The Convener: Members will see from the committee papers that the Procedures Committee is undertaking an inquiry into consolidation bill procedure. It has written to the committee to seek our views on our involvement in the scrutiny of such bills. We are supposed to be involved in a specific aspect of the procedure. Our only involvement to date has been our scrutiny of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill in 2003, when the committee considered new powers to make subordinate legislation and also raised a number of points on existing powers as consolidated.

If members have read through the material, they will see that the big issue is whether we should continue to scrutinise all provisions or restrict ourselves to new provisions that arise in a consolidated bill. As I understand it, the problem is that when we examined provisions in the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill that we might have considered to be old provisions rather than new ones, we discovered that there were issues with them, so if we deal only with new provisions we might well miss the opportunity to rectify other issues.

Murray Tosh: So there is a case for reinventing the wheel.

I am reluctant to deny our legal advisers the opportunity—indeed, the delight and privilege—of examining all the provisions. After all, everything looks different when seen in a new context, and we should examine the whole bill.

The Convener: What is the committee's general view?

11:15

Gordon Jackson: Leaving aside the burden of work involved, I think that it would be kind of daft if we were barred from correcting errors that no one had noticed before. It is not so much about reinventing the wheel as about whether we are obliged to repeat mistakes.

Murray Tosh: Perhaps it is more like reinserting a spoke in the wheel.

The Convener: That is better.

Mr Macintosh: When we discussed similar measures for our draft report on the regulatory framework in Scotland, we felt that enforcing the split between new and old provisions in consolidated legislation was logical and would help to save parliamentary time. However, the issue is clearly not that easy. Given that there is no point in trying to enforce an artificial divide, I think that the suggestion that we consider all relevant provisions is sensible.

The Convener: The point is that faults were found with old provisions.

Mr Macintosh: Indeed. It works both ways. Because such a divide is artificial, not natural, we should not worry about it.

Mr Maxwell: I agree. We should consider the whole legislation, not just bits of it. Bringing two old provisions together might indeed give rise to something new.

It might be worth commenting not only on the points in the letter but on consolidation in general. Indeed, we can use the work that we have already carried out on consolidation in our regulatory framework inquiry to provide a wider response to the Procedures Committee. We have done the work—it is simply a matter of extracting the material.

Gordon Jackson: Fair enough.

Mr Macintosh: I assumed that Iain Jamieson had already done that, given that he is advising the committee.

Mr Maxwell: It seems daft not to use that work.

The Convener: Do members agree to send that part of our regulatory framework report to the Procedures Committee and to consider all provisions in consolidated legislation?

Members *indicated agreement*.

The Convener: Thank you very much. I hope that you have a nice summer recess and that we see you all in September, refreshed and recharged.

Meeting closed at 11:17.

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