

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 5 December 2006

Session 2

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## SUBORDINATE LEGISLATION COMMITTEE

34<sup>th</sup> Meeting 2006, Session 2

### CONVENER

\*Dr Sylvia Jackson (Stirling) (Lab)

### DEPUTY CONVENER

\*Mr Kenneth Macintosh (Eastwood) (Lab)

### COMMITTEE MEMBERS

\*Janis Hughes (Glasgow Rutherglen) (Lab)

Mr Adam Ingram (South of Scotland) (SNP)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

\*Euan Robson (Roxburgh and Berwickshire) (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:

Helena Janssen (Scottish Executive Legal and Parliamentary Services)

Louise Miller (Scottish Executive Justice Department)

Mike West (Scottish Executive Justice Department)

### CLERK TO THE COMMITTEE

Ruth Cooper

### SENIOR ASSISTANT CLERK

David McLaren

### ASSISTANT CLERK

Jake Thomas

### LOCATION

Committee Room 6



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 5 December 2006*

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

### Delegated Powers Scrutiny

#### Legal Profession and Legal Aid (Scotland) Bill: as amended at Stage 2

**The Convener (Dr Sylvia Jackson):** I welcome members to the 34<sup>th</sup> meeting of the Subordinate Legislation Committee in 2006. I have not received any apologies, so I expect Adam Ingram to arrive soon.

We will be joined by Executive officials for our delegated powers scrutiny of the Legal Profession and Legal Aid (Scotland) Bill, as amended at stage 2. I suggest that we collect our points and questions together and address them to the officials later.

We start with paragraph 2(7) of schedule 1, "The Scottish Legal Complaints Commission", which is introduced by section 1(2). The schedule has been amended in response to concerns that we raised at stage 1. The number of non-lawyer members of the commission must now always be between four and eight, and the number of lawyer members must be between three and seven. The power remains subject to the affirmative procedure. Are we content with that?

**Members indicated agreement.**

**The Convener:** There is a new subsection (1B) in section 2, "Receipt of complaints: preliminary steps". It was introduced following concerns about the position of practitioners who might also be part-time holders of judicial office. The power is subject to the negative procedure. The Executive has chosen not to list any courts or tribunals in the bill, although the major courts and tribunals that will require to be specified can be identified without difficulty. Do members have any questions for the Executive?

**Murray Tosh (West of Scotland) (Con):** The legal brief picks up the issue of tribunals and suggests that we might wish to inquire whether the Executive sees merit in listing in a schedule the bodies that might usefully be mentioned in the bill. We appear to have time to ask that question, and it might be useful to get an answer to it before we consider what we might ultimately recommend.

**The Convener:** Okay. We will come back to that point when the officials arrive.

We will move on to section 2A, "Existence of specified regulatory scheme". New section 2A(2)(b) confers a power on ministers to specify, by order, additional persons besides the complainant and the practitioner to whom the commission must give notice of its intention not to deal with any element of a complaint that is capable of being dealt with under a specified regulatory scheme. Are we content with the power, and with the negative procedure being used in this case?

**Members indicated agreement.**

**The Convener:** Section 2A(5) confers on ministers a power to determine, by order, the definition of a "specified regulatory scheme" for the purposes of section 2A. The power will ensure that the list of schemes is relevant and up to date. Are we content with the power and with the use of the negative procedure?

**Members indicated agreement.**

**The Convener:** Subsection (8) of section 16, "Investigation under section 15: final report and recommendations", has been amended to require ministers to consult relevant professional organisations and consumer groups prior to exercising their power to vary the maximum amount of compensation that can be awarded in respect of a handling complaint. We drew the absence of such a requirement to the Executive's attention at stage 1. Are members content with how section 16 has been amended? I think that it is okay now.

**Members:** Yes.

**The Convener:** The Executive officials have arrived. We will give them time to settle into their seats and we will move on to section 18, "Annual general levy". The section has been amended to require relevant professional organisations to pay to the commission each year a sum representing the total amount of annual general levies due by their members. There is a slight concern about the use of the words "if any" in section 18(3)(b).

We might want to start our questioning, now that the Executive officials have taken their seats. I welcome Mike West and Louise Miller from the access to justice division, and Helena Janssen from the office of the solicitor to the Scottish Executive. We started without you. We had already identified one question, which Murray Tosh wishes to put. It was on section 2(1B).

**Murray Tosh:** We are going back, are we?

**The Convener:** We might as well go back to the first question that we identified. It was to do with courts and tribunals.

**Murray Tosh:** The issue is that the Executive has not listed any courts or tribunals in the bill. The supplementary delegated powers memorandum states:

“the major courts and tribunals which will require to be specified can be identified without difficulty”.

If that is the case, why would you not want to mention them in the bill, perhaps in a schedule, and create a power for ministers to amend or add to the list in future, as necessary? That would seem to be a way to give greater clarity to our intentions, but not to compromise the Executive’s ability to vary the list if it needs to be varied in future.

**Louise Miller (Scottish Executive Justice Department):** I take responsibility for that sentence in the supplementary delegated powers memorandum, as I wrote it. In retrospect, it might be slightly optimistic. We could all happily agree about part-time sheriffs, for instance. Some of the major statutory tribunals will also be pretty apparent but, given that such bodies are prone to being renamed and restructured, there is obviously a risk that references to them might already be out of date by the time we come to commencement. The Scottish legal complaints commission will not be up and running until autumn 2008, according to the current schedule.

We also had a broader difficulty. We will need to do a trawl of virtually every public body just to check what bodies practitioners might be sitting on with what could be said to be a judicial or quasi-judicial role. We therefore felt that any list that we came up with would be incomplete, would not be terribly informative and might already be out of date at the time of commencement.

**Murray Tosh:** That all sounds very reasonable. We probably would not have asked the question, but for that comment in the memorandum.

**The Convener:** Okay, we will go back to where we were before the officials came in, which was section 18(3)(b). The inconsistency that we have found in that section also appears in sections 18(4)(b) and 19(3)(b). We were concerned about the words “if any” in section 18(3)(b). Will the officials explain those words? Section 19(3)(b) does not include them.

**Louise Miller:** Section 19(3)(b) deals with the complaints levy. In the bill as amended, that levy would be paid only by a practitioner who had had a complaint upheld against him or her. With the complaints levy, there was a definite policy decision that practitioners who had already done something wrong should not compound that wrong with a late payment of the levy. At the time of drafting, the policy was that the complaints commission would definitely charge interest for late payment of the complaints levy. The

commission also had a rule-making power to specify the date from which interest would run. It would be slightly odd if the commission exercised that power and then ministers did not prescribe a rate of interest.

With the annual general levy, we have left a slight leeway in the policy. Before they decided to impose an interest rate, ministers might decide that they wanted to see whether there was a problem in practice with the late payment of annual levies.

**The Convener:** We felt that including the words “if any” suggested that ministers had to exercise the power to make an order, but could prescribe a nil rate. Could the words “if any” mean that there might not be an interest rate?

**Helena Janssen (Scottish Executive Legal and Parliamentary Services):** In the paragraphs that contain the words “if any”, yes.

**The Convener:** I am sorry—I was talking about section 18(3)(b), although I realise that I linked it with the other two sections. You are saying that there could be a nil rate when the words “if any” are included.

**Helena Janssen:** Yes—or ministers could simply decide not to have a rate at all, which would have the same effect.

**Mr Stewart Maxwell (West of Scotland) (SNP):** Having sat through stages 1 and 2 of the bill on the Justice 2 Committee, I understood the logic of the argument on section 19(3)(b). However, I am puzzled by the argument on section 18(3)(b). It seems to me that exactly the same argument should apply. Everyone who comes into the appropriate category must pay the annual general levy. If they do not do so on time, for whatever reason, why would interest not be payable?

**Louise Miller:** It might be that, if the number of individual practitioners who paid late was small, collecting the interest would be uneconomic. However, I see your argument. I would not want to second-guess what ministers would do, but it is likely that in practice they will decide to specify rates of interest in all three situations in the sections that the convener mentioned.

**Mr Maxwell:** Because of the reason for making the levy, I would have thought it normal to charge interest for late payment. I am struggling to understand why you would not charge interest if someone had not paid the levy on time. Can you give me a solid reason why you would not?

10:45

**Helena Janssen:** The economic reason could be valid.

**Mr Maxwell:** If the small numbers of late payers made collection uneconomic, could that logic not apply to section 19(3)(b) as well?

**Helena Janssen:** Yes, it could. It was a policy call. For the situation covered by section 19(3)(b), it was felt more strongly that interest should be charged.

**Mr Maxwell:** I agree—but I am still slightly puzzled as to why section 18(3)(b) is different.

**Louise Miller:** Another point to make is that we would certainly hope that there would be fewer complaints levies than annual levies. Obviously, every practitioner has to pay the annual levy. If three people out of 10,000 pay late, it is probably not worth collecting the interest. However, with complaints levies, even if small numbers do not pay, they would still represent a higher proportion.

**Mr Maxwell:** The proportion might be higher but there still might be only three people. I really do not follow the economic argument that there is a difference between the two cases. Perhaps I am straying slightly.

**The Convener:** Helena Janssen said that it was a policy call. I wonder whether the inconsistency in the three sections might be reconsidered.

**Louise Miller:** I do not think that this was an issue that anybody felt particularly strongly about at the time, so we could certainly look at it again.

**Mr Maxwell:** The difference is rather odd, so I might lodge an amendment, if one has not already been lodged. However, that is a separate matter and not for this committee.

**The Convener:** Okay, we have dealt with the “if any” question, which also related to sections 18(4)(b) and 19(3)(b), but are there any other points on section 18(3)(b)?

**Members:** No.

**The Convener:** We will hear back from the officials about the inconsistency over the words “if any”.

**Louise Miller:** Yes.

**Mr Maxwell:** We were talking about section 18(3)(b) but the arguments apply to section 18(4)(b) as well.

**The Convener:** The inconsistency runs through sections 18(3)(b), 18(4)(b) and 19(3)(b).

Section 18(4)(b) is on the annual general levy. Do members wish to raise any other points?

**Members:** No.

**The Convener:** Do members wish to raise any other points on section 19(3)(b)?

**Members:** No.

**The Convener:** We move now to paragraph 2(da) of schedule 3, which was introduced by section 23(2). The paragraph relates to rules on the commission's practice and procedure.

At stage 1, the committee took the view that the importance and sensitivity of the provisions went beyond the purely procedural. We felt that they should be subject to parliamentary scrutiny. The Executive advised us that it was possible that the provisions would be revised at stage 2 and that amendments could be lodged to make the rules subject to parliamentary procedure. However, although the rule-making provisions have been expanded and amended, no provision has been made to subject them to any parliamentary scrutiny. Why was that?

**Louise Miller:** We considered that question, but we felt that it was important for the commission, as an independent body, to have the flexibility to adjust its rules swiftly in the light of experience. Under the bill, the commission has a statutory duty to adjust the rules whenever it considers an adjustment appropriate. The commission is already under an obligation to consult before making any adjustment, and we felt, after further consideration, that that was a sufficient safeguard. We did not want to impose additional procedures that might lead to an extra lead-in time before changes in rules could take effect. Such a lead-in time could create a tension with the duty that we have placed on the commission to react and to amend the rules whenever it seems appropriate in the light of experience.

**The Convener:** Are members content with that explanation? Are we content with the power and that no parliamentary scrutiny is required?

**Members indicated agreement.**

**The Convener:** We come to part 2. Section 36(4) of the bill as introduced provided a power for ministers to modify any enactment as they considered appropriate for the purpose of giving certain bodies further powers in relation to conduct complaints suggesting unsatisfactory professional conduct. Although that section has been amended, the delegated powers in new section 42ZA(9) and 42ZA(10) of the Solicitors (Scotland) Act 1980 remain unaltered in essence, providing a power to amend the sum specified in new section 42ZA(4)(b) of the 1980 act, by way of a negative instrument, to reflect changes in the value of money. There is also a power in new section 42ZA(4)(c) of the 1980 act to amend by statutory instrument the sum specified in that subsection after consultation. In that case the instrument will be subject to the affirmative procedure.

Do members have any problems with that?

**Mr Kenneth Macintosh (Eastwood) (Lab):** The legal brief states that various sums of money are

identified in the bill—and in previous acts of Parliament—but there does not seem to be any power to amend them over time. Does such a power exist in other acts of Parliament, or is its omission from the bill an oversight?

**Mike West (Scottish Executive Justice Department):** The omission of the power from the bill was an oversight. We have spotted the provisions in which there was no uprating power and have drafted amendments to rectify the problem at stage 3.

**Mr Macintosh:** Thank you.

**The Convener:** The point that you are making is elaborated in paragraph 40 of our legal brief.

**Mr Macintosh:** That is right.

**The Convener:** We come to section 37, “Unsatisfactory professional conduct: conveyancing or executry practitioners”. At stage 1 we questioned the use of delegated powers and considered that the provisions were more suited to primary than secondary legislation. The Executive has done what we suggested. Are members happy with the amendment that has been made?

*Members indicated agreement.*

**Murray Tosh:** It would be childish not to be happy.

**The Convener:** Section 37(2) inserts new section 20ZA into the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The powers contained in the section are consistent with other powers already in the 1980 act, so I do not think that there are any points to raise on that specific measure. Is that agreed?

*Members indicated agreement.*

**The Convener:** However, two additional points arise. First, section 37, like section 36, has been amended extensively. New sections 20B(1)(e), 20B(2)(b), 20B(3) and 20E(1)(b) of the 1990 act appear to raise the same question that Ken Macintosh asked about section 36. Are amendments to those sections in the pipeline, too?

**Mike West:** Yes.

**The Convener:** Secondly, there does not seem to be any power to amend the sum of £5,000 in new section 20E(1)(b) of the 1990 act, yet section 38(1A)(b) provides for a specific power to amend the same sum specified in new section 55(1)(bc) of the 1980 act. Have you drafted an amendment to address that?

**Mike West:** Yes.

**The Convener:** Section 38 is “Powers to fine and award compensation for professional misconduct etc”. Do members have any points to

make about section 38(1A)(b)? There is an issue about cross-referencing.

**Murray Tosh:** There is an issue about the discrepancy between apparently similar provisions, but I dare say that it has been picked up.

**Mike West:** It has.

**The Convener:** Excellent.

Section 38(2)(b) is consistent with other powers in the bill. There is a requirement for consultation and the affirmative resolution procedure is proposed. Are members happy with that?

*Members indicated agreement.*

**The Convener:** We come to part 3 and section 43A, “Regulation of notaries public”. Before making rules, the court is obliged to consult. The rules are not made as statutory instruments and are not subject to parliamentary procedure. Are members content with that?

*Members indicated agreement.*

**The Convener:** We come to part 4. Any regulations using the power in subsection (2) of section 46A, “Regulations under section 36 of 1986 Act”, and which insert new material into the 1986 act, will be subject to the negative procedure. Are members happy with that?

*Members indicated agreement.*

**The Convener:** We come to part 5. Section 49, “Regulations or orders”, was not amended at stage 2. At stage 1 sections 36 and 37 contained substantial regulation-making powers, but were intended as holding provisions. The Executive’s intention was to substitute primary legislation for delegated powers at stage 2. Both sections now proceed by way of textual amendment of the 1980 and 1990 acts. The delegated powers and relevant procedures are now contained within the amendments. Accordingly, the references to sections 36 and 37 in section 49(3)(b) are now redundant. Should those redundant references be removed?

**Mike West:** They will be removed at stage 3.

**The Convener:** Schedule 4 is “Minor and consequential modifications”. Are members happy with paragraph 2(1C)(k)?

*Members indicated agreement.*

**The Convener:** Are members happy with paragraph 2(1C)(l) of schedule 4?

*Members indicated agreement.*

**The Convener:** That ends our consideration of the bill. I thank the officials for answering our questions. We need you to get back to us on only one of them.



## Executive Response

10:56

**The Convener:** I welcome Euan Robson to the meeting.

**Euan Robson (Roxburgh and Berwickshire) (LD):** I apologise for being late.

**The Convener:** That is okay.

### **Police (Minimum Age for Appointment) (Scotland) Regulations 2006 (SSI 2006/552)**

**The Convener:** Members will recall that we asked why the 21-day rule had been breached. We have received a reply from the Executive. Do members have any comments to make?

**Murray Tosh:** We should draw it to the attention of the lead committee and the Parliament.

**The Convener:** Yes, and we hope that the rule will not be breached again, given that the Executive said that it is looking into the matter.

## Instruments Subject to Annulment

### **Health Protection Agency (Scottish Health Functions) Order 2006 (SSI 2006/559)**

10:57

**The Convener:** No points arise on the order.

### **National Health Service (Superannuation Scheme and Compensation for Premature Retirement) (Scotland) Amendment Regulations 2006 (SSI 2006/561)**

**The Convener:** There is a minor issue with the regulations, but no substantive points arise.

### **Register of Sasines (Application Procedure) Amendment Rules 2006 (SSI 2006/568)**

### **Meat (Official Controls Charges) (Scotland) Regulations 2006 (SSI 2006/580)**

**The Convener:** No points arise on the instruments.

## Instruments Not Laid Before the Parliament

### **National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2006 (SSI 2006/560)**

10:58

**The Convener:** A number of points arise on the order. Does anyone want to list them?

**Mr Macintosh:** I am sure that you can do that, convener.

**The Convener:** We will ask the Executive to confirm that section 10(4) of the National Health Services (Scotland) Act 1978 is the correct enabling power and, if so, to explain the omission from the preamble of a recital of the consultation requirement imposed by it. We will also ask it to explain why section 105(7) has not been cited as an enabling power, given that the parent act predates the Interpretation Act 1978.

The order is the fifth amendment to the regulations. We will shortly be entering discussions with the Executive on consolidation. I suggest that we note the order and include it in our list of examples to discuss. Is that agreed?

**Members** *indicated agreement.*

### **Shetland Islands (Electoral Arrangements) Order 2006 (SSI 2006/562)**

**The Convener:** No points arise on the order.

10:59

*Meeting continued in private until 11:14.*



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