

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 23 January 2007

Session 2

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CONTENTS

Tuesday 23 January 2007

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EXECUTIVE RESPONSES	2249
Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/610)	2249
Environmental Impact Assessment (Scotland) Amendment Regulations 2006 (SSI 2006/614)	2250
Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2007 (SSI 2007/1)	2252
INSTRUMENT SUBJECT TO APPROVAL.....	2254
Local Government Finance (Scotland) Order 2007 (draft)	2254
INSTRUMENTS SUBJECT TO ANNULMENT	2254
Non-Domestic Rate (Scotland) Order 2007 (SSI 2007/2)	2254
Argyll and Bute Council (Pilotage Powers) Order 2007 (SSI 2007/3)	2254
Road Works (Inspection Fees) (Scotland) Amendment Regulations 2007 (SSI 2007/4)	2254
Drugs Assessor (Qualifications and Experience) (Scotland) Regulations 2007 (SSI 2007/8)	2254
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT	2255
Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Miscellaneous) 2007 (SSI 2007/6)	2255
Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2007 (SSI 2007/7)	2255
Health Act 2006 (Commencement No 1) (Scotland) Order 2007 (SSI 2007/9)	2255
Health and Social Care (Community Health and Standards) Act 2003 (Commencement No 1 and Savings) (Scotland) Order 2007 (SSI 2007/10)	2255
TRANSPOSITION AND IMPLEMENTATION OF EUROPEAN DIRECTIVES INQUIRY	2257

SUBORDINATE LEGISLATION COMMITTEE

3rd Meeting 2007, 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 ALSO ATTENDED :

Mairi Gibson (Legal Adviser)

Margaret Macdonald (Legal Adviser)

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 23 January 2007

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

Executive Responses

Police (Injury Benefit) (Scotland) Regulations 2006 (SSI 2006/610)

The Convener (Dr Sylvia Jackson): I welcome members to the Subordinate Legislation Committee's third meeting of 2007. I have apologies from Adam Ingram and Murray Tosh.

Agenda item 1 is Executive responses. Members will remember that we raised several issues about the regulations and will have seen the response that we received to each point. The Executive has undertaken to rectify the regulations by adding amendments to schedule 5 to the new police pension scheme regulations, which are to be laid very soon. Are members content to draw the regulations to the attention of the lead committee and the Parliament on the ground that the Executive has undertaken to correct them?

The legal brief says that on points 1 and 2, which concern regulation 16, we may report a failure to follow proper legislative practice or defective drafting. Which option do members choose? Members will remember that point 1 concerns the words "wife" and "husband" and that point 2 concerns the words "widow" and "widower". The regulation is inconsistent.

Mr Stewart Maxwell (West of Scotland) (SNP): The main problem that bothered us when we first addressed the regulations was the inconsistency. In this day and age, the mistake is bizarre and rather surprised me. I would not come down too hard on the Executive. It has explained clearly the meaning, which we all knew. However, we are right to report the inconsistency.

The Convener: We will point out the inconsistency and say that the Executive failed to follow proper legislative practice on those two points.

Mr Maxwell: Yes.

The Convener: Do we agree to report defective drafting in regulations 24(2), 25(2), 28(4)(i), schedule 2 and schedule 3, as described in points 3 to 8 in the legal brief, which the Executive has acknowledged?

Members indicated agreement.

The Convener: Point 9 in the legal brief was that the meaning of the word "hearing" in schedule 6 was unclear.

Points 10 and 11 were about the differences between the approach in Scotland in schedule 6 and the approach in England and about the delay in making the regulations, on which the Executive supplied further information as requested.

Do members wish to raise further points?

Euan Robson (Roxburgh and Berwickshire) (LD): No.

The Convener: Is that okay?

Mr Maxwell: Yes.

Environmental Impact Assessment (Scotland) Amendment Regulations 2006 (SSI 2006/614)

The Convener: We asked the Executive several questions about the implementation of the public participation directive and members will have seen the response. On the questions that we asked about implementation of the PPD, the delay in commencing consultation and the transposition note, are members content to report that information was sought from the Executive and to pass that on?

Mr Maxwell: Yes.

The Convener: The most serious point is on implementation, in paragraph 5 on page 2 of the supplementary legal brief, which says:

"The arguments advanced are capable of enabling compliance with the Directive (although without extensive consideration of the relevant legislative regimes it is not possible to be conclusive). In the circumstances, the Committee may wish to report to the lead committee that information was sought from the Executive and has been received."

The point is about the amount of searching that would be involved. As I said, extensive consideration would be required to be conclusive about the implementation. The best that we can say is that the provision seems okay.

Mr Maxwell: What a ringing endorsement.

The Convener: I know. Do you want to read paragraph 5, which forms the crux of the argument?

Mr Maxwell: I read the paragraph before the meeting and I reread it just now. In many ways, it is damning. If our advisers have such difficulty, what chance does anybody else have? The problem is not necessarily that the provision is wrong—it may well be fine; I do not particularly doubt that—but that proving whether the provision is correct involves much difficulty.

The Convener: Do members mind if I ask Mairi Gibson to explain in more detail? What she has just said sounded more convincing than what I said.

Mairi Gibson (Legal Adviser): The directive allows member states discretion as to how to implement its provisions on consulting the public. The regulations take a slightly different approach according to the subject. However, we cannot extrapolate that a different approach means incompatibility for subjects for which some provisions do not exist—more expertise in the general subject is required. I concluded that I did not feel able to go as far as saying that doubt exists about whether the directive has been implemented adequately. That is why I thought that I could go as far as to say that information had been sought and received. A difference exists according to the subject, but we cannot conclude incompatibility from that.

Mr Maxwell: That is fundamentally what the convener said. The problem is that, without that expertise, we cannot be—

The Convener: Conclusive.

Mr Maxwell: Yes. That leaves us in a slightly difficult position, but we can do nothing other than accept what our advisers and the Executive have said.

The Convener: Do members have other points?

Mr Kenneth Macintosh (Eastwood) (Lab): I am not sure why we are making such a huge issue of the matter. The directive is about compliance with public participation measures and ensuring that people in other member states know about projects that we are implementing and which may affect them. Is that right?

The Convener: Yes.

Mr Macintosh: The directive is also about ensuring that people here are aware of projects in other member states that may affect them. My reading is that the Executive says that it is relying on other member states to ensure that the public are fully informed. Am I oversimplifying the matter?

Mairi Gibson: I am not sure whether the explanation that the Executive gave covered how the Scottish public would be consulted about a project in another member state. Provision is made for some subjects but not others and the Executive response did not quite explain that. However, I did not feel able to extrapolate any other conclusion from that; the difference might have a policy justification.

Mr Maxwell: I do not think that we are making a big issue of the matter. We are just pointing out the slight difficulty.

The Convener: That is all that we are doing. We are pointing out that the legal advisers tell us that considerable effort would be needed to consider all the various elements in order to be conclusive.

Mr Macintosh: Yes.

The Convener: Paragraphs 12 to 14 of the supplementary legal brief concern the other point. Paragraph 14 gives a summary:

“Taking into account primarily the legal effect created by section 101 of the Scotland Act, but also that other corresponding UK provision will be made, we do not consider that reporting the instrument to the lead committee as potentially raising a devolution issue is warranted in this case”.

Obviously, that is for us to decide on. We can flag that up.

Mr Maxwell: I do not think that that is a problem.

The Convener: Are members content to report that there has been a failure to follow proper drafting procedure?

Members indicated agreement.

Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2007 (SSI 2007/1)

The Convener: We asked two questions on the regulations. First, in relation to regulation 2(5), we asked why the Executive had omitted to cite paragraph 1A of schedule 2 to the European Communities Act 1972 as an enabling power. Members have seen the response and, given that the relevant provisions of the Legislative and Regulatory Reform Act 2006 have only very recently come into force, it is perhaps hardly surprising that the Executive has not reached any firm decision on its practice in this area. The arguments for and against citing new paragraph 1A of schedule 2 to the ECA as an enabling power appear to be finely balanced.

If members have no comments, I suggest that we state that there has been a failure to follow proper legislative practice, as acknowledged by the Executive, and report in those terms. Is that agreed?

Members indicated agreement.

The Convener: Secondly, we asked about the vires for regulations 5(2), 5(7) and 5(9) and 16(3). Members will have seen the Executive's response.

Are members content to draw the attention of the lead committee and the Parliament to the regulations on the ground that further clarification was requested from and supplied by the Executive?

Members indicated agreement.

Mr Maxwell: Before we move on, convener, I would like to say that, with regard to regulation 2(5), paragraph 44 of our legal advice says that the Executive will address the omission as a printing issue.

The Convener: We will put that in our report and note that the Executive is grateful to the committee for drawing the matter to its attention.

Mr Maxwell: That should be on the record.

Instrument Subject to Approval

Local Government Finance (Scotland) Order 2007 (draft)

10:42

The Convener: No points arise on the draft order.

Instruments Subject to Annulment

Non-Domestic Rate (Scotland) Order 2007 (SSI 2007/2)

10:43

The Convener: The order sets the non-domestic rates for 2007-08. No points arise on the order.

Argyll and Bute Council (Pilotage Powers) Order 2007 (SSI 2007/3)

The Convener: No substantive points arise on the order, but there is a small point that could be mentioned in an informal letter.

Road Works (Inspection Fees) (Scotland) Amendment Regulations 2007 (SSI 2007/4)

The Convener: No points arise on the regulations.

Drugs Assessor (Qualifications and Experience) (Scotland) Regulations 2007 (SSI 2007/8)

The Convener: Do members agree to ask the Executive to confirm that the enabling power will be brought fully into force on or before the coming into force of the regulations on 26 February 2007?

Members *indicated agreement.*

Instruments Not Laid Before the Parliament

**Act of Sederunt (Ordinary Cause,
Summary Application, Summary Cause
and Small Claim Rules) Amendment
(Miscellaneous) 2007 (SSI 2007/6)**

**Act of Sederunt (Rules of the Court of
Session Amendment) (Miscellaneous)
2007 (SSI 2007/7)**

**Health Act 2006 (Commencement No 1)
(Scotland) Order 2007 (SSI 2007/9)**

10:44

The Convener: No substantive points arise on the instruments, but there are minor points on each that can be raised informally.

**Health and Social Care (Community Health
and Standards) Act 2003 (Commencement
No 1 and Savings) (Scotland) Order 2007
(SSI 2007/10)**

The Convener: Our legal advisers have been in touch with the Executive about the order because an error in the interpretation of the enabling powers resulted in the Executive treating the order as subject to annulment. In fact, the order is not subject to any procedure, as is customary, and the Executive is amending the italic headings as a printing issue.

Are members content with the situation?

Members *indicated agreement.*

Mr Maxwell: I have a small question. The legal brief refers to the "Secretary of State". Is that the Scottish Secretary or the Secretary of State for Health?

Margaret Macdonald (Legal Adviser): It is the Secretary of State for Health.

Mr Maxwell: Why is that?

Margaret Macdonald: Because there are implications for social security tribunals. I have the reference somewhere.

The Convener: We will double check that, Stewart, and put the answer on the record.

Mr Maxwell: I was just curious about whether there was a slight error in the legal brief or whether there was a reason why the Secretary of State for Health was involved. If it is to do with social security tribunals, that is okay.

Margaret Macdonald: The consent of the Secretary of State for Health is required under the parent act—the Health and Social Care (Community Health and Standards) Act 2003.

The Convener: That is on the record.

Transposition and Implementation of European Directives Inquiry

10:46

The Convener: Members have a copy of a draft response to send to the convener of the European and External Relations Committee in relation to its reporter's inquiry report.

The first four paragraphs of our response present background information. Paragraph 5 draws the attention of the European and External Relations Committee to a few points.

The first bullet point in that paragraph deals with transposition notes not being routinely provided with instruments.

The second bullet point draws the committee's attention to the open procedure that is provided for in section 2(2) of the European Communities Act 1972 and states that we are

"also aware of the available choice, under section 2(2) of the ECA, of using primary rather than secondary legislation to implement European law."

We have pointed out that there could be greater scrutiny than is sometimes the case in relation to the negative procedure.

The third bullet point relates to section 2(2) of the European Communities Act 1972. We talked about this last week or the week before, in relation to a case in which the Executive was using that provision instead of domestic legislation.

The fourth bullet point says:

"The SLC has a role in relation to the scrutiny of delegated power and has often encountered new powers specifically designed to provide delegated powers for the provision of implementing obligations in a specified field. It is not always clear why the Executive has sought specific powers rather than rely on section 2(2) of the Act."

We thought that we might include at that point in our response an example of what we are talking about, using a situation involving criminal proceedings legislation.

Mr Maxwell: That would be a good idea.

The Convener: The next bullet point deals with the working relationship between the United Kingdom Parliament and the Scottish Parliament and says that the implementation of European Union directives relies heavily on co-operation between the two bodies. That is a good point to make, because we have had problems to do with timescales in that regard. Do members have anything to add to that?

Mr Maxwell: I would just insert the headline that was in *The Herald* yesterday.

The Convener: I have not seen it. What did it say?

Mr Maxwell: I will let you read it for yourself.

The Convener: The last bullet point says:

"The Committee considers that there can be merit in there being as little deviation as possible between *certain* provisions made at Westminster and in Scotland."

Euan Robson: With all due respect, because of the can be's and the possible's and so on, that paragraph is somewhat convoluted. The main point is about timescales and penalties. We could have a separate paragraph to say that in most instances where instruments involve penalties and timescales it would be appropriate that they should be as similar as possible, although there could conceivably be circumstances in which that might not be the case. That point is a bit lost among the qualifications.

There could be a separate bullet point to say that the committee also accepts the fact that the Scottish Executive and, indeed, the Parliament should be free to diverge where there are good reasons to do so. It is a little difficult to obtain the sense of that from the way in which the paragraph is composed.

Mr Maxwell: I disagree entirely. Euan Robson's suggestion completely changes the meaning of the paragraph. He suggests that we are effectively saying that there should always be little deviation, except for rare circumstances and exceptions. The current paragraph could perhaps be made clearer, but the general thrust is that

"there can be merit in there being as little deviation as possible".

What Euan Robson is saying turns that the other way round. We would be saying, "This should always be the case but, on occasion, there may be good reasons why provisions should diverge", as if that was the norm and everything else was abnormal.

That is a political point, which is not appropriate here. If Euan's suggestion is taken up I will oppose it, because it completely changes the meaning of the paragraph.

The Convener: I see your point.

Mr Macintosh: The paragraph is quite diplomatically worded at the moment. We are not really talking about the difference between Scotland and Westminster. The context is harmonisation, and the implementation of European directives. I can see why it is worth making the point that, if we are trying to harmonise with European law, we would want to harmonise the law in England and Scotland too. However, that is so close to such a political dividing line that

I am not sure how we can find our way through it. There is no point in making a huge issue of it.

Mr Maxwell: The paragraph makes the point that “there is merit”. I accept the wording as it stands, in relation to timescales and penalties, but if we go down a different route we will have a problem.

The Convener: What Euan suggests would put more emphasis on consistency with the United Kingdom Government.

Janis Hughes (Glasgow Rutherglen) (Lab): As Ken Macintosh says, the paragraph is diplomatically worded. To separate it out or to have a big disagreement about it just complicates the issue. It is probably best to leave it as it is.

The Convener: The general agreement is to keep what we have got. Okay?

Euan Robson: No problem at all. If the same words can be read in two different ways, that is marvellous.

The Convener: We move on to the section on phase 1 inquiry recommendations. We thought that we might as well put as much as we could in here. The first point is on regulatory impact assessments—it is fair enough.

Mr Maxwell: The first sentence concludes:
“and in particular the relevant processes in Ireland.”

That sits there with no explanation.

The Convener: We could explain it a bit more.

Ruth Cooper (Clerk): That is in response to what the European and External Relations Committee reporter highlighted.

Mr Maxwell: I read that in isolation.

Ruth Cooper: It may not make sense in isolation. We could take it out or develop it.

The Convener: We will make that clearer.

Mr Macintosh: Jim Wallace went to Denmark and Ireland and a few other places.

The Convener: Is the thrust of that paragraph, which is about issues to do with regulatory impact assessment, okay?

Members indicated agreement.

The Convener: The next bullet point is about effective consultation, which is always important. The point after that deals with the committee's recommendation

“that there should be a requirement for the Executive to explain, when consultation has not been carried out in relation to any statutory instrument, the reasons why it has not been undertaken.”

I do not know why that is a separate bullet point. I suppose that that makes it clearer. Is that all right?

Members indicated agreement.

The Convener: That is one of the on-going issues.

Finally, there is the suggestion that the improving regulation in Scotland unit be relocated to the First Minister's office.

Mr Macintosh: That was in the committee's report on phase 1 of the regulatory framework inquiry. I was not a committee member then, and I do not agree with the suggestion, which I notice is up for discussion later. It is a daft recommendation. However, the committee agreed to it a year or so ago. I am not particularly worried about it.

The Convener: Stewart Maxwell and I are in a bit of a weak position here, because there are only two of us. Is Euan Robson happy for us to keep with the previous inquiry recommendations?

Mr Maxwell: Sorry to interrupt, convener, but would it be helpful if we added a sentence about why we support that position, which is because of the effectiveness of the unit down south? We saw the merit—to use a phrase from a previous paragraph—in the unit's relocation. Members might disagree, but that approach might be helpful.

The Convener: The idea was to extend the work of the unit away from purely the regulation of business and into all the other realms. We took evidence from Margaret Curran, who agreed that we should give more consideration to the voluntary sector and other aspects. It was agreed by the committee that that was a move in the right direction.

Mr Macintosh: Are you saying that Margaret Curran, the Minister for Parliamentary Business, agreed that the unit should move to the First Minister's office?

The Convener: No. Margaret Curran suggested what Stewart Maxwell was suggesting—the rationale for our conclusion—that it was important that the unit should not just be focused on business and economics, but that it should consider all other areas as well. We discussed where the unit should be located, and Margaret Curran would perhaps not agree that it should be in the First Minister's office, but that was our conclusion.

Mr Macintosh: It is not a huge issue. We have not yet agreed that in the committee's regulatory framework inquiry report—perhaps we will later. Can we say that previous members of the committee called for it?

The Convener: We could do. Euan?

Euan Robson: As you posed the question, I do not think that the First Minister's office is the

appropriate place for IRIS. I agree that we should put it somewhere more prominent, but I am not clear that the First Minister's office is the right location. Having said that, if you were to ask me where else it should go, I would say possibly the Minister for Parliamentary Business's office, or possibly somewhere near the permanent secretary.

The Convener: I suggest that we head up this paragraph with the rationale for the suggestion, and conclude by saying that the unit should be given a more prominent status or position. We could suggest what that position might be, but that would leave it more open.

Euan Robson: We could put in "for example", which would not necessarily commit us all to the suggestion that the unit should go to the First Minister's office.

The Convener: The rationale is the important thing.

Mr Maxwell: The rationale is the important thing here, although it might be helpful to say that that is what we called for in the earlier report.

The Convener: We will put it in context, and we will put the rationale up front. Okay?

Members *indicated agreement.*

The Convener: Are members happy for us to send this letter off with all the suggested attachments?

Members *indicated agreement.*

10:59

Meeting continued in private until 11:43.

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