

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 27 March 2007

Session 2

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## **SUBORDINATE LEGISLATION COMMITTEE**

**12<sup>th</sup> 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

### **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 27 March 2007*

[THE CONVENER opened the meeting at 10:30]

### Executive Responses

#### Napier University (Scotland) Order of Council 1993 Amendment Order of Council 2007 (SSI 2007/160)

**The Convener (Dr Sylvia Jackson):** I welcome members to the Subordinate Legislation Committee's 12<sup>th</sup> meeting in 2007, which is our last meeting of the parliamentary session. I will say a few words about that later. I have apologies from Adam Ingram, Euan Robson and Janis Hughes.

Item 1 is Executive responses. Last week, the Executive was asked to explain why terms that are defined in the order of council are different from the terms that are used. Members will have seen from its response that the Executive tends to accept what we say, but sees no problem because it thinks that the draftsman's intention is clear. Do members have comments?

**Mr Stewart Maxwell (West of Scotland) (SNP):** I agree that the intention may be clear—I am not saying otherwise—but the simple point is that if the Executive had stuck with the same wording, no possibility of doubt arising would exist. The intention is clear, but when people see different wording for the same thing, they tend to think that there must be a reason for that and wonder what that is. Sticking to the same wording would have been better. I agree with the recommendation in the legal brief that we should report the order of council on the ground of defective drafting.

**The Convener:** Do we agree to report the defective drafting to the lead committee and to Parliament?

*Members indicated agreement.*

#### Firefighters' Pension Scheme Amendment (Scotland) Order 2007 (SSI 2007/200)

**The Convener:** We asked the Executive why it included in a footnote on page 1 a reference to an order that transferred functions to the Scottish ministers that no longer has effect. Members will have seen the Executive's explanation. Do members have comments or are they content?

**Mr Kenneth Macintosh (Eastwood) (Lab):** Content.

**The Convener:** Good.

#### Police Pensions (Scotland) Regulations 2007 (SSI 2007/201)

**The Convener:** We asked two questions about the regulations—one was about a reference in schedule 3 and the other was about the sum of £30,000. The Executive acknowledged the cross-referencing error but does not think that it affects the validity of the regulations. It also explained why the amount of money is, as the committee said last week, different from the equivalent in England.

**Mr Maxwell:** To be fair, we were pretty sure that the difference was a policy matter and was not a typographical error. We just wanted to double-check that, as the difference between the two figures is large.

**The Convener:** Do we agree that the first point is defective drafting and are members happy with the explanation on the second point?

*Members indicated agreement.*

**Mr Macintosh:** We should probably write to let the police in England know about the difference.

**The Convener:** The figure is higher here.

#### Business Improvement Districts (Scotland) Regulations 2007 (SSI 2007/202)

**The Convener:** Members will recall that we asked the Executive how a vote could be exercised jointly. I do not know what members think about the response, which I understand to say that if the parties that have a joint vote cannot agree, they will not be able to vote.

**Mr Maxwell:** Is it only me who thinks that that is odd? I am sure that what the Executive says is exactly what the regulations say. The committee has no technical reason to take a view on that, because it is a policy issue. However, it is odd to have a vote that can be exercised jointly but which cannot be exercised if people disagree.

**The Convener:** Perhaps the Local Government and Transport Committee will take up the point this afternoon.

**Mr Maxwell:** Yes, perhaps it will.

**The Convener:** There are no further points from that response.

**National Health Service (Travelling  
Expenses and Remission of Charges)  
(Scotland) Amendment Regulations 2007  
(SSI 2007/225)**

**The Convener:** We asked the Executive to explain the vires for regulation 2, which gives another provision retrospective effect. We have dealt with the issue before. As I understand it, the Executive is arguing that it has taken the approach based on the idea of fairness. However, as members will see, the legal brief states that that argument does not really apply, as there should be a power in the original act if a provision is to apply retrospectively. What are members' thoughts?

**Mr Macintosh:** I do not think that any member will disagree that we want to be fair to students throughout Scotland, particularly to those from more deprived backgrounds. There is no lack of sympathy for the policy intention. However, as a committee, we should address our concern about the use of retrospective powers that are not expressly provided for.

Our legal advisers make a strong argument, but I thought that perhaps the most worrying comment was towards the end of the brief, where they point out that there have been four such examples in recent years—civil legal aid regulations account for the other three—which may amount to a trend.

**The Convener:** It was in months rather than years.

**Mr Macintosh:** In months—sorry. That trend is what is particularly worrying about the idea of justifying retrospective legislation in this manner, which is effectively what the Executive is doing.

**Mr Maxwell:** I agree with Ken. There are a couple of issues.

First, despite the fact that I agree with the fairness argument—in this case, in the effect on students—we can never claim that when we are being fair to somebody we are not being unfair to somebody else. I am not sure that the Executive's argument holds water. In the previous cases, with civil legal aid regulations, the argument was about fees. At the end of the day, it was the taxpayer who had to fund those fees, so were we being unfair to the taxpayer when we were being fair to those involved? It is not logical to say that the fairness argument holds. It may be that nobody will challenge it legally, but I believe that there is a difficulty in the logic of the Executive's argument.

My second point is that, even if we accept that the Executive is trying to do the right thing, once it brings about uncertainty in the law it creates difficulty. People should be able to expect that the law will be certain at any one time, and we should be cautious about the idea that the Executive can come along later and introduce retrospective

legislation when nothing in the original act provides that it can do so. If there is such a provision, that is fair enough—people will expect it to happen. However, when there is no such provision, they would not expect it to happen. An Executive taking a power to apply retrospectively something that is not in the original act is a dangerous road to go down. It opens up all sorts of possibilities. Even if we agree with the policy intention in the four cases so far, I am concerned that we will end up in a situation in which the procedure has become the norm and that future Executives could say that there is precedent. My concern is general; it is not about the policy intention, but about using the powers in that way.

**The Convener:** What do members think about paragraph 29 of the legal brief, which mentions the Joint Committee on Statutory Instruments at Westminster?

**Murray Tosh (West of Scotland) (Con):** It is an interesting comment, and the conclusion is clearly that the Executive should amend primary legislation rather than tinker with secondary legislation, draw inferences and go beyond its powers.

**Mr Macintosh:** The Parliament has the power to apply retrospective legislation. However, in this case, although I suppose that we are being consulted, the Parliament is not really being consulted or giving its approval in an appropriate manner for such a major digression from accepted practice. We should flag up our concerns.

**Murray Tosh:** We have not really been consulted—we have just noticed that it is happening on the way past. If we had been consulted and somebody could have said whether it is good practice, that might have been a better position for the Executive to find itself in. However, it is clearly just winging it.

**The Convener:** Okay. We will bring two points to the attention of the lead committee. First, regulation 2 appears to give regulation 3(2)(c) retrospective effect, but the parent act contains no authority to do that. Secondly, because of that, there are doubts about the vires of regulation 2.

**Mr Maxwell:** Will the Local Government and Transport Committee consider the regulations this afternoon?

**The Convener:** Yes.

**Mr Maxwell:** Will we be able to get our arguments to the committee before it meets this afternoon?

**The Convener:** Yes, thanks to the speed of our clerical staff.

**Mr Maxwell:** I know that they are fantastic. I just wanted to check.

## Instrument Subject to Annulment

**National Health Service (Travelling  
Expenses and Remission of Charges)  
(Scotland) Amendment (No 2) Regulations  
2007 (SSI 2007/259)**

10:40

**The Convener:** No substantive points arise on the regulations, but members will note that they breach the 21-day rule. The Executive has provided an explanation.

## Instruments Not Laid Before the Parliament

**Criminal Proceedings etc (Reform)  
(Scotland) Act 2007 (Commencement and  
Savings) Order 2007 (SSI 2007/250)**

**Poultry Breeding Flocks and Hatcheries  
(Scotland) Order 2007 (SSI 2007/254)**

10:41

**The Convener:** No substantive points arise on the orders, but there is a minor point on each. Do members agree that we should raise those informally?

**Members** *indicated agreement.*

**Animal Health and Welfare (Scotland) Act  
2006 (Commencement No 2) Order 2007  
(SSI 2007/257)**

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

**Ruth Cooper (Clerk):** I clarify to Stewart Maxwell that the National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2007, which were mentioned a moment ago and which purport to have retrospective effect, will be considered by the Health Committee.

**Mr Maxwell:** I think that I copied the convener in mentioning the Local Government and Transport Committee.

**The Convener:** I mentioned that committee earlier in relation to the Business Improvement Districts (Scotland) Regulations 2007.

**Mr Maxwell:** Yes. The Health Committee will meet tomorrow, will it not?

**Ruth Cooper:** It will meet tomorrow to discuss another instrument, but it is aware of the regulations that you mentioned and it will take the Subordinate Legislation Committee's report into account in its consideration.

**Mr Maxwell:** That is fine.

**Murray Tosh:** Will we deal today with the Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No 2) Order 2007 (SSI 2007/240), or is the letter that was faxed to the committee about the order just for information?

**The Convener:** It is just for information. The letter was sent to me and I circulated it to members of this committee and to the lead committee.

## Legacy Paper

10:42

**The Convener:** We will go through the various changes that were made to our legacy paper last week. I have been trying to find out who made which changes, so members should shout out when we reach a change that they proposed.

The first change is in paragraph 4, on our inquiry into the regulatory framework in Scotland. The committee wanted to ensure that its successor committee takes account of our inquiry.

**Mr Maxwell:** In the previous version, our three years' work on the inquiry and a large amount of time and effort were boiled down to one paragraph. I felt that it should be bolstered and that we should point out to our successor committee the good work that was done. We should point it in the direction of our report, which is well worth looking at.

**The Convener:** You never know—we might all be gathered here again after the election. We will have to see.

The next change is in paragraph 7, which states that, on several occasions, the committee was successful in changing the use of negative procedure to the use of affirmative procedure. I think that Murray Tosh raised that point. Paragraph 8 covers the difficulties that are caused by the short time between stages 2 and 3 and the need to take evidence from officials.

**Murray Tosh:** Convener, I am momentarily stunned by your suggestion that we might all be gathered here again for a further four years.

**The Convener:** I wondered what you were going to say there.

**Murray Tosh:** As far as the textual changes are concerned, they cover the points that were made last week.

**The Convener:** Good. Do you agree with paragraph 9 as well?

**Murray Tosh:** Yes.

**The Convener:** The clerk wondered whether a footnote should be added.

**Ruth Cooper:** Yes. I wondered whether the committee wanted specifically to mention the Custodial Sentences and Weapons (Scotland) Bill, which was held up as a good example.

10:45

**The Convener:** We thought that such a footnote would add to the paper.

On page 3, did Stewart Maxwell have a point about tracking reports?

**Mr Macintosh:** I think that that was me.

**The Convener:** Does what we added address the issues that you raised about tracking reports?

**Mr Macintosh:** Yes.

**The Convener:** Further down the page, a comment was made about reports to lead committees and when it is important to flag up matters.

**Mr Macintosh:** The legacy paper now reflects well my concern about the language used in such reports.

**The Convener:** Over the page, there is a paragraph on consolidation. When I met Margaret Curran, she said that the Executive was keen to take up our recommendation about consolidation and to ensure that the proposed working group is established. Members will see that the end of paragraph 20 says:

"It may also be useful for a successor to examine whether there is a role for the Procedures Committee in examining this issue."

That is another aspect that will have to be taken on board. I hope that members are content with that.

I invite comment on the improving regulation in Scotland unit. We made a recommendation about where IRIS should be located and commented on the increased focus that we would like the unit to have. It should not focus only on the business perspective, as members will remember that Margaret Curran spoke about IRIS's involvement in the voluntary sector and other areas. Are members content with the amended paragraph?

**Mr Maxwell:** It is fine.

**The Convener:** Everything else on page 5 seems to be okay. [*Interruption.*] I dread to think what members are muttering about.

In paragraph 30, on page 6, I picked up that there were two consecutive mentions of the word "that", so we have taken one out.

**Murray Tosh:** It is a common error. Well spotted.

**The Convener:** Is it? Ruth Cooper thought so.

Our big concern is with the use of combined powers. Paragraph 31 seems to be okay. Are members content?

**Members indicated agreement.**

**The Convener:** Paragraph 32 is on financial transparency—I think that it is okay now. Paragraph 34 is on European issues, which is a



big area, and I think that the alterations that have been made are all right.

Everything on page 7 seems okay. I thank members for their contributions.

As this is our final meeting of the session, I thank the legal advisers, Margaret Macdonald, who is not here today, Mairi Gibson and Greg Thomson—everyone will agree that we could not do without them. I also thank the clerking team—we could not do without them, either—particularly Ruth Cooper, who is the lead clerk to the committee. I thank her for the legacy paper as well as for all her patience and hard work. I thank David McLaren, without whom we could not have done the regulatory framework inquiry, as well as Iain Jamieson, our adviser, who is not with us today. I also thank our clerks Jake Thomas and Andrew Proudfoot, who have always supplied us with all the necessary material. Finally, I thank members. We have worked together fairly well as a team. Some of you have been on the committee for some time—Murray Tosh and Stewart Maxwell in particular. After the meeting closes, we have the thrill of cakes.

*Meeting closed at 10:49.*



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