

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 November 2008

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

31st Meeting 2008, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

Jackson Carlaw (West of Scotland) (Con)
*Malcolm Chisholm (Edinburgh North and Leith) (Lab)
*Helen Eadie (Dunfermline East) (Lab)
*Tom McCabe (Hamilton South) (Lab)
*Ian McKee (Lothians) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Ross Finnie (West of Scotland) (LD)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Beth Elliot (Scottish Government Legal Directorate)
Kenneth Hogg (Scottish Government Health Delivery Directorate)
Robert Kirkwood (Scottish Government Health Delivery Directorate)

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament Subordinate Legislation Committee

Tuesday 11 November 2008

[THE CONVENER *opened the meeting at 14:15*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the 31st meeting in 2008 of the Subordinate Legislation Committee. We have received apologies from Jackson Carlaw. As usual, can everyone turn off their mobile phones, BlackBerrys and all that stuff?

Agenda item 1 is to consider whether to take agenda item 6, which is consideration of the evidence on the Health Boards (Membership and Elections) (Scotland) Bill, in private. That will give us the opportunity to clarify issues that have been raised in evidence and express our views on what we have heard from our witnesses. Is that all right with members?

Members *indicated agreement.*

Health Boards (Membership and Elections) (Scotland) Bill: Stage 1

14:15

The Convener: Agenda item 2 is stage 1 consideration of the Health Boards (Membership and Elections) (Scotland) Bill. I welcome the Scottish Government officials, who will answer questions. We have with us Kenneth Hogg, the deputy director of health delivery; Robert Kirkwood, the bill team policy officer; and Beth Elliot of the Scottish Government legal directorate.

The committee wrote to the Scottish Government about a number of delegated powers in the bill, and, after thinking about the Government's response, we agreed that we wished to take evidence to explore further the intended use of those powers. The delegated powers that we shall address are as follows: sections 1(5) and 1(6), which confer the power to specify circumstances in which ministers may determine that members are to vacate office—a chilly phrase for the elected members present; section 2, in particular the power to set the criteria for the franchise of elections by subordinate legislation; section 4, which is about the pilot order, which has the effect of commencing the substantive provisions in the bill in relation to certain health board areas only in order to pilot the process; and section 7, which is about roll-out orders that have the effect of commencing the bill in areas that were not subject to the pilot scheme.

We will begin with questions on sections 1(5) and 1(6). Having regard to the committee's remit, we are examining the issue of whether the circumstances in which ministers should have discretion—I use that word carefully—to dismiss members of a health board, including those who have been elected, should be set out in the bill by Parliament or whether it is appropriate for ministers to set the limits of the power in subordinate legislation that can be amended from time to time. I invite Malcolm Chisholm to open the batting on that point.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I thank the officials for their response, which explains that the Government wishes to be able to ensure that national policy issues are addressed across health boards. I suppose that some people might think that it is quite a big leap from that statement to saying that the bill must confer a power to specify when there is discretion to dismiss members. Could you explain your thinking? Why does the need to ensure that national policy issues are addressed lead to putting all that into subordinate legislation?

Robert Kirkwood (Scottish Government Health Delivery Directorate): We intended that the measure would put all health board members on the same footing. We already have a power to remove appointed members of health boards if it is in the interests of the national health service to do so. The proposal is to extend the power to cover elected members.

Malcolm Chisholm: We are trying not to get into the policy substance of the point, but a lot of people will feel that elected members are in a slightly different category and that dismissing one is quite a serious and new thing to do. Given that that would be controversial, people will ask whether it would not be appropriate for those circumstances to be included in the bill and agreed by Parliament.

Kenneth Hogg (Scottish Government Health Delivery Directorate): To the best of my knowledge, the existing power to remove members has never been used, so I agree that it is something of a nuclear option. For example, it might be used in circumstances in which it was felt that a health board member was acting to subvert the accountability links between the health board, ministers and the Parliament. The rationale is to extend the provision to cover all health board members equally.

It has been quite an important point of principle, which we discussed with the Health and Sport Committee and the Finance Committee, that the elected members will be bound by the same corporate governance requirements as other members are, and that the inclusion of directly elected members does not alter the lines of accountability from health boards through ministers to the Parliament. We are therefore deliberately trying to keep all types of member on the same footing in order not to change the existing accountability lines.

Malcolm Chisholm: That would not necessarily lead you to the conclusion that the provision has to be in subordinate legislation. You gave an interesting general explanation of the circumstances in which someone might be dismissed, but is there not a strong argument for putting that in the bill? In a way, your explanation leads to a lot of the big policy issues of the bill and, although we are not here to discuss those issues today, one would think that when Parliament debates the bill, members will want to discuss that kind of situation. It is one of the issues that is thrown up by having directly elected members, traditional accountability arrangements and ministerial powers.

Kenneth Hogg: The view that has been taken to date is that it would be serious if the power to dismiss an elected member of a health board were ever to be used, and it would be equally serious if

it were to be applied to an appointed member of a health board. We have sought not to distinguish between the two types of member in terms of their obligations and responsibilities as members of a health board.

Malcolm Chisholm: Even following that line of argument, your response talks about the

“interests of the National Health Service.”

Some might feel that that is a bit general, although, again, that is a policy issue that we will not explore. What would be the argument against that formulation of words, if that is what exists for current members of health boards, or would it not be appropriate in the bill? I am not saying that I support that point of view, but that form of words could be in the bill. At the moment, the bill is so general that people will have concerns about what is intended.

Beth Elliot (Scottish Government Legal Directorate): The existing power on which the proposed power is based is in subordinate legislation. The power to remove an appointed member, if the Scottish ministers consider that to be in the best interests of the national health service, is in subordinate legislation, which is why we have decided to put the proposed power into subordinate legislation. There is always a balance to be struck between what should be in the bill and what should be in subordinate legislation.

Malcolm Chisholm: Your final comment was useful. You are saying that you might well want to use the particular form of words that I mentioned in subordinate legislation, but your thinking is that if the current situation is governed by subordinate legislation, then the new situation should be.

Beth Elliot: That is one factor that was taken into account.

Malcolm Chisholm: That clarifies what you are saying, but I do not think that it will remove people's concerns. At least we are a bit clearer about what you are thinking.

Helen Eadie (Dunfermline East) (Lab): I want to progress along the same lines as Malcolm Chisholm. An open power to set out any circumstances in which ministers would have discretion to dismiss members is broader than the

“interests of the National Health Service”

criterion, and it would clearly allow other criteria to be set. Why is that thought to be necessary and appropriate?

Kenneth Hogg: We are not seeking to broaden the circumstances in which a member could or should be removed, but simply to extend the provision to include directly elected members.

Helen Eadie: The committee needs to consider carefully how powers could be used, in addition to how the Government indicates that it would use them. Is it not possible to restrict the power in some way to address such concerns?

Kenneth Hogg: It would be possible to legislate to change the basis on which all members could be removed. That, however, is not the primary purpose of the bill, which is simply to include directly elected members in health board membership.

The bill could, in principle, do what you ask and legislate to change the basis on which all members could be removed, but we are not seeking to change the existing circumstances in that regard.

Helen Eadie: Would the Government consider, as an alternative means of addressing those concerns, making the exercise of the power to specify the limits of ministerial discretion subject to affirmative procedure?

Beth Elliot: The exercise of the power is currently subject to negative procedure, but we will take into account any comments from the committee in relation to that. The Government currently intends it to be subject to negative procedure, as the current regulations that apply to appointed members are subject to negative procedure.

The Convener: We move to section 2. Apropos of what Beth Elliot has just said, we are pleased that the Scottish Government has confirmed that it intends to amend the power to make election regulations so that it is subject to affirmative procedure—that is good news.

However, we have further questions about setting the criteria for the franchise at elections, in order to assess whether that should be set out in primary legislation by Parliament rather than in subordinate legislation. It is similar to what we discussed a few minutes ago.

Gil Paterson (West of Scotland) (SNP): Your response mentions the need to provide flexibility for changing circumstances with regard to the franchise. Can you explain what is envisaged? Is setting the franchise for the elections not a matter of principle that should be decided by Parliament?

Kenneth Hogg: Do you mean by altering the balance between secondary and primary legislation, or by some other route?

Gil Paterson: It is in regard to whether affirmative or negative legislation should be used.

Kenneth Hogg: I will begin, and ask my colleague to pick up on the detail in a moment. One of the points that we have borne in mind throughout the bill process is that we want to

introduce the provisions through pilots. Following the responses to the consultation in advance of the bill, we are keen to test the provisions in practice in pilot areas.

We currently envisage that two health board areas will host the pilots, and we intend that they will cover a geographic area that is representative of Scotland: one largely urban, and one largely rural. We therefore want to retain the flexibility to amend proposals, if necessary, in the light of our experience of, and what we learn from, those pilots during the roll-out. That has informed our approach in deciding whether to include provisions in the regulations or on the face of the bill, and in making decisions between affirmative and negative procedure.

I ask Beth Elliot to comment further.

Beth Elliot: We have specified in the bill that the franchise includes those who are aged 16 or over. Certain key policies that relate to the way in which the elections will be held, such as the use of single transferable voting, are also prescribed in the bill. The other criteria that will be used to identify the franchise are set out in the regulations, a draft copy of which has been sent to the committee. That is our view on the appropriate split between what should be in the bill and what should be included in subordinate legislation.

Kenneth Hogg: Under the current draft, affirmative procedure would be required if the Government of the day wanted to change its mind about the use of STV, single wards or extending the franchise to 16 and 17-year-olds in rolling out the proposals.

14:30

Gil Paterson: I want to clarify that when I referred to negative legislation, I made a slip of the tongue—I should have been talking about primary and subordinate legislation.

If the intention is to follow the local government election model—apart from the age limit, which is to be reduced to 16—would it not be possible to restrict the power to make future changes to the franchise to any that are made in relation to local government elections?

Beth Elliot: I am sorry, I am not sure that I follow your question.

Gil Paterson: I will re-read it. If the intention is to follow the local government election model—apart from the age limit, which is to be reduced to 16—would it not be possible to restrict the power to make future changes to the franchise to any that are made in relation to local government elections?

Beth Elliot: The intention is to follow the local government model, with the exception of age. One reason that we have put further detail in the regulations rather than in the bill is because of the need to have a young person's register to try to capture information about 16 and 17-year-olds. We considered that we needed a certain amount of flexibility in addition to the pilot process in order to see how that worked in practice.

We are aware that there are other examples of elections in which the franchise, if the local government model has been used, is prescribed in the bill. We have not, to date, taken that approach, but we can consider it further.

The Convener: Would you agree that that could be made a little clearer in the bill, apart from what you say about the age aspect? The fact that we asked the question means that we had not understood what you have just referred to.

Beth Elliot: That it is based on the local government model?

The Convener: Yes—would you take the opportunity to examine that and think about it?

Kenneth Hogg: Certainly.

The Convener: We move to section 4 and the pilot order.

We are pleased that the modifications to the bill with regard to the pilot order will be subject to affirmative procedure. However, we want to explore one or two other things, particularly the procedure to apply to amendments to the pilot order, and an order which revokes the pilot order and which—unusually—repeals the substantive provisions in the bill, if that is done before the bill is rolled out. That has caught our attention, because it appears that if the pilot is revoked that unravels the bill, which is, I believe, pretty unheard of. Ian McKee will ask questions on the matter.

Ian McKee (Lothians) (SNP): I am on the Health and Sport Committee as well as this one, and it is a bit like groundhog day, seeing the same witnesses about the same bill.

As the convener said, we welcome your commitment to lodge an amendment at stage 2 to make the pilot order that modifies the bill subject to affirmative procedure. Only one pilot order can be made, but it can be amended. If an amending order modifies the bill, will it also be subject to affirmative procedure?

Beth Elliot: Yes.

Ian McKee: I will move on to the procedure for revoking the pilot order. A revocation that takes effect before a roll-out order is made has the effect of repealing the election provisions in the bill. Are we correct in understanding that such an order would be subject to no parliamentary procedure?

Beth Elliot: Yes.

Ian McKee: Why is it considered appropriate that ministers should be subject to no parliamentary control or sanction in choosing to revoke the pilot and repeal the bill? Is that not a matter for Parliament?

Beth Elliot: We touched on that issue in our response. The pilot order allows for pilots to take place—it is akin to a commencement order in that respect. Once the pilot order is made, we do not consider that it is possible to uncommence the pilot process merely by revoking the pilot order.

The bill sets out the process that will take place: first, a pilot order will be made; secondly, there will be an evaluation; and finally, we will decide whether the scheme will be rolled out. Once the pilot order is made, either there will be a roll-out, in which case the order will not be needed, or nothing further will happen, in which case revoking the pilot order will simply be a matter of tidying up the statute book.

Ian McKee: I yield to your greater experience in these matters, but is it not unusual to repeal a bill simply by revoking the pilot order and without giving Parliament a say?

Beth Elliot: The issue arises because the bill sets out a pilot procedure—which is, I suspect, something that is fairly unusual to most bills. If the Parliament approves the bill's principles, it will in effect approve the principle of pilots and the pilot scheme set out in the bill.

Ian McKee: So the Parliament would actually approve the minister's ability to repeal the bill without Parliament's further approval.

Beth Elliot: Yes, if that was what Parliament did.

Ian McKee: If Parliament passes the bill, that is what it will do.

Beth Elliot: Yes.

Malcolm Chisholm: As a new member on the committee, I do not know whether my questions will be appropriate, but describing a bill's repeal as a tidying-up procedure sounds odd to me.

Beth Elliot: I was referring not to the repeal of the bill, but to the revoking of the pilot order.

Malcolm Chisholm: I know, but revoking the pilot order has the same effect as repealing the bill. Once the order is revoked, no directly elected health boards will be planned. In effect, such a move kills off the bill.

I take your guidance on this point, convener, but I presume that, given that there is no subordinate legislation to consider, we should not be exploring the issue. However, this ministerial power seems

to be subject to no parliamentary oversight whatever—not even a negative statutory instrument. Given the significance attached to such an order, that seems rather odd.

Beth Elliot: Parliament certainly has a role with regard to roll-out, as the roll-out order will be subject to the parliamentary process. However, it is up to ministers to determine whether there will be a roll-out.

Kenneth Hogg: Perhaps I can amplify that point. The issue perhaps arises because the provisions almost have a sole purpose: creating the pilots. It would take the Government of the day to decide that it positively wanted to roll out pilots across Scotland for that to happen. Equally, if the Government of the day did not want to roll out pilots across Scotland in line with its existing policy, or if Parliament did not ratify the provisions through the relevant procedure, the exercise would not happen. As I say, the point arises because of the focus on pilots in the first instance and the fact that two sets of decisions will be needed for roll-out to take place.

Malcolm Chisholm: I am speaking purely theoretically here—I am certainly not speaking on behalf of my party—but would it be the case that, if a new Government that did not support the idea of directly elected health boards came to power, it could simply revoke the pilot order and end the whole thing without Parliament being involved in any discussions or decisions?

Beth Elliot: Yes, because ministers decide on the roll-out. If ministers did not want the pilot to be rolled out or wanted to stop the provision, they could revoke the order.

Malcolm Chisholm: I am sure that that will be discussed when the bill is debated.

The Convener: We have probably gone as far as we are allowed to with this extremely interesting discussion. The committee has fulfilled its role as custodian of the parliamentary interest with regard to the bill; it is now for the Parliament and the relevant subject committees to take a view on the matter. The bill sets a most interesting precedent and will certainly be of interest as a mechanism that might be used in other legislation, but I will go no further than that in my comments.

With regard to section 7, on roll-out orders, a roll-out order can make such amendments or modifications to primary legislation, including the bill, as ministers consider appropriate. The Scottish Government has agreed to make such an order subject to affirmative procedure. However, we wish to explore further this power to amend primary legislation and how the bill's provisions will be rolled out across Scotland.

Tom McCabe (Hamilton South) (Lab): You have given a welcome commitment that any roll-out orders that amend or modify legislation will be subject to affirmative procedure. However, the power is pretty wide, as it allows ministers to make any changes that they consider “appropriate”. Is it possible to restrict any such modifications to those that drive the bill's purpose?

Kenneth Hogg: Our intention is that any provisions that modify enactments to the bill—in practical terms, textual amendments—should trigger the affirmative procedure. For example, any decision to use STV and not a first-past-the-post system, to extend the franchise to those aged 16 or to move to multimember wards would trigger the use of affirmative procedure, as it would modify the enactment in the legislation.

Tom McCabe: So, if a minister considers it appropriate to make any textual change at all to the bill, that change will be subject to affirmative procedure.

Kenneth Hogg: That is correct.

Tom McCabe: Good.

With its focus on pilots and roll-out orders, the bill is a bit different from previous legislation. Are you able to give a commitment that, if a decision is made to roll out these schemes, the roll-out will take place across the whole of Scotland and within a specified period?

Robert Kirkwood: The bill specifies a period of seven years, but that is very much a long-stop provision. It provides for the making of only one pilot order, which means that, once the order is made, we must move either to rolling out the scheme or to doing nothing further with the bill. If the Government of the day decides to roll out the scheme, all territorial health boards would have to be included.

Tom McCabe: So, if you decide that the pilot has been successful and that you want to roll out the scheme, the decision will automatically apply to the whole of Scotland.

Robert Kirkwood: Yes. Such a decision and any textual amendments to the act would be subject to parliamentary procedure.

Tom McCabe: But under the long-stop provision the process could take seven years.

Robert Kirkwood: Yes. That is the long stop set out in the bill.

Beth Elliot: As the bill allows for more than one roll-out order to be made, it could allow for a staged commencement of the process in different health boards according to the bill's provisions. Of course, the policy question whether we do that or not is a different matter.

The Convener: As members have no other questions, I thank our three guests for their responses. We will complete our consideration of the bill at stage 1 next week, before we issue our report.

Draft Instruments Subject to Approval

Budget (Scotland) Act 2008 Amendment Order 2008 (Draft)

14:44

The Convener: Are we content to draw the order to the Parliament's attention on the ground that the form or meaning of article 3(2)(c)(iv) could be clearer? I point out, however, that it is not thought that that will affect the order's operation.

Members indicated agreement.

Fundable Bodies (Scotland) Order 2008 (Draft)

Protection of Charities Assets (Exemption) and the Charity Test (Specified Bodies) (Scotland) Amendment Order 2008 (Draft)

The committee agreed that no points arose on the instruments.

Instrument Subject to Annulment

National Health Service Central Register (Scotland) Amendment Regulations 2008 (SSI 2008/358)

14:44

The committee agreed that no points arose on the instrument.

Instrument not laid before the Parliament

Legal Profession and Legal Aid (Scotland) Act 2007 (Abolition of the Scottish legal services ombudsman) Order 2008 (SSI 2008/352)

14:45

The committee agreed that no points arose on the instrument.

The Convener: As agreed, we now move into private for item 6.

14:45

Meeting continued in private until 15:05.

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