

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 October 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

28th Meeting 2002, Session 1

CONVENER

Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tw eeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)

*Colin Campbell (West of Scotland) (SNP)

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)

Murdo Fraser (Mid Scotland and Fife) (Con)

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE SUBSTITUTES

Jackie Baillie (Dumbarton) (Lab)

Mr Kenny MacAskill (Lothians) (SNP)

Mr Brian Monteith (Mid Scotland and Fife) (Con)

Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 8 October 2002

(Morning)

[THE CONVENER *opened the meeting at 11:21*]

The Deputy Convener (Ian Jenkins): I welcome everyone to the 28th meeting this year of the Subordinate Legislation Committee. We have received apologies from Gordon Jackson, and Margo MacDonald is engaged on parliamentary business.

Delegated Powers Scrutiny

Title Conditions (Scotland) Bill: Stage 1

The Deputy Convener: The first item is the scrutiny of delegated powers. The two points that we raised with the Executive on the Title Conditions (Scotland) Bill at stage 1 were of a minor technical nature, and concerned sections 37(3) and 37(6), which deal with conservation burdens. The Executive accepted that section 37(6) could be regarded as superfluous, but felt that it helped to make it clear that the Scottish ministers could remove conservation bodies from the prescribed list. Subject to members' views, I suggest that the committee does not press the point, despite the fact that a wee bit of doubt remains about the Executive's explanation.

Colin Campbell (West of Scotland) (SNP): We will not press the point.

The Deputy Convener: The committee also wondered whether subordinate legislation in the form of an order, rather than regulations, might be more appropriate. It is interesting to consider that, as long ago as 1932, the use of the terms "regulation", "rule" and "order" was the subject of a recommendation in the Donoughmore committee report. That committee recommended that the terms should not be used indiscriminately in statutes to describe the instruments by which law-making power conferred on ministers should be exercised. "Regulation" is used to describe an instrument by which the power to make substantive law is exercised, "rule" is used for procedural matters and "order" is used where ministers exercise either executive power or the power to take judicial or quasi-judicial decisions.

Colin Campbell: That is valuable information.

The Deputy Convener: Generally, that is the way that things are done. In any case, we welcome the Executive's undertaking to amend the relevant provisions in line with the recommendation that underpinned our question.

Protection of Children (Scotland) Bill: Stage 1

The Deputy Convener: We move on to scrutiny of the delegated powers in the Protection of Children (Scotland) Bill at stage 1. The bill provides for the Scottish ministers to establish and maintain a list of persons unsuitable to work with children. Those on the list will be banned from working with children in either a paid or an unpaid capacity.

The bill contains 11 provisions that delegate powers to Scottish ministers to make subordinate legislation. Perhaps we should go through each of those provisions one by one, and agree whether it is suitable or not, although I should say that few of them contain any controversial elements. I should also point out that, in general, most of the provisions will allow the Executive some flexibility in dealing with slightly different circumstances with regard to people who might be excluded from the list or to organisations that might be able to refer people on to the list.

Section 4 of the bill is "Reference by certain other persons". Our legal adviser suggests that the use of delegated powers in the section is appropriate. Section 4 enables the Scottish Commission for the Regulation of Care and the Scottish Social Services Council to refer individuals to the list of persons unsuitable to work with children. The Executive's memorandum describes how that would work in practice.

Bill Butler (Glasgow Anniesland) (Lab): It seems to be an appropriate use of delegated powers.

The Deputy Convener: Yes. The power seems sensible.

Section 6 is "Individuals named in the findings of certain inquiries". The section allows for relevant inquiries to refer an individual to the Scottish ministers for inclusion on the list. There are some safeguards, in that the ministers must be satisfied that the inquiry has been properly conducted. Given that condition, it seems to me that the need for the power is self-evident, and its inclusion in the bill reasonable.

Bill Butler: I agree.

The Deputy Convener: Section 8 is "Determination under section 5 or 6: power to regulate procedure". Section 8(1) allows for regulations to set out the detailed procedure to be followed by the Scottish ministers to enable them

to make a determination. The regulations would deal with such things as the time limits within which decisions would have to be made and the evidence that would need to be produced to allow the ministers to make such a determination. That seems to be a proper use of delegated powers.

However, in the light of our remarks on the previous bill, it may be worth asking whether the power would be better exercised in the form of rules, rather than regulations.

Bill Butler: I agree, because the delegated legislation would deal with procedural matters.

The Deputy Convener: We shall raise that question with the Executive.

Section 9 is "Individuals convicted of an offence against a child". The section provides for the court to refer to Scottish ministers for inclusion on the list any individuals who have been convicted of an offence against a child. That is an acceptable procedure for people who have been convicted of a crime of that sort.

It may be worth noting in passing that, as the provision seems to mandate the procedures to be followed in the court, there is a sense in which the court is being told what to do. However, in the circumstances, given the particular offences and the particular list that is involved, I do not want to make a fuss about that. The delegated powers are acceptable.

Section 11 is "Searches of lists: amendment of Police Act 1997". Our legal advice refers to various statutes, but the drift of it is that section 11(1) is taking a belt-and-braces approach for the avoidance of doubt. The provision is just dotting i's and crossing t's to ensure that nobody slips through the net. With the committee's permission, we will say that that is okay.

Members indicated agreement.

The Deputy Convener: Section 11(4) makes detailed references to the 1997 act and to lists in England, Wales, Northern Ireland, the Channel islands and so on. The provision is a Henry VIII power to try to ensure that, if people are put on a list in one country, that knowledge is made available in other jurisdictions.

Colin Campbell: That is how it should be.

The Deputy Convener: We recognise the logic of the provision and it seems a reasonable way of using delegated powers. Primary legislation would be cumbersome and difficult, so this is fair enough.

Bill Butler: Indeed.

11:30

The Deputy Convener: Section 15 is "Meaning of 'disqualified from working with children'". Like section 11(4), section 15(2) attempts to make the definition work across the various jurisdictions. Such a provision is necessary and has been done in other legislation in the criminal justice field.

Bill Butler: It seems to be a suitable use of delegated powers.

The Deputy Convener: Yes. The power seems sensible.

Section 16 is "Interpretation". Section 16(1), under the definition of work, provides for a power to prescribe an enactment that creates an office. The definition of work is wide ranging. The power given in section 16(1) seems to be reasonable.

We might ask a question about the power in section 16(2), although the set-up is not hugely controversial. Section 2 places a duty on child care organisations to make referrals, as appropriate, to the list of persons unsuitable to work with children. The order-making power in section 16(2)(c) would allow for the conditions to which the definition of a child care organisation is subject to be amended or extended as future developments require. Any such order would be subject to annulment.

However, it is technically possible that such an order might have reverberations on the original purpose of the bill. Given the context of the bill, we may be willing to accept things as they stand. Will we ask the Executive for some justification of why it has chosen this method?

Bill Butler: I see no harm in asking for some justification.

The Deputy Convener: Okay. An order made under section 16(2) could influence the interpretation of other parts of the bill.

Section 20 is "Short title and commencement". There is nothing to report on that.

Schedule 2 deals with the definition of "child care position". Obviously, that is important, because people are not allowed to work in child care positions if they are on the list. The schedule lists a whole range of positions, some of which are described in wide-ranging and generic phrases. Reference is also made to other statutes.

It is important that we understand the Executive's wish for flexibility in responding to circumstances as they emerge in practice. Members might wonder whether it is appropriate to amend the definition by way of subordinate legislation. That is a matter for the committee. Do members have any views?

Bill Butler: I assume that the affirmative procedure is essential.

The Deputy Convener: Given that it is proposed that the affirmative procedure will be used, that would seem to be a sufficient safeguard.

Bill Butler: Yes. That would seem to be a sufficient safeguard.

The Deputy Convener: Thank you.

Instruments Subject to Annulment

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2002 (SSI 2002/440)

The Deputy Convener: Item 3 on the agenda is instruments subject to annulment.

Colin Campbell: The explanatory note on the regulations seems to be obscurely drafted. Should we raise the matter with the Executive?

The Deputy Convener: Yes. I think that there is just about time to let the Executive know that we are worried about that. We cannot come back to the regulations because, owing to the recess, the 40-day rule comes into play.

Colin Campbell: We should make the point.

The Deputy Convener: Yes. We will write an informal letter to draw the Executive's attention to the matter. Is that agreed?

Members *indicated agreement.*

Criminal Legal Aid (Scotland) Amendment Regulations 2002 (SSI 2002/441)

Colin Campbell: No points arise on the regulations.

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2002 (SSI 2002/442)

Bill Butler: The regulations seem fine.

The Deputy Convener: No points arise on the regulations.

Housing (Scotland) Act 2001 (Housing Support Services) Regulations 2002 (SSI 2002/444)

Colin Campbell: The regulations are okay.

Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2002 (SSI 2002/445)

The Deputy Convener: Our legal advisers have drawn to our attention a number of points about the regulations, which give rise to some questions that we might wish to ask the Executive.

Colin Campbell: The Executive appears to have breached the 21-day rule. The English regulations were made in May, which suggests that there may have been some foot-dragging on somebody's part.

The Deputy Convener: We shall ask about that.

Are there any other questions?

Bill Butler: We could ask why, in the definition of “owner” in regulation 2(1), the words “or part” have been omitted after the word “consignment” the second time that it occurs. That is a small point, but it is worth asking about.

We could ask for an explanation of the meaning of regulation 4(c), which does not appear in the English regulations.

The Deputy Convener: Yes. Our advisers had some difficulty with regulation 4(c).

Bill Butler: Indeed.

Colin Campbell: We could ask the Executive why regulation 33(6) refers to “destination premises”, when elsewhere in the regulation the reference is to “destination establishment”. Is that being pedantic?

The Deputy Convener: It is, but it is drafting policy to use the same phrases consistently, so it is worth asking the question.

Bill Butler: In addition, we could ask why regulation 61(1) does not refer specifically to unincorporated associations and partnerships, given the wording of paragraph 61(3). How will notices and so on be served on such bodies?

The Deputy Convener: We are asking a series of questions.

Finally, we might ask why the heading to schedule 7 and the relevant item in the table of arrangement do not correspond. The Executive’s drafting practice is under scrutiny.

Instruments Not Laid Before the Parliament

Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (Commencement and Transitional Provisions) Order 2002 (SSI 2002/443)

The Deputy Convener: Item 4 is instruments that are not laid before Parliament.

Colin Campbell: The instrument appears to be in order.

The Deputy Convener: That brings us to the end of the agenda. I thank members and I thank the patient officials.

Meeting closed at 11:40.

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