

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 2 December 2003
(Morning)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

15th Meeting 2003, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

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

*Christine May (Central Fife) (Lab)

*Alasdair Morgan (South of Scotland) (SNP)

Mike Pringle (Edinburgh South) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Joanne Clinton

Catherine Fergusson

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 2 December 2003

(Morning)

[THE CONVENER opened the meeting at 10:31]

Delegated Powers Scrutiny

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 15th meeting of the Subordinate Legislation Committee in Parliament's second session. I have received apologies from Mike Pringle.

The first item on the agenda is delegated powers scrutiny of the Education (Additional Support for Learning) (Scotland) Bill at stage 1. The notes that we have received from our legal adviser point us to section 7(4) of the bill, on co-ordinated support plans. There appear to be two points: first, although the terms in which the power is drafted are wide, they cannot alter the substance of CSPs as set out in section 7(2), so there is perhaps enough safety on that point.

The second point is of more concern and relates to disclosure of CSPs. In terms of the European convention on human rights, should we raise the issue with the lead committee? Members should note that disclosure has been dealt with differently in the drafting of section 11(7). Do members have any ideas?

Murray Tosh (West of Scotland) (Con): I thought you had this all scripted, convener.

The Convener: No—not at all.

Murray Tosh: I think that the suggestion that we pursue the issue is worthwhile.

The Convener: The issue does crop up again. Is it agreed that we will pursue it?

Members indicated agreement.

The Convener: Section 11(6) is on changes in schooling. The question is whether the correct balance has been struck between primary and secondary legislation, but there is also—again—the issue of disclosure of information. It seems that the balance is possibly okay, and we have already raised the disclosure issue. Are there any further points, or are members happy?

Christine May (Central Fife) (Lab): The balance seems to be okay.

The Convener: Section 12(5) is on additional support needs tribunals. There is concern that the Executive appears to be unable to say how it proposes to exercise the power. We could ask the Executive for examples of how it thinks that the power would be used. Is it agreed that we do so?

Members indicated agreement.

The Convener: Next, we must consider paragraphs 2(1), 3(1)(a) and 3(1)(b) of schedule 1 to the bill. Our legal adviser suggests that, on balance, the way in which the issue has been dealt with is okay. Do members have any other points to raise?

Mr Stewart Maxwell (West of Scotland) (SNP): We have dealt with similar cases before; we wrote recently to the Executive about a similar case and the Executive was fairly categorical in its assurance that it would not take the avenue of avoiding implementation of regulations. Given that the Executive would probably lose any case that was brought under a judicial review, we should accept that the provision is okay.

The Convener: There is enough safety in the system.

Mr Maxwell: Yes.

The Convener: Do members agree with that?

Members indicated agreement.

The Convener: Paragraph 2(4) of schedule 1 seems to be okay—members should stop me if they do not agree—and there are no substantive points on paragraphs 3(2)(c), 11(1) and 16. On the provisions in schedule 1 for delegation of other powers, there are no substantive points to be made about paragraphs 7, 9(2), 9(3), 8(1), 8(3), 12 and 17.

Concern has been expressed that more detail is needed in the provisions on dispute resolution in section 17(1).

Mr Maxwell: The Executive says that those regulations will cover disputes that concern matters that will not be eligible for referral to tribunals, but it has given no examples of the kinds of matters that it means, which would have been helpful. The provision is not clear, so perhaps we could ask the Executive to provide examples.

The Convener: Yes. Does the committee agree to ask the Executive to provide examples in relation to section 17(1)?

Members indicated agreement.

The Convener: There appear to be no substantive points on section 19(2)(c), which concerns specification of appropriate agencies. In

section 19(4) a little more detail might be required on the circumstances in which exceptions can be made from the requirement to respond to a request for assistance within the specified time scale.

Section 20(1), on the power to prescribe standards and requirements relating to the conduct of special schools, raises a much bigger issue about the use of non-statutory guidance.

Christine May: We have received interesting advice on that section. On the one hand, the Executive states that the power is being consolidated in the bill, but on the other, it admits that it has never used the power and has proceeded in the past by means of guidance. That seems to be extraordinary; we need to push the Executive quite hard on the matter. I do not think that it is legal to ignore statutory powers and simply to draw up one's own internal rules.

Alasdair Morgan (South of Scotland) (SNP): The situation is also unsatisfactory because a conspiracy theorist might suggest that civil servants were using guidance rather than statutory instruments in order to avoid parliamentary scrutiny. Perish the thought.

The Convener: We could raise the specific point that relates to the bill and we could include the general issue on the list of matters that we intend to discuss informally with the Scottish Executive.

Murray Tosh: Our legal adviser's notes give details about previous cases in which ministers have come a cropper on the matter. Ministers do not seem to learn from such cases which—it occurred to me—is ironic in the context of a bill about support for learning. Perhaps a section should be added to the bill that would prescribe a mechanism for ministers to learn the lessons of their defeats in court.

The Convener: Absolutely. Two notable defeats are mentioned in our legal briefing papers.

Murray Tosh: Some of that information is of stunning contemporary relevance.

The Convener: We will say no more.

Alasdair Morgan: The cases show that coming a cropper is no bar to limited political advancement, at least.

Murray Tosh: That proves that you are not a conspiracy theorist, Alasdair.

Christine May: Can I ask Murray Tosh what his view is on the recent leadership contest?

Murray Tosh: I am quite happy with the outcome—as I was with the outcome of the legal cases in question.

The Convener: To spare your blushes, Murray, we will move on.

We welcome Gordon Jackson, who has just joined the meeting.

Gordon Jackson (Glasgow Govan) (Lab): I am sorry that I am late.

The Convener: We are still considering the Education (Additional Support for Learning) (Scotland) Bill, under item 1. We are considering publication of information under section 22(3). The legal advisers suggest that the way in which the bill is drafted points to use of the affirmative procedure. However, from looking at the substance of the provisions, it seems that the negative procedure would possibly be more appropriate in this case. Is that a sufficiently important point to make to the Executive?

Mr Maxwell: We have, in effect, had this discussion before. We have been using a rule of thumb whereby we generally prefer that the affirmative procedure be used, but it is rather doubtful that the affirmative procedure is necessary in this case. It might be breaking the rule that we have adopted in the past, but I think that the negative procedure would probably be okay in this instance.

The Convener: You think that the negative procedure is okay.

Mr Maxwell: Yes.

The Convener: Are we agreed that we will leave that provision as it is?

Members indicated agreement.

The Convener: Section 23 covers the issuing of a code of practice and directions. The points that we have to raise on this section, which relate to the use of codes of practice in place of legislation, and to difficulties that arise from that, are similar to some that we have raised on previous occasions. A number of options are before us—in paragraph 69 of the legal brief—which are very similar to some options that we considered on a previous occasion. I propose that we write to the Executive expressing our concerns and presenting those options to them. Is that agreed?

Members indicated agreement.

The Convener: Section 25 covers ancillary and commencement provisions. An issue arises around the use of words such as “supplemental”. We have raised the same issue previously. Are there any other comments?

Christine May: We have made the point before.

The Convener: We will take the matter up with the Executive.

Schedule 2 to the bill covers placing requests. They are dealt with specifically under paragraphs 3(5), 4(3) and 6(6). No substantive points have been identified, however. Are members happy with that?

Members *indicated agreement.*

The Convener: That brings us, rather quickly as it turns out, to the end of item 1.

Executive Response

Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003 (SSI 2003/560)

10:42

The Convener: Item 2 is Executive responses. We wrote back to the Executive about the Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003 (SSI 2003/560). Do you wish to comment, Gordon?

Gordon Jackson: Not at all. I was just smiling inanely to myself about the contradictions. Can people not make up their minds whether to keep them or release them? I was just sitting here, wondering what it all meant.

The Convener: You will see from its response that the Executive thinks that it is clarifying the situation, but there is still some concern expressed in our legal advice about how the matter is being dealt with. What are the committee's views?

Christine May: I do not think that we would gain anything by pursuing the matter further with the Executive. I think that we should simply report our comments to the lead committee. Given the way in which Scotland has been defined in the order, we do not think that the provisions are necessarily *intra vires*.

The Convener: Our concerns will be passed to the lead committee and Parliament. Do you wish to comment, Murray?

Murray Tosh: No—it is nothing.

The Convener: I thought that we were going to hear a gem there.

Draft Instrument Subject to Approval

Water Environment and Water Services (Scotland) Act 2003 (Designation of Scotland River Basin District) Order 2003 (draft)

10:43

The Convener: No points have been raised on the draft Water Environment and Water Services (Scotland) Act 2003 (Designation of Scotland River Basin District) Order 2003.

Instruments Subject to Approval

Pig Carcase (Grading) Amendment (Scotland) Regulations 2003 (SSI 2003/565)

10:43

The Convener: No points arise on SSI 2003/565.

Christine May: Except the one about pigs being kept in proper-sized pens.

Race Relations Act 1976 (Statutory Duties) (Scotland) Amendment Order 2003 (SSI 2003/566)

The Convener: There are two minor drafting points to raise on SSI 2003/566, which we could forward to the Executive. Do members agree to that?

Members *indicated agreement.*

Collagen and Gelatine (Intra-Community Trade) (Scotland) (No 2) Regulations 2003 (SSI 2003/568)

The Convener: No points arise on SSI 2003/568.

Honey (Scotland) Regulations 2003 (SSI 2003/569)

Alasdair Morgan: A point occurred to me as I looked through SSI 2003/569. It has probably arisen elsewhere, although I am not aware of any examples. Regulation 5(1) covers labelling requirements and subparagraph (c) requires that

“the country or countries of origin where the honey has been harvested”

be stated. Nowhere do the regulations define “country”. However, anyone who reads through them and notices the number of times that Scotland is referred to might well think that Scotland could be a country in this context. Who knows? The wording of the regulations is transposed from the Council of the European Union’s original directive, which also does not explain what is meant by “country” and is of no help in that regard. We should seek clarification.

The regulation will apply to anyone who sells honey, so it could apply to some fairly small operators. It is not particularly satisfactory if they cannot establish without considerable extra cost what their legal obligations are. Furthermore, nowhere in the regulatory impact assessment is much allowance given to finding out what exactly has to be done to comply with the law.

The Convener: Those are good points. I wonder about branding—if someone marks their

honey as coming from Scotland, or from an area within Scotland, would they still have to put "UK" on it? It would be useful to ask about those points.

**Regulation of Care
(Applications and Provision of Advice)
(Scotland) Amendment (No 2) Order 2003
(SSI 2003/570)**

**Regulation of Care (Excepted Services)
(Scotland) Amendment Regulations 2003
(SSI 2003/571)**

**Regulation of Care (Requirements as to
Care Services) (Scotland) Amendment
(No 2) Regulations 2003 (SSI 2003/572)**

**Regulation of Care (Fees) (Scotland)
Amendment Order 2003 (SSI 2003/573)**

**Regulation of Care (Scotland) Act 2001
(Transitional Provisions) Order 2003
(SSI 2003/574)**

10:45

The Convener: There is a raft of instruments to do with regulation of care. No substantive points arise on SSI 2003/570, SSI 2003/571, SSI 2003/572 and SSI 2003/573. However, I gather that the Regulation of Care (Scotland) Act 2001 (Transitional Provisions) Order 2003 (SSI 2003/574) has now been revoked. I suggest that we do not consider the order. Is that the correct procedure, Gordon?

Gordon Jackson: Absolutely.

The Convener: Good.

Gordon Jackson: Was the order revoked before we got it?

Christine May: No—an instrument that revokes the order has just been laid. We could consider both at the same time.

The Convener: We just heard about that instrument today.

Murray Tosh: The Executive knew that it could never get the order past Gordon Jackson.

Gordon Jackson: Blast!

**Registration of Establishments Keeping
Laying Hens (Scotland) Regulations 2003
(SSI 2003/576)**

The Convener: We come now to a rather difficult little regulation: the Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003 (SSI 2003/576). It concerns

registration and tracing where eggs have come from. The regulations are a total mess, according to our legal advice. They are not very coherent and the legal adviser is not even sure that all the mistakes have been picked up.

Christine May: I recall using a particular textbook when I was training.

Alasdair Morgan: It was not training in keeping hens, was it?

Christine May: No, it was not; it was catering training. The section on eggs was one of the biggest sections in the book. An egg has been broken for every dish for which an egg could possibly be broken in these regulations. They are a mess. The egg production industry in Scotland—as well as throughout the United Kingdom—has not had its troubles to seek. People who work in the industry deserve something that is clear and, if they have to get a registration number and register their establishments, they should be told how they can do that, what the regulations are, what the penalties are for infringements and how registration may be removed. Those seem to be four relatively simple things to tell the industry, and the regulations do not do that.

On the provisions that cover when registration may be agreed, a distinguishing number is required, and a reply must be made within 21 days. Somewhere else in the regulations, however, a 28-day period is specified. Do those times run concurrently or consecutively? Are they like prison sentences? We do not know. Could the Executive have another shot at the whole thing, please?

Alasdair Morgan: I was interested in the point about punishment for anyone who falls "fowl" of these incoherent regulations.

Members: Oh!

Christine May: That was a bad one.

Alasdair Morgan: The regulations state that someone who is guilty of an offence is liable on summary conviction to a fine

"not exceeding level 4 on the standard scale".

They can also get done on indictment. It has been pointed out to us that the standard scale is meant to apply only to offences that are triable by summary procedure. There is a bit of a contradiction there.

Gordon Jackson: Where is that?

Alasdair Morgan: It appears in regulation 12 on page 4.

The Convener: We will wait while Gordon Jackson finds the place, because it will be interesting to get his view on the subject.

Christine May: It is all right, Gordon—we are not in a hurry.

Gordon Jackson: Many offences, such as speeding, are prosecuted only on summary complaint, but it is possible to prosecute anything on indictment if there are more serious charges on the same indictment. Are you with me?

Alasdair Morgan: Yes.

Gordon Jackson: I suspect that regulation 12 is designed to cover the rare situation in which someone is prosecuted for really serious offences and an offence under the laying hens regulations is added in as part of the picture. The regulation is saying that, on the offence under the laying hens regulations, that person can still only be fined, even though they are being prosecuted on indictment on more serious matters. Is that wrong?

The Convener: Alasdair Morgan does not look as if he is convinced.

Alasdair Morgan: I do not know—we should seek clarification.

The Convener: If that point is not included in points (a) to (l) on the list from our legal adviser Margaret Macdonald, we will add it. [*Interruption.*] Apparently, it is included in the list.

Mr Maxwell: We have pages of points on the regulations. Some aspects of the regulations seem to be bizarre. One of the points that was raised is that, if there are to be any changes in the information that is submitted as part of the application for registration, the person who submitted that application in the first place must submit those changes. No account is taken of the aging process, death, resignation, retirement or of any other factor that could mean that that person would not be available any more. That is a minor point, but it is indicative of the bad drafting of the whole instrument.

The Convener: Could the death of the original person who was being sought generate a loophole that would mean that someone could get off?

Gordon Jackson: I do not know.

Mr Maxwell: I would like to see what a dead person would be charged with.

The Convener: The regulations have obviously got us very confused, so I am sure that they will get other people very confused. As Christine May said, we want the regulations to be clear. We will ask the Executive for more information on points (a) to (l). We hope that it will have another crack at the regulations.

National Assistance (Assessment of Resources) Amendment (No 4) (Scotland) Regulations 2003 (SSI 2003/577)

The Convener: No points have been raised on SSI 2003/577.

Christine May: I think that the regulations will be welcomed by a number of people. I have come across constituents who have been caught because they received awards that took their notional incomes over the threshold. The result was that they were obliged to pay, which meant that they got no benefit from the award. SSI 2003/577 will be warmly welcomed.

Food Labelling Amendment (Scotland) Regulations 2003 (SSI 2003/578)

The Convener: There are no points on SSI 2003/578.

Plant Protection Products (Scotland) Regulations 2003 (SSI 2003/579)

The Convener: There are no points on SSI 2003/579.

Local Government Pension Reserve Fund (Scotland) Regulations 2003 (SSI 2003/580)

The Convener: We move to consideration of SSI 2003/580. The only question of substance that has been raised is why it was thought necessary to include a definition of “local authority”, given that the term is defined in the enabling powers in the same terms in which it is defined in the regulations. That is a fairly small point, but does the committee agree to raise it with the Executive?

Members *indicated agreement.*

Pupils' Educational Records (Scotland) Regulations 2003 (SSI 2003/581)

The Convener: We have a number of points on SSI 2003/581—they are listed (a) to (g) in the legal briefing—but they are of much smaller magnitude than those that we had on the Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003. Do members have any points that they would like to add to the fairly minor ones that are listed?

Mr Maxwell: Paragraph 172 of the legal briefing states:

“Regulation 8 provides that a responsible body must meet a reasonable request under regulation 5(2) to supply information ‘in an alternative language or form’.”

I wonder whether we could ask what the Executive means by the phrase,

“in an alternative language or form”.

It seems to be obvious that it means that information should be supplied in languages other than English, but it is not obvious whether that includes things such as Braille or tape. I imagine that that is the case, but we need clarification.

The Convener: We will pass to the Executive points (a) to (g), which include Stewart Maxwell's point.

Instrument Not Laid Before the Parliament

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 1) Order 2003 (SSI 2003/562)

10:55

The Convener: Item 5 is consideration of instruments not laid before Parliament. There is a small point on SSI 2003/562, which we thought we could raise by way of an informal letter. It relates to section 36(2)(c) of the Water Environment and Water Services (Scotland) Act 2003, which is relevant to the making of the order. We might want to ask the Executive why section 36(2)(c) has not been cited as an enabling power. Is that agreed?

Members *indicated agreement.*

The Convener: Thank you very much.

Meeting closed at 10:56.

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