

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 24 February 2004
(Morning)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

7th Meeting 2004, 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 24 February 2004

(Morning)

[THE CONVENER *opened the meeting at 10:40*]

Delegated Powers Scrutiny

Antisocial Behaviour etc (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members back after the recess to the seventh meeting of the Subordinate Legislation Committee.

As members know, the time that the committee has to consider the Antisocial Behaviour etc (Scotland) Bill is now at an end. We have been reassured that we will be able to consider the bill again at stage 2.

The Executive's response to the committee's points shows that a few things have been changed. However, paragraphs 5 and 6 of the legal brief might make the committee want to reconsider the guidance and schedule 4. Further changes might be required following the lead committee's discussion of the bill. Is that acceptable? Do members have any other points to make?

Alasdair Morgan (South of Scotland) (SNP): There are clearly still concerns about the guidance on dispersal of groups and the directions to local authorities under the Social Work (Scotland) Act 1968. We cannot do any more at this stage but, given that the bill will come back to the committee, we can consider those issues again.

The Convener: We can pick up on those points then.

Mike Pringle (Edinburgh South) (LD): There are likely to be some changes to the bill by the time it comes back to the committee.

The Convener: All the committee's points and the Executive's responses will be passed on to the lead committee. Is that agreed?

Members indicated agreement.

Tenements (Scotland) Bill: Stage 1

The Convener: We are just starting to consider the Tenements (Scotland) Bill, which forms the third and final part of the programme of property

law reform. The policy memorandum gives a precise background to the bill. Most of it is about the tenement management scheme that the bill will introduce. There are several delegated powers in various sections of the bill. We have plenty of time to consider the bill, so we can go through those sections and come back at the end if there are any points that we want to raise with the Executive.

Section 4 deals with the various rules of the tenement management scheme. Does anyone want to highlight any of the points in the legal briefing?

Alasdair Morgan: The Executive wants to be able to increase the amounts of deposit specified in rule 3.3 of the scheme to take account of inflation. Given that that would be done by negative instrument, it should be written into statute that changes will be simply inflationary. As the bill stands, the amounts could be changed in any way.

The Convener: Should we get the Executive to confirm that that is the case?

Alasdair Morgan: Yes, because the Executive has been prepared to insert similar provisions in other legislation that we have dealt with recently. I do not see why that should not apply in this case.

The Convener: However, as you suggest, if the legislation was going to involve changes to monetary amounts other than inflationary changes, we would want an affirmative order to be used.

Alasdair Morgan: It would not be desirable for the affirmative procedure to be used to change monetary amounts by the rate of inflation. If changes were so restricted, it would be best for the negative procedure to be used.

The Convener: So we want to check that the sole change will be a change to take account of inflation.

Alasdair Morgan: If that is the Executive's intention, we should ask why it does not include a provision to that effect in the bill.

The Convener: Absolutely. Is that agreed?

Members indicated agreement.

The Convener: Section 15 is about the insurance provisions. The Scottish Law Commission was against the Executive putting in a list of risks, on the ground that that would not be flexible. What does the committee think about what is proposed?

Alasdair Morgan: It strikes me that we should be worried about the enforceability of legislation. The more detail that the bill prescribes about the type of insurance that is required, the more difficult

the bill will be to enforce. Given that the Scottish Law Commission did not believe that a list of risks was necessary, we should ask the Executive why it thinks that a list is necessary and whether having a list will help or hinder the implementation of the bill.

Christine May (Central Fife) (Lab): Will we have time to consider the Executive's response? Depending on what the Executive says, we might want to make further comment.

The Convener: Yes, there will be plenty of time for that. Shall we ask that question?

Members indicated agreement.

The Convener: Section 22 amends the Title Conditions (Scotland) Act 2003 to replicate the provisions of rule 3 of the tenement management scheme. That brings us back to the issue of amounts of money, so the same points apply as we raised about section 4.

Hopefully, we are all delighted that section 26, on ancillary provision, and section 29, on the short title and commencement order, seem to be reasonable.

Executive Responses

Renewables Obligation (Scotland) Order 2004 (draft) (withdrawn)

10:46

The Convener: The legal brief contains the Executive's response to the original draft of the order, which we were very unhappy with. That has now been withdrawn and the order has been relaid. The new one is in members' papers. It is suggested that, for completeness, it would be good to put the Executive's responses to the committee's questions into the committee's report.

Mr Stewart Maxwell (West of Scotland) (SNP): There is no point in spending any time on this because the Executive has withdrawn the order and relaid it. However, it is important to state in the report that we asked the questions in the first place. People might wonder what happened to those questions if we did not do that.

Christine May: The Executive was remarkably helpful in its treatment of the issue. Well done to everyone who put a lot of effort into it.

The Convener: We can also say that the liaison between our legal advisers and the Executive seems to be working quite well.

Registration of Establishments Keeping Laying Hens (Scotland) Amendment Regulations 2004 (SSI 2004/27)

The Convener: Members will recall that we have seen the regulations before.

Murray Tosh (West of Scotland) (Con): Convener, will you excuse me at this point?

The Convener: Yes.

Murray Tosh: I am going to a meeting of the Scottish Parliamentary Corporate Body.

The Convener: You chose your moment well.

Murray Tosh: I have bigger eggs to scramble.

The Convener: Members will recall that we had severe reservations about the regulations. Because the regulations are already in force, there are parts that we just cannot alter because that would involve making retrospective changes. However, there are some issues that we could raise.

Two particular issues came up, one of which was the definition of "owner or keeper". Alasdair, do you have any further comments to make on that? Revoking the licence still seems to be an issue.

Alasdair Morgan: Yes. The point is that someone could lose their livelihood because of an omission by someone else. They might not be aware that the other person had omitted to notify a change or was even required to do so.

Mr Maxwell: Someone might take the blame for an action that was not their fault. Under the English and Welsh regulations the person would be fined, but in Scotland the person would lose their licence and, in effect, their livelihood. That seems rather extreme and we should certainly report on that point.

The Convener: Are we agreed that we should bring the various points that are raised in the legal brief to the attention of the lead committee and the Parliament? The main points are that defective drafting remains, that the regulations continue to represent an unusual or unexpected use of powers and that the regulations raise devolution issues because they raise doubts about compatibility with the European convention on human rights.

Alasdair Morgan: Yes. The fact that the appeal is not seen to be to an independent body is a potentially serious point and lays the process open to challenge.

The Convener: Exactly. I suggest that we pass on all the points that are raised on the six pages of the legal brief to the lead committee and to Parliament.

Mr Maxwell: I know that we are going to report on the regulations, but I fail to understand why the Executive has dug its heels in on the "owner or keeper" issue. It seems clear that that will cause confusion. Who is responsible? Is it the owner or is it the keeper? We have asked a perfectly reasonable question and I do not understand why the Executive has dug its heels in and stated that what is in the regulations is clearer than saying either that the obligation is on the owner or that it is on the keeper. I am bemused by the Executive's response on that point. We should highlight that problem to the lead committee. I know that we have identified many other problems and issues but that point and the possible loss of livelihood are, as you have said, the main ones.

The Convener: Is what I have suggested agreed?

Members indicated agreement.

Local Government Capital Expenditure Limits (Scotland) Regulations 2004 (SSI 2004/29)

The Convener: It has been suggested—as the legal advice says, the matter is finely balanced and only a court could give a definitive answer—that there is slight doubt about whether regulation

2(2) is *intra vires*. I suggest that we raise that issue with the lead committee and with Parliament.

Christine May: I agree. If we have a doubt, a doubt exists, or it is possible for a doubt to exist. Therefore, the lead committee should be made aware of the issue. It will be for it to decide what it wants to be done.

National Health Service (Tribunal) (Scotland) Regulations 2004 (SSI 2004/38)

The Convener: We welcome the helpful explanation of the regulations in relation to the two points that we raised with the Executive and will pass the explanation on to the lead committee and to Parliament. Is that agreed?

Members indicated agreement.

Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2004 (SSI 2004/44)

The Convener: Members will remember that we raised points about the order because we thought that the issue was particularly sensitive. Our legal advice is that three points are still outstanding. What are members' views on those points?

The first issue is the defective drafting, which is raised in parts (a), (b) and (d) of question 1 in the legal briefing and in questions 2, 3, 4 and 5. The defective drafting is acknowledged in part by the Executive. I am advised that negotiations are ongoing and that changes may be made to the European regulations, which could lead to changes to our regulations.

Alasdair Morgan: In view of the potential changes to the European regulations and the fact that a fresh set of regulations or amending regulations could come before us, it is sufficient at this stage for us to point out the Executive's correspondence to the lead committee.

The Convener: Yes. Part (c) of question 1 raises the issue that the meaning could be clearer. Question 6 asks about the Executive's failure to follow proper legislative practice. Is it agreed that we pass those points on to the lead committee?

Members indicated agreement.

Local Government in Scotland Act 2003 (Commencement No 2) Order 2004 (SSI 2004/28)

The Convener: There is an issue to do with the order not specifying a calendar date.

Alasdair Morgan: The date on which the order is made is on the order, but article 2(1) states that certain sections of the Local Government in Scotland Act 2003

"shall come into force on the day after the day on which this Order is made."

Given that when the Executive printed the order it knew that that would be 30 January, I do not know why it did not state that and make it clear to everyone. The Executive certainly does not get the clear English award for the order. It would be much more helpful if the suggested approach were to be followed in future.

The Convener: Yes. It is recommended that we pass on to the lead committee and to Parliament our concerns about the failure to follow proper legislative practice.

Draft Instruments Subject to Approval

Advice and Assistance (Financial Conditions) (Scotland) Regulations 2004 (draft)

10:57

The Convener: Item 4 is draft instruments subject to approval. No points have been identified in relation to the regulations. Are there any further points?

Members: No.

Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2004 (draft)

The Convener: No points arise.

Housing Support Grant (Scotland) Order 2004 (draft)

The Convener: Although no points of substance arise, a couple of errors in the accompanying report were identified, but I am told that those have been addressed.

Renewables Obligation (Scotland) Order 2004 (draft)

The Convener: This is the relaid draft order. No points have been identified.

Instruments Subject to Annulment

Advice and Assistance (Scotland) Amendment Regulations 2004 (SSI 2004/49)

10:58

The Convener: Item 5 is instruments subject to annulment. No points have been identified on the regulations.

Civil Legal Aid (Scotland) Amendment Regulations 2004 (SSI 2004/50)

The Convener: It has been recommended that we ask the Executive why the regulations do not cite either section 17(2B) or section 42 of the Legal Aid Scotland (Act) 1986 as enabling powers—both those sections appear relevant to the regulations. The committee also notes that section 42 is cited as a power in the Executive note. Is it agreed that we ask the Executive about that point?

Members indicated agreement.

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2004 (SSI 2004/51)

The Convener: No points of substance have been identified, but we could draw to the Executive's attention by way of an informal letter several typos and minor points of form. Is it agreed that we pass those on?

Members indicated agreement.

Motorways Traffic (Scotland) Amendment Regulations 2004 (SSI 2004/53)

The Convener: No points of substance have been identified.

Alasdair Morgan: I wish to make what is perhaps a policy point. In effect, special roads are motorways, so it strikes me as curious that the Executive had to put in place regulations to class this bit of special road as not being a motorway. That is clearly a policy point. I would have thought that the Executive would want to claim that it had built as much motorway as possible.

Christine May: Perhaps the Executive does not want to pay for upkeep of the road.

Alasdair Morgan: It is still a trunk road. However, that is a policy matter.

The Convener: Yes, it is, so it is not really our concern.

A1 (East of Haddington to Dunbar) Special Road Regulations 2004 (SSI 2004/54)

The Convener: No points have been identified.

Sea Fishing (Prohibited Methods of Fishing) (Firth of Clyde) Order 2004 (SSI 2004/55)

The Convener: No points of substance arise. The order breaches the 21-day-rule, but reasons for that were provided in the letter to the Presiding Officer, and they seem reasonable. Are there any further points?

Members indicated disagreement.

Food (Chilli and Chilli Products) (Emergency Control) (Scotland) Regulations 2004 (SSI 2004/56)

The Convener: We now return to regulations that we considered several weeks ago. There are no points of substance.

Non-Domestic Rate (Scotland) Order 2004 (SSI 2004/59)

Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2004 (SSI 2004/60)

The Convener: No points have been identified on the orders.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2004 (SSI 2004/48)

11:00

The Convener: No points have been identified on the instrument, which is in the normal form. It arises from the fallout from the Chernobyl disaster. I remember electioneering at the time and wondering how I was going to be affected.

Mr Maxwell: I remember the rain coming down.

The Convener: Yes, it was raining very heavily, as I recall.

Mike Pringle: I cannot believe that, 17 years on, we still have this continuing problem. It is amazing.

The Convener: It is quite incredible. Is it agreed that there are no points to raise?

Alasdair Morgan: I noticed that the schedule mentions the “Allt Dubhchclair Burn”. Given that “allt” means “burn” in Gaelic, one would have thought that that was a bit of a superfluity—but never mind.

The Convener: Well spotted. My goodness!

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 5) (Scotland) Order 2004 Partial Revocation Order 2004 (SSI 2004/61)

The Convener: This is a revocation order in the normal form. No points have been identified.

Instruments Not Laid Before the Parliament

Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2004 (SSI 2004/52)

11:02

The Convener: The act of sederunt makes miscellaneous amendments to the rules of the Court of Session. No points of substance have been identified, but there are a number of typos that we might wish to refer informally to the court. We have six points to raise, which are detailed in our legal brief. Is it agreed that we pass them on informally?

Members indicated agreement.

Private Hire Vehicles (Carriage of Guide Dogs etc) Act 2002 (Commencement No 1) (Scotland) Order 2004 (SSI 2004/57)

The Convener: There is an issue with regard to numbering. It is suggested that we ask the Executive why it has chosen not to follow paragraph 3.24(b)(ii) of the guidance on the drafting of statutory instruments and why it has entitled the instrument “(Commencement No 1)”, given the fact that the parent act is a Westminster statute, and the first commencement order has already been made for England and Wales.

Christine May: The word “Scotland” has been put into the title of the instrument, so a number need not have been included at all.

Sorry—I now understand that that was necessary. I had understood from what I had read that the Executive did not need to do that in the circumstances, but there we are.

The Convener: The legal advisers think that the Executive needed to include that.

Christine May: That is fair enough.

The Convener: No further points arise.

Primary Medical Services (Scotland) Act 2004 (Commencement) Order 2004 (SSI 2004/58)

The Convener: No points of substance have been drawn to our attention by the legal advisers. However, we may wish to note a point about drafting in relation to the anticipatory exercise of powers. We might be able to discuss that with the Executive at our next informal meeting. Is that agreed?

Members *indicated agreement.*

The Convener: I put on record the fact that we received apologies from Gordon Jackson, who was trapped in a train—I think that that was the explanation.

Alasdair Morgan: I hope that it was not painful.

The Convener: We hope to see him next week. I thank the committee.

Meeting closed at 11:05.

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