SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 May 2004
(*Morning*)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
16th 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

Bruce Adamson
Joanne Clinton

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 May 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:32*]

Delegated Powers Scrutiny

Emergency Workers (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 16th meeting this year of the Subordinate Legislation Committee. I have received no apologies.

The committee will recall that we wrote to the Executive about the bill, and were concerned about section 6(1). We thought that the power under that section should be subject to the affirmative procedure, rather than to annulment. Although the Executive has not agreed to move in that direction, I gather that it is considering the matter and that the Minister for Finance and Public Services, Andy Kerr, will be giving evidence to the lead committee on the bill, the Justice 1 Committee, on 9 June. We will find out after that whether the Executive has taken our point on board. It is suggested that we leave our report on the bill until after 9 June, hear what is said at the Justice 1 Committee's meeting and then make a final decision. Is that agreed?

Members *indicated agreement.*

Gordon Jackson (Glasgow Govan) (Lab): Do we have time to do that?

The Convener: Yes, we have time. The stage 1 debate is due to take place in September, when—hopefully—we will be in the new building.

Prohibition of Smoking in Regulated Areas (Scotland) Bill: Stage 1

The Convener: For item 2, delegated powers scrutiny of the Prohibition of Smoking in Regulated Areas (Scotland) Bill at stage 1, we have with us Stewart Maxwell, the member in charge of the bill—he is a member of the committee, of course. He is happy to answer questions on the bill.

There are three powers in the bill with which we are concerned. The bill aims to prevent people, including children, from being exposed to the effects of passive smoking in certain public areas, and specifically in areas where food is supplied and consumed.

The first power is mentioned in section 1(4), and allows the extension of the prescribed period—the period during which smoking is prohibited in a regulated area prior to food being consumed there—from five days. The order-making power is subject to the affirmative procedure; the question is whether that is adequate.

Christine May (Central Fife) (Lab): Although I am content for there to be a power to extend the prescribed period, I wonder if legislative good practice should also allow for the ability to restrict the period, subject to changing scientific evidence, for example. I am aware that this might be straying into the policy elements of the bill. Would it not be better practice to allow for the prescribed period to be changed and to leave it at that, rather than specifying either extension or restriction of the period?

The Convener: We will take on board members' points and then ask Stewart Maxwell for his comments.

Gordon Jackson: It is up to Stewart to tell us what he thinks, but I think that we are straying into policy matters. That is an easy thing to do with this bill, as we all have quite strong views about its policy—some are for and some are against. It does not seem particularly unusual to fix the prescribed period at a minimum by statute, but for the power to change the period to come under subordinate legislation. There might be a policy decision to be made about whether five days is the right period with respect to the scientific evidence but, subject to what Stewart Maxwell has to say, I cannot see much wrong with the provision being subject to the affirmative procedure. We will come to other regulations in the bill where I do have objections, but it seems normal to use the affirmative procedure for the provisions under section 1(4).

Alasdair Morgan (South of Scotland) (SNP): I agree with Gordon Jackson. It is not a totally analogous situation but, in cases where there is a power to vary fines, for example, the powers are always to increase them; we do not usually have powers to decrease fines. The starting point is set according to the policy decision; subsequently, such things tend to get varied upwards.

Mike Pringle (Edinburgh South) (LD): I would not have put five days for the prescribed period; I would have put a longer period. I would not want it to be reduced. If we are going to extend the period from five to 10 or 15 days, I would be all in favour of that. I would certainly not be in favour of reducing the period to less than five days. Having the power to extend the period is the right way forward.

Murray Tosh (West of Scotland) (Con): The point about the five days is a policy point. I do not think that Christine May was arguing that the time should be reduced; she was arguing that there should be the facility to reduce it, in the light of changed scientific analysis. It might also be that better ventilation would allow the period to be safely reduced. It is not so much a question of whether the period will actually be reduced; it is a question of whether the facility to do that should be in the bill, and of whether there should rather be almost a presumption that the time can be lengthened, but not changed the other way; that seems a bit unusual.

The Convener: Being a former science teacher, I can see the point that members are making. The scientific evidence might change. I invite Stewart Maxwell to respond to those comments.

Mr Stewart Maxwell (West of Scotland) (SNP): This is effectively a policy matter for the most part. We have chosen a five-day period; we could have chosen a shorter or longer period but, based on the scientific evidence and the average room size, average furnishings and so on, that judgment seems to be legitimate. As I said, that is all about policy.

On the question whether an allowance should be made to shorten the prescribed period, I take Alasdair Morgan's point about it not being unusual to have provisions in primary legislation that start from a base point, which may be moved onwards, upwards or higher, rather than moved back the way. I can say with a fair degree of certainty that there will be no scientific evidence in the future to say that smoking, passive smoking or the inhalation of any of the substances involved will become less dangerous. We know that smoke lingers in the atmosphere and is absorbed by materials in a room and can subsequently reappear in the atmosphere. We also know that ventilation does not deal with that problem. Therefore, it seems entirely appropriate to draw a baseline of five days. As we have agreed, that is a policy matter, but a baseline of some sort should be established.

If there is evidence in future to say that that five-day period is inadequate, and that smoke in fact lingers for longer, then the regulatory power is there to extend that prescribed period to ensure that people are protected from the dangers of passive smoking. It is entirely appropriate to draw a line in the sand and say that that is the minimum period.

The Convener: The committee feels that section 1(4), which provides for secondary legislation to be made under the affirmative procedure, is the normal way in which to proceed in such situations. However, the measure is also a policy matter and is dependent on scientific evidence. There is concern that the period of five days has been chosen and that that might not be the required number of days in future, perhaps because of better ventilation. The period could be shortened rather than stretched out—we do not know. I suggest that the lead committee on the bill should discuss the matter. Are members content with that suggestion?

Members *indicated agreement*.

The Convener: I am looking at Alasdair Morgan because he argued for the measure.

Alasdair Morgan: I am sure that the lead committee will discuss the matter anyway.

The Convener: We move to the more controversial order-making power in section 2(1), which allows the definition of the term "regulated area" to be altered. At the moment, the term relates solely to enclosed public spaces where food is supplied and consumed, but section 2 gives the Scottish ministers the power to amend the definition so that the term applies to other areas. However, the power cannot be used to remove any of the areas that the bill covers. Any order would be subject to the affirmative procedure. The legal adviser has pointed out that the power would extend to amending the definition of the term "public space" and removing the exemptions in schedule 1. We must take on board those points.

Do members think that the power and the use of the affirmative procedure are appropriate or do changes need to be made to the bill?

Christine May: The first line of the bill refers to "smoking in regulated areas", but at that point it does not refer to public areas. Therefore, it is at least in theory possible for ministers to make an amendment under which any area could be regulated, including my house or other private or public areas. That is far too broad a provision. If the first line mentioned "regulated public areas", the issue would not arise.

The Convener: The legal advice is that the power is very wide.

Alasdair Morgan: I tend to agree. No matter how one looks at the issue, the power is broad and it goes beyond what one might expect on a first reading of the bill. The fact that the area that the bill covers can be extended simply by order to include other areas that might not even be premises, but might be outdoors, raises serious questions, albeit that that would have to be done under the affirmative procedure.

Murray Tosh: I agree with those points. This may be more of a policy issue, but it seems that the enthusiasm on the part of the bill's promoters is impelling them faster and with more momentum than we would have expected if no-one had any

emotional or intellectual capital invested in the issue.

Mike Pringle: I am interested to hear what Stewart Maxwell says.

10:45

Mr Maxwell: The power in section 2 is the crux of the bill. I accept that the situation is unusual in that we are in danger of straying into the policy or principle of the bill, which is to create a power to allow further regulated areas to be created. The bill will create one regulated area, but the main purpose is to establish the principle that the Parliament accepts that smoking can be regulated or prohibited in certain enclosed public areas.

The policy memorandum makes it clear that it is not the intention that outside areas such as beer gardens be included—they are certainly not included in the bill as it stands. It is unlikely that the exemptions in schedule 1 would be removed because that would raise issues under the European convention on human rights. In several of the exempt areas, particularly state hospitals and prisons, people do not have the liberty to choose to go to another place. Given that people have that liberty elsewhere—they can choose to smoke outside or in their home or car—there may be an ECHR issue in removing the right to smoke of people who are locked in one area and are unable to move. It is unlikely that those exemptions would be removed.

The Henry VIII power is wide in the sense that other regulated areas can be created. As I said, that is a policy matter and if the Parliament agreed in principle that smoking should be regulated in public places, it would be entirely appropriate to use that power. However, the power is narrow in the sense that it does not apply to other legislation, but purely to the bill. Many Henry VIII powers that the committee has seen allow ministers to change measures in a range of different legislation, whereas the present power relates only to this one bill. Any order would have to be considered under the affirmative procedure. The bill also constrains ministers in that they must—not may—consult with appropriate bodies. There are safeguards—people will be consulted and any order must go through Parliament under the affirmative procedure.

Given that in anti-smoking legislation round the world, and in other legislation here, an incremental approach is taken, the bill is entirely appropriate and fits into that overall approach. We will start with the principle and lay down the first regulated area, which in future can be extended to new regulated areas. It is entirely appropriate to use subordinate legislation to do that because if the original principle or policy is accepted by the Parliament, the regulated areas can be changed as and when that is deemed appropriate, with the safeguards of the affirmative procedure and the consultation that must take place.

I do not accept that there is a problem with the power, which is appropriate and is in line with the bill's policy intention. I reject the wilder suggestions that the bill could be used to create a non-smoking area throughout the whole of Scotland. That is clearly not the intention—that would fall outwith the scope of the bill and it would not be done.

Alasdair Morgan: I accept the argument that the bill aims to regulate smoking and that once that power has been created, it is perfectly logical that ministers should be able to vary the regulated area. However, I am concerned about Stewart Maxwell's argument that it is not the intention that the bill be used to extend the regulated area to open spaces or whatever. My response is that if that is not the intention, why do we not simply alter the wording so that not only is that not the intention, but it cannot actually be done. That would be a much happier position at which to arrive.

Christine May: Whatever the intention is, we must be careful that the bill does not give such a wide opportunity to somebody who is less well intentioned than the current ministers are.

Section 5(5) lists those who must be consulted, which is an issue we may discuss further later. If none of the prescribed bodies were to exist any longer, we would be left with

"such other bodies as the Scottish Ministers consider appropriate"

and it might be deemed appropriate to consult with no more than a couple of chosen bodies, so the consultation provision would become almost null and void, almost irrelevant. The power is too wide, and Alasdair Morgan's suggestion that there should be a slight amendment to the bill to prevent such circumstances makes legislative sense.

We should forget about whether the policy is right or wrong and whether we support it or not—as a reformed smoker, I do—because we are about making good laws and eliminating the potential for malign beings to do things that were never the intention of the bill's promoter or of those currently in office.

Mike Pringle: If we ignore the ministers' role, although they would have a vote if an order were to come before the Parliament, we are saying that we might end up with 129 malign people. I have no problem with the power; it has to come before the Parliament through the affirmative procedure and, if it has to be changed, it must go before the Parliament again. If a majority in the Parliament at

some point in future wishes to extend the regulated areas, that is democracy, and I suggest that the affirmative procedure is the right way forward. I am more than happy with that aspect of the bill and am very much in favour of the bill—I hope that it will become law. If we wanted to change it in any way in future, the affirmative procedure would mean that the proposed change would have to go before the 129 members of the Scottish Parliament, who would decide whether it was right or wrong.

Murray Tosh: That is a romantic view of how secondary legislation works.

The Convener: There speaks the Deputy Presiding Officer.

Murray Tosh: Secondary legislation is take it or leave it. There has been debate about whether to pass some secondary legislation, which has been passed because members liked 80 per cent of what was in it and were prepared to swallow the other 20 per cent. That is always the risk with secondary legislation.

I do not know enough about the sweep of secondary legislation to question the analogies, but the power is not like the National Parks (Scotland) Act 2000, which wills a national park and under which we bring in a series of variations on a central model. The power has more of a ratchet effect—I realise that that is a policy objection—because, if it were used, the provisions would advance further and include more categories. If that is the intention, it should be clear in the bill.

I am a non-smoker and I signed Kenny Gibson's proposal for a bill to regulate smoking in the first session of the Parliament, but I will vote against Stewart Maxwell's bill in this session. I am grateful to Stewart Maxwell, the quality of whose argument I appreciate, because he has clarified for me why I will do that: the power goes too far. The intention should be spelled out more clearly, and there is an intention to introduce measures beyond those that public opinion supports.

The legal briefing makes the point that extending the regulated areas will be controversial, which is right. Debate is likely to be squeezed out if the power is used—as other legislation has been—to convoy unacceptable or contentious issues through behind something that will, on balance, be supported. The point is not whether malign people will do that, but whether we want to subscribe to the use of delegated powers to allow a policy objective to ratchet up the measures that are proposed in the bill.

Mr Maxwell: Some things must be put straight. Murray Tosh is surprisingly incorrect in his comments, and I thought that he would know better. Mike Pringle is right that, when an affirmative instrument comes before the Parliament, it is for the Parliament to decide whether to accept or reject it; that is democracy.

Murray Tosh: But the Parliament cannot amend such an instrument.

Mr Maxwell: You were here through the first session, Murray, and if you have a problem with that, perhaps you should have introduced proposals to amend the procedure.

On a number of occasions, committees of the Parliament have rejected affirmative instruments—the Justice 1 Committee has rejected the same one twice. Given that the affirmative procedure has that level of protection and that we have experience of affirmative instruments being passed and rejected, it seems to me that, once we accept the principle of creating non-smoking areas—or regulated areas, as they are called in the bill—that is an entirely appropriate level of scrutiny.

To talk about going beyond what is publicly acceptable or supported is also incorrect: because it has taken us a year to reach this point, the bill is now way behind public opinion on the matter. The bill would ban smoking in places in which food is consumed, which is supported by just short of 90 per cent of people according to all the surveys and opinion polls that I have seen. Opinion on banning smoking in public and other areas more widely is in the region of 77 per cent to 90 per cent. There is no problem with the level of support, so Murray Tosh is incorrect to say that we are going beyond what is publicly acceptable.

I return to the use of the affirmative procedure for the power to extend the regulated areas. Christine May talked about ministers who are less benevolent than the current Executive using the power, but the power will not be exercised by ministerial diktat. Ministers will be able to introduce measures, but the Parliament can reject them, and, as I have said, that has happened in the first five years of the Parliament's existence. The suggestion that ministers could force a majority of the Parliament to pass legislation that is against the public interest, that the public do not support and that is against normal human rights does not hold up. The power will not be exercised by ministerial diktat, but by an order being laid before the Parliament, discussed in the committees and voted on in the Parliament. That is what the affirmative procedure means, and, if we accept the principle of introducing new regulated areas—we are straying into policy—the affirmative procedure is entirely appropriate.

The Convener: I will make a suggestion again. As most of us, apart from Mike Pringle, feel that that the powers are too wide, we have two alternatives: we can wait for Stewart Maxwell to

mull over what we have said and come back to say more about it; or we can write our report to the lead committee fairly rapidly and pass on our concerns. I gather that there is no hurry for us to report to the lead committee, so if committee members wanted to, we could leave the matter for a while, see how the debate about the bill develops, come back to it when we know a little more of Stewart Maxwell's ideas and make our final report.

Murray Tosh: Is there any point in that, convener? What we have heard from Stewart Maxwell shows a level of commitment that makes me think that he is unlikely to wish to reflect on what we have said this morning. It is an object lesson in how absolutist approaches slough off support at the margins.

Mr Maxwell: I will not comment on that. It is entirely appropriate for me to come back to the committee in a week or two, because there is time.

I did not cover Alasdair Morgan's and Christine May's comments about the intention versus the actuality, although I should have done. It is not the intention to invade private space or regulate open spaces. Even though Murray Tosh thinks that I am absolutist, I would be more than happy to consider the comments on such spaces. The arguments have merit, and I would certainly consider supporting any amendments that were lodged to deal with that issue and restrict potential extension to enclosed public spaces of the kind about which I have been talking. I do not support restrictions in, for example, the open air, private homes or private vehicles, and that is not the policy intention, so if the bill requires amendment on that, I am open to considering it.

Alasdair Morgan: Those comments are helpful—in their light, we should leave the matter for a couple of weeks.

The Convener: We are agreed that we will leave the matter until a little further down the road. Thank you, Stewart.

Murray Tosh: He just needed a nudge.

11:00

The Convener: The third issue is the signage requirements in section 5(4). The legal advice is that that section is perfectly adequate; our only concern is that if the definition of the term "regulated area" were to be extended, some of the bodies in the list in section 5(5), which Christine May mentioned earlier, might not be appropriate and others might go out of existence. Alasdair Morgan had another point.

Alasdair Morgan: It was about the potential ephemerality—if that is the right word—of some of the bodies on the list, given that they are not statutory bodies. However, in the great scheme of things, that is not a major problem.

Mike Pringle: I have a question on a completely different point. In section 6, which deals with penalties, Stewart Maxwell has chosen a level 3 fine on the standard scale. My understanding is that that means a fine of up to £1,000. I would like to know why he chose level 3 and not a higher level.

The Convener: We can ask Stewart Maxwell about that, but that really is a policy matter.

Mike Pringle: Okay. I will speak to him after the meeting.

Christine May: The points that the convener made about the list in section 5(5) are relevant. However, the matter is one of policy and is for the lead committee. I am not sure whether it is appropriate for our report to raise such matters with the lead committee, but, if not, I am sure that Stewart Maxwell will take our comments on board.

Executive Responses

European Communities (Services of Lawyers) Amendment (Scotland) Order 2004 (SSI 2004/186)

11:02

The Convener: Agenda item 3 is on Executive responses. We had three questions about the order. The first was whether solicitor advocates are included in the more generic term "solicitor", which they are. The second question was why the designation for a lawyer from Luxembourg is shown in one way in the original order, but in another way in this order. We are reassured that a more recent directive designated Luxembourg lawyers in the same way as in the order. Thirdly, Alasdair Morgan raised the issue of the different alphabets that were used—the designation for lawyers from Greece was in the Latin alphabet, while for lawyers from Cyprus it was in the Greek alphabet. We have heard that that is because of the Athens treaty, by which the new accession countries entered the European Union. However, the Executive accepts that it might have been more sensible to have used similar terminology in both cases.

Are there any comments?

Christine May: I clasp the orange fur lining of my anorak in joy at hearing that.

The Convener: The explanations were helpful.

Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Miscellaneous) 2004 (SSI 2004/197)

The Convener: Members will remember that the amendment changed the period for the exchange of lists of witnesses from 14 to 28 days. We questioned why there appeared to be a change when the amendment was supposed simply to replace existing rules. Apparently, those rules had already been changed, so there was no change to anything.

Christine May: Given that this is the 16th amendment, perhaps the word "consolidation" might be mentioned in a loud stage whisper to the Executive.

The Convener: You recommend an informal letter to the Executive to suggest consolidation.

Christine May: Yes.

Instrument Subject to Annulment

Feeding Stuffs (Scotland) Amendment Regulations 2004 (SSI 2004/208)

11:05

The Convener: Agenda item 4 is instruments subject to annulment. The regulations make provision for the implementation and enforcement in Scotland of a number of recent Community measures relating to the composition of animal feeding stuffs. Similar regulations have been made for other parts of the UK. The legal adviser is concerned that in the citation there is no reference to article 9 of the relevant EC regulation, although that reference is in the English equivalent. We are somewhat mystified as to why that keeps happening. It is suggested that we might raise the issue again with the Executive.

There is also no transposition note, although I gather that one would not have been particularly helpful in this case. Finally, the issue of consolidation, which Christine May raised earlier, should be raised. Even though the original regulations are fairly recent, they have been altered a lot.

Do members agree to raise those points with the Executive?

Members *indicated agreement*.

Instrument not laid before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Sexual Offences Act 2003) 2004 (SSI 2004/206)

11:06

The Convener: No points have been identified on the act of adjournal.

I thank colleagues and remind them that next week's meeting is on Monday because Parliament will meet on Tuesday, Wednesday and Thursday. The legal briefing will begin at 2 o'clock.

Meeting closed at 11:07.

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