

SUBORDINATE LEGISLATION COMMITTEE

Monday 17 May 2004
(*Afternoon*)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

17th 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

Monday 17 May 2004

(Afternoon)

[THE CONVENER opened the meeting at 14:29]

Delegated Powers Scrutiny

School Education (Ministerial Powers and Independent Schools) (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 17th meeting of the Subordinate Legislation Committee this year. Apologies have been received from Murray Tosh, who is on business connected with his role as Deputy Presiding Officer, and from Gordon Jackson, who is away with the European and External Relations Committee.

Members will note from the legal brief that the bill has three parts, although only parts 2 and 3 really concern us in relation to subordinate legislation issues.

The first power under part 2 of the bill relates to section 98(3)(a) of the Education (Scotland) Act 1980, which is the power to prescribe by regulation what information registered schools must provide to the registrar of independent schools, and in what form. The legal advisers do not think that there are any issues to do with that power. Do members have any points to make?

Members: No.

The Convener: The second power comes under section 4(2) of the bill: the power to prescribe by regulations the form that an application for the registration of an independent school will take and the information that it must contain. The legal advisers think that the provisions are perfectly in order. Is that agreed?

Members indicated agreement.

The Convener: The third point also comes under section 4(2). It concerns the power to prescribe by regulations the class of person that will be defined as a "prescribed person". Section 4(2) inserts new section 98A into the 1980 act, and has caused the legal advisers some problems. It is suggested that, although the European convention on human rights will have to be taken on board, the annulment procedure is not

sufficient for this power, and that the affirmative procedure should be used instead. I should add that there is no statutory requirement for consultation. I need members' views.

Alasdair Morgan (South of Scotland) (SNP): It is a bit of a broad provision if one is able to proscribe a whole section of society from undertaking a particular activity, particularly through a negative instrument. Despite the failsafe requirement for that to be done in accordance with the ECHR, it is a broad power and, at the minimum, it should be subject to the affirmative procedure rather than the negative.

Mr Stewart Maxwell (West of Scotland) (SNP): I agree with that. The power seems extraordinarily wide. Huge swathes of the population could be classified as being prescribed persons. That could be controversial. At the very least the affirmative procedure ought to be used. The idea that there need not be prior consultation is extraordinary. There must be consultation on this sort of matter, and it would be unacceptable for the provisions to remain in their present form.

The Convener: Do we agree that consultation should be part of the process, and that we think that the affirmative procedure would be more suitable than the negative procedure?

Members: Yes.

The Convener: Section 9, in part 3, is the power to make an order appointing the day or days on which the provisions will come into force, as well as any transitional provisions or savings. No particular objection has been made as to how the section has been drafted. Is it agreed that it is okay?

Members indicated agreement.

The Convener: Section 4(1) relates to directions, rather than subordinate legislation. There is therefore no scrutiny attached to the provision. It concerns directions given by Scottish ministers to the registrar of independent schools regarding the information that must be recorded in the register of independent schools.

A lot of information has been provided by the legal advisers, who comment that they are not convinced by the Executive's justification for relying on a direction-making power, rather than on subordinate legislation. That justification is cited in paragraph 29 of the legal brief. The Executive mentions the need for flexibility, yet we are also told that flexibility can be effectively provided in orders and other subordinate legislation. Paragraph 29 of the legal brief says:

"However, the existing power in section 98 of the 1980 Act is a power to give directions and that is considered to provide an appropriate degree of flexibility over time, to

enable account to be taken of developments in the practical administration of the system.”

If we keep with things as they are, then the status quo will apply.

Alasdair Morgan: I think that we would want a reiteration of the status quo. Problems have not been caused in the past, so I do not think that we should be raising any queries at this stage.

The Convener: Is that agreed?

Members *indicated agreement.*

Executive Response

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

14:35

The Convener: Members will recall that we asked the Food Standards Agency Scotland two questions on the regulations. The first was why a certain point about the consultation requirements had not been included in the preamble. The Food Standards Agency’s answer suggests that it did not think that that was necessary.

Our second question was on consolidation—the regulations are getting quite messy. The agency has stated that it

“may consider consolidation once the current tranche of amendments is complete.”

I ask for members’ ideas on those two responses.

Christine May (Central Fife) (Lab): Good subordinate legislative practice would determine that a reference to the requirement for consultation should be in the preamble. The agency says that that is not a statutory provision. I accept that. Nonetheless, it is reckoned to be good practice. We have raised the matter before, and the agency has declined to take on board our views or to include such a reference. I think that we should make the point again.

The Convener: What about consolidation?

Mike Pringle (Edinburgh South) (LD): I think that we should refer that to the lead committee.

Mr Maxwell: I think that the agency’s response is fairly poor. It might consider our point, but it might not—and if it does consider it, it might reject it. Given the numerous amendments and changes that have been made, I think that our view on consolidation is correct. The agency says that it

“may consider consolidation once the current tranche of amendments is complete.”

When exactly will the current tranche of amendments be complete? That statement sounds rather open ended.

The Convener: We can ask that question. We have to pass on our views on the regulations to the lead committee, so we could perhaps ask our question informally. We can pass on our comments on the two points that we have raised on legislative practice and consolidation to the Parliament and the lead committee. Is that agreed?

Members *indicated agreement.*

Instruments Subject to Annulment

Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures) (Scotland) Order 2004 (SSI 2004/209)

14:37

The Convener: Two issues have been identified by our legal advisers. First, if there is derogation from what is being proposed, it is unclear whether the fish will simply not be weighed or whether the British sea fishery officer will not be present at the weighing. There is a difficulty with the interpretation of that.

On the second point, the legal advisers do not see the need for or the purpose of article 15(2) of the order, as its provisions appear to be covered by section 16(1) of the Interpretation Act 1978. Are there any other points? Do members disagree with those comments?

Christine May: No, but, given that a breach of the requirement to have the sea fishery officer present at a weighing would be a criminal offence, it is important that we ask for clarification on precisely the circumstances under which the derogation applies.

The Convener: We will ask for an explanation of the derogation and about the purpose of article 15(2). Is that agreed?

Members indicated agreement.

Food (Emergency Control) (Scotland) (Miscellaneous Amendments) Regulations 2004 (SSI 2004/210)

Tobacco Advertising and Promotion (Specialist Tobacconist) (Scotland) Regulations 2004 (SSI 2004/211)

The Convener: No particular points have been identified on either set of regulations.

Primary Medical Services (Consequential and Ancillary Amendments) (Scotland) Order 2004 (SSI 2004/212)

The Convener: The legal adviser makes two points on the order, both to do with the vires of the provisions. First, the amendments in paragraphs 1 and 5 of schedule 1 refer to reserved matters. Secondly, there is inclusion of a reference to paragraph 78 of schedule 1 to SI 2002/2469 in schedule 2. Are there any additional comments or do members agree to ask the Executive about those two points?

Members indicated agreement.

Meeting closed at 14:40.

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