

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 May 2004
(*Morning*)

Session 2

£5.00

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SUBORDINATE LEGISLATION COMMITTEE

18th 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 25 May 2004

(Morning)

[THE CONVENER *opened the meeting at 10:30*]

Items in Private

The Convener (Dr Sylvia Jackson): I welcome members to the 18th meeting this year of the Subordinate Legislation Committee. I have received no apologies, so I expect that Gordon Jackson will arrive during the meeting.

The committee is invited to consider whether to take both items 10 and 11 in private, because both concern draft reports. Item 10 is on the draft report concerning the committee's visit to Westminster, which comes under our inquiry into the regulatory framework. Item 11 concerns the draft consultation document for our inquiry. It would seem that the draft report for our Westminster visit is fairly near to completion, so I suggest that we deal with item 10 in public and deal with only item 11 in private. That is normal procedure for consideration of a draft document, and our adviser, Iain Jamieson, will be with us for that item. Is that agreed?

Members indicated agreement.

Delegated Powers Scrutiny

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

10:32

The Convener: We return to the Prohibition of Smoking in Regulated Areas (Scotland) Bill at stage 1. Stewart Maxwell is with us as both a member of the committee and the member in charge of the bill. Members will recall that the committee questioned whether the bill potentially made it possible for a ban on smoking to be imposed in almost all public areas. Stewart Maxwell was to take the matter away for consideration and return to us with his response, so I hand over to him.

Mr Stewart Maxwell (West of Scotland) (SNP): The main concern on the part of the committee—and rightly so—was that the power under section 2(1) as drafted could effectively allow private places to be regulated. For instance, somebody's car, home or other private space could potentially be regulated. Obviously, that is not the policy intention. I am happy to accept the comments that the committee made on 11 May.

It is my intention to lodge an appropriate amendment effectively to debar private places from the scope of the bill, so that a private space could not be created as a regulated area. Any private space would be protected and further primary legislation—a separate bill—would be needed to change that. Following amendment, the power under section 2(1) could not be used to regulate somebody's home, car or other private space. I think that that covers members' main concern. The exact wording of the amendment has not yet been worked out, but I think that it will deal with that main point.

The Convener: Could you elaborate on the example of a hotel bedroom, which we considered the last time we discussed the matter? Secondly, could you clarify your stance with regard to more open public spaces, rather than enclosed public spaces?

Mr Maxwell: I checked the position on the example of hotel rooms, about which there was some dubiety. I have received clarification on the matter from lawyers, and I understand that hotel rooms would be considered as private spaces. Once they are hired out, and guests have a key to their lock, they become a private space, so they would not be caught under the bill.

Murray Tosh (West of Scotland) (Con): Would a hotel's function suite or meeting room also be considered to be a private space, or would it constitute a public space?

Mr Maxwell: I think that such rooms would constitute public spaces, but I reiterate that a hotel bedroom would be exempt. It could not be included as a public space under the bill.

On open spaces, there is a clear distinction between an “enclosed public space” that is completely enclosed, such as this room, and places that are wide open. There is no policy intention to create restrictions or regulated areas in wide open spaces. There are places that fall between the two, which the bill does not cover. At the moment, a regulated area could not be created for somewhere that is partially enclosed. As is mentioned in the policy memorandum, a beer garden that was attached to a premises, or that was located outdoors and next to regulated premises, would not be included. Whether or not such places would be included at some point in future would be a matter for the Parliament to take up.

Christine May (Central Fife) (Lab): As one of the members who was concerned, I welcome what Stewart Maxwell has told the committee this morning. Obviously, we will want to see the precise terms of the amendment but, if it lives up to the spirit of what has been said this morning, I imagine that the committee will welcome it and—without wishing to pre-empt a decision—would recommend that it be agreed to.

Alasdair Morgan (South of Scotland) (SNP): We must report on the bill as it is, having heard what Stewart Maxwell has said. We will not see his amendment before we make our report, but we welcome the clarification that it is intended to make at stage 2.

The Convener: Is it agreed that we will report to the lead committee on that basis?

Members indicated agreement.

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

The Convener: Members will recall that we sent the Executive some questions regarding the School Education (Ministerial Powers and Independent Schools) (Scotland) Bill, which is at stage 1. They largely related to the question of the person who will be defined as a “prescribed person”. We were somewhat concerned about the breadth of the powers that were being suggested, especially as the matter was not being dealt with under the affirmative procedure.

Members will note that, halfway down paragraph 1 of its response to our first question, the Executive states, in justification of why it thinks the measure is needed, that:

“It would also be valuable were Scottish Ministers to

decide for example to impose a particular standard for teachers within independent schools, requiring registration with the General Teaching Council of Scotland.”

I have asked our legal advisers about the matter and, as members will see, they are not happy with the explanation that has been given. It is quite reasonable to seek that the affirmative procedure be used for the power.

Alasdair Morgan: It is all very well for the Executive to cite the potentially benign use of the power, but that does not get away from the fact that the power is very wide indeed. The Executive states later in its response:

“it is anticipated that use of this power would be made infrequently, and in limited circumstances ... There is no question of this provision being used to discriminate against wider sections of the community.”

That is not the point. It is not the intention of the current Executive that is the issue; the issue is that the bill gives powers to any future Executive to do just that. There need to be parliamentary safeguards against that happening. The affirmative procedure, rather than the negative procedure, should be used, and it should be necessary to consult before any further proposal is introduced.

The Convener: The Executive says that it would carry out appropriate consultation, but does the committee think that that should be specified in the bill?

Members indicated agreement.

The Convener: The two proposals are that the affirmative procedure be used for the powers in relation to the “prescribed person” under section 4(2), and that a reference to consultation be included in the bill.

Murray Tosh: It might be useful to put it on the record that, although the Executive has said that the power is included in the bill in order to give it the ability to take account of minor consequential changes that might arise from other legislation, the thrust of paragraph 11 of our briefing paper is that the proper vehicle through which to take account of such changes is that other legislation.

We should encourage the Executive to look at the range of amendments that may be required at the point at which it introduces primary legislation, instead of coming back and combing through subordinate legislation to see how other legislation might need to be changed to reflect the primary law that it has just passed.

The Convener: Absolutely. Two main points arise in respect of the “prescribed person” list, if we include the point that Murray Tosh has just made. Are we agreed?

Members indicated agreement.

The Convener: We will make our report on the bill to the lead committee.

Executive Responses

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

10:41

The Convener: We have two responses to consider under item 4 today. On the first instrument, members will remember that we raised a point about an ambiguous derogation. We asked whether the derogation is in respect of the requirement for a controller or whether it is in respect of the whole obligation. The Executive response confirms that it is in respect of only the controller.

The Executive has conceded the point that we raised in our second question; it agrees with us on that. Do members have any other point to raise?

Christine May: No. I suggest that we report the instrument on the ground that we asked for and received explanations.

The Convener: On the first point, we will say that the drafting was ambiguous but that we have received the Executive's full explanation. On the second point, we will say that the order failed to follow proper legislative practice.

Members indicated agreement.

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

The Convener: Members will remember that we raised the sufficiency of the vires. Our legal adviser is now of the opinion that the Executive's explanation is okay, although it was quite difficult to follow its explanation of the provision. Our advice now is that there is really no practical effect that would be detrimental in any way to the instrument.

Christine May: Can I ask that paragraph 26 of our briefing paper, which sets out the Scottish Executive's explanation of the point that we raised, be produced in full in the record or in our report?

The Convener: Absolutely. We all had problems with it.

Murray Tosh: Is it not a straight lift from a "Yes, Minister" script?

The Convener: Absolutely.

Christine May: We are looking for volunteers to read it out and make it sound sensible.

Mike Pringle (Edinburgh South) (LD): That would be impossible.

Draft Instruments Subject to Approval

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2004 (draft)

Advice and Assistance (Financial Limit) (Scotland) Amendment Regulations 2004 (draft)

10:43

The Convener: We move to item 5, which is consideration of draft instruments subject to approval. No points have been identified on either set of regulations. Is that agreed?

Members indicated agreement.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2004 (SSI 2004/221)

10:43

The Convener: We move to item 6, which is consideration of an instrument subject to approval. No points have been identified on the order. Is that agreed?

Members indicated agreement.

Instruments Subject to Annulment

National Health Service (General Medical Services Contracts) (Scotland) Amendment Regulations 2004 (SSI 2004/215)

10:43

The Convener: We move on to consideration of instruments that are subject to annulment. Members will remember that the principal regulations came to us in a not very good state. They are now being amended. No points have been identified on the regulations this time. Is that agreed?

Members *indicated agreement.*

National Health Service (Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2004 (SSI 2004/216)

The Convener: Again, no points have been identified on the regulations. Is that agreed?

Members *indicated agreement.*

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Amendment Regulations 2004 (SSI 2004/217)

The Convener: A minor point does arise, however, on these regulations. The comment from our legal adviser concerns regulation 2(3)(b). It is suggested that we inquire why “23(5) to (7)” is substituted for a reference to “23(6) to (8)”. It is not clear why paragraphs 23(8) and 23(9) of schedule 2 to the regulations are not included, as they appear to relate solely to paragraph 23(6). It is suggested that we consider asking for an explanation. Is that agreed?

Members *indicated agreement.*

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuff) (Scotland) Amendment (No 2) Regulations 2004 (SSI 2004/220)

General Medical Services and the General Medical Services and Section 17C Agreements (Transitional and Other Ancillary Provisions Orders) (Scotland) Amendment Order 2004 (SSI 2004/223)

10:45

The Convener: No points have been identified on the instruments. Is that agreed?

Members *indicated agreement.*

Instrument Not Laid Before the Parliament

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Sexual Offences Act 2003) 2004 (SSI 2004/222)

10:45

The Convener: We move on to consideration of instruments not laid before the Parliament. No points have been identified on the act of sederunt. Is that agreed?

Members *indicated agreement.*

Guidance Subject to Annulment

Framework Guidance on Preparing a National Park Plan (SE/2004/98)

10:46

The Convener: Two issues are raised in respect of the guidance. I gather that the Scottish Executive is confused about our first question, which is why there is no indication in the guidance that it is a draft and that it is subject to a form of parliamentary procedure under its parent act. Our legal advice is that that should be made clear. The second point that we should raise is that it might also be useful, following the Scottish statutory instrument precedent, to record in the text of the draft guidance the fact that the statutory procedure has been complied with in respect of the guidance.

We can raise the points formally or informally. What do members suggest that we should do?

Mr Maxwell: Given that it is the first of the draft guidelines that we—or anyone—has seen, I suggest that we do so formally in order to get our comments on the record and make the Executive aware of our views on the matter.

The Convener: Are we agreed?

Members *indicated agreement.*

Murray Tosh: The draft guidance has come to us because it falls within this committee's remit. Has it also gone to the Environment and Rural Development Committee so that any policy issues can be considered?

The Convener: Yes, it has.

Murray Tosh: That is fine.

Regulatory Framework Inquiry

10:47

The Convener: We move on to item 10, which is the committee's inquiry into the regulatory framework in Scotland. Members have a copy of the report that Christine May and Alasdair Morgan have put together on their visit to Westminster. Perhaps one of them would like to speak to the paper and take us through some of the main points. Who would like to volunteer?

Christine May: Perhaps I could give some overall impressions rather than speak specifically to the report. Unlike Alasdair Morgan, I have no experience of Westminster. What struck me was how diffuse the scrutiny system for subordinate legislation is; it is spread over a number of bodies.

As the report highlights, the body that tends to have the greatest weight placed on its deliberations is the House of Lords Delegated Powers and Regulatory Reform Committee, which is a select committee. Certainly, it was clear from what its members told us that significant account is taken of its reports. I do not think that they do very many reports in huge detail, but when they do produce one, the weight of the committee's expertise means that its reports count for a considerable amount.

The other question that was asked of that committee's members was what account they took of Scottish elements in delegated legislation. Other than Lady—I am sorry—

Alasdair Morgan: Lady Carnegie.

Christine May: Yes. Lady Carnegie made it her business to look out for Scottish elements.

The House of Commons Regulatory Reform Committee does not meet on a regular basis; it meets only when there is sufficient work for it to do.

The Joint Committee on Statutory Instruments is quite similar to this committee. I recall that its membership is fairly static, which means that it has built up a considerable amount of skill and expertise. Its meetings are relatively short. We found it interesting that most of the JCSI's meetings are held in private, unless witnesses have been called to give evidence. The fact that there is no statutory requirement to publicise the committee's agenda means that the timescale between deciding what might be on the agenda and debating a particular subject is quite short.

The European Scrutiny Committee obviously considers a great volume of material. I suppose that the main difference is that Westminster does not have the subject committee structure that we

do, which allows the policy elements to be examined in parallel with the work that the Subordinate Legislation Committee does. That is a significant difference.

I have to confess that, by the time we found out about the Select Committee on the Merits of Statutory Instruments, my brain was getting a bit tired—it had been a very long day. Alasdair Morgan might want to comment on what that committee does.

Although the work of the regulatory impact unit and the better regulation task force was interesting, I did not get a great sense of what they have achieved in terms of reducing regulation in a practical way. We still hear the same sorts of comments from business, local authorities and others about the impact of regulation. Perhaps a bit more time might be necessary for that to work through the system.

The Convener: Thank you, Christine. Alasdair, do you want to add anything?

Alasdair Morgan: It is clear that, from the outside, the position as regards the number of committees and how their responsibilities are divided is a bit confusing. Our system is much simpler. That is because the Westminster system has arisen in an ad hoc fashion over many years and because Westminster is a bicameral Parliament, which means that two chambers have an interest in subordinate legislation.

I will develop a couple of the points that Christine May mentioned. There might well be an issue about United Kingdom statutory instruments that cover Scotland, but I suspect that that is no more the case with statutory instruments than it is with primary legislation.

Some of the committees at Westminster seem to have more weight. For example, the Select Committee on the Merits of Statutory Instruments can secure a debate in the House of Lords if it has concerns about a particular instrument. Although it is not impossible that we could secure a debate in the Scottish Parliament in similar circumstances, I suspect that that is rather unlikely to happen.

The fact that the Westminster system has some strengths stems, in part, from the more extended consideration that the House of Lords can give to all kinds of legislation; it can adopt a more measured and relaxed approach and can examine matters in depth. However, given that we will not have a second chamber here for some time to come, that is probably not a viable option.

I thought that the regulatory impact unit was interesting. It is clear that it has plans. The Select Committee on Delegated Powers and Regulatory Reform was also eager to consider regulatory reform, so I think that there is more pressure down

in Westminster to begin to reform pre-existing legislation. That is not something that we are doing to any extent.

The Convener: Are there any other comments?

Murray Tosh: I have a couple of points. First, the report was good and helpful and we are all grateful for the work that Alasdair Morgan and Christine May have done.

I have a query about the note in parenthesis in paragraph 17 of the report, which states:

“At Westminster, Ministers are required to provide with affirmative instruments, a statement of compatibility with Human Rights.”

It goes on to say that there is no such parallel requirement here. I wondered what the reason for that is and whether it is an issue that we should consider at some stage. At first sight, it occurred to me that the reason might well be that all our legislation must be compatible with human rights, but I presume that that would not cover subordinate legislation that was made under pre-devolution legislation. It struck me that that was a bit of a gap in our procedures.

The Convener: I gather that that is because we have a blanket requirement for the European convention on human rights to apply to all our committee work and so on.

Murray Tosh: Does that mean that any subordinate legislation that was made under the Environmental Protection Act 1990, for example, which was passed pre-devolution, would be ECHR proof?

The Convener: As far as legislation that has been passed since the Scottish Parliament was set up is concerned—which is obviously all that we are concerned with—everything that the ministers deal with must have taken into account the human rights aspect. Can you ask your question about the pre-devolution situation again?

Murray Tosh: Not all the statutory instruments that Scottish ministers make are made within the framework of devolved legislation; some of them are made within the framework of primary legislation that predates devolution and which was passed when adherence to the ECHR was not binding. I am simply asking whether instruments that are made under those arrangements are still ECHR proof.

The Convener: We do not believe that such instruments would be ECHR proof.

Christine May: That is a good point.

Murray Tosh: We do not need to put the matter at the top of our agenda, but the legal advisers might like to give it some thought and to consider whether we ought to raise it.

The Convener: That is a very good point. In relation to paragraph 17 of the report, I suggest that we—

Murray Tosh: I do not think that the paragraph needs to be changed; it simply identifies an issue.

The Convener: Yes, but I do not want to miss that point when we conduct our review. I want to ensure that Alasdair Rankin has made a note of it. The legal adviser will find some more information and prepare a further note for us, which will add to the comment in paragraph 17.

Murray Tosh: The other point that struck me when reading the report relates to paragraph 27, which says:

“The Committee was aware that any instrument on which it did report would be likely to be prayed against.”

That is a straightforward importation of Westminster jargon. I wonder whether it might be helpful to translate that into everyday speak. There are many pieces of legislation in the Scottish Parliament that all sorts of people pray against in a different sense. [*Laughter.*]

The Convener: That is no problem; we can do that.

Murray Tosh: I was not thinking of Stewart Maxwell’s bill, although I know one or two people who might be praying against that.

Mr Maxwell: I was interested in paragraph 26, the opening sentence of which mentions that “some 1,500 negative instruments” come before Parliament each session. That is an incredible number of negative instruments. On the back of that, I wondered how effective Westminster had been in reducing the number of statutory instruments. Does the figure of 1,500 represent a reduction on the number of negative instruments in previous years or has there been no impact at all? The regulatory impact unit has obviously been set up with the intention of simplifying, codifying and consolidating what already exists, but I hope that it also has the aim of reducing the amount of red tape. I wonder whether the figure that is quoted represents a reduction.

Christine May: I do not think that we asked the question.

The Convener: That figure does not represent a reduction.

Christine May: I seem to recall that the impression was given that better regulation did not necessarily mean fewer pieces of paper; it just meant that less of an onus was put on those people who had to comply with it.

Mr Maxwell: I accept that, but when I read that Westminster dealt with 1,500 negative instruments per session, I wondered about the volume.

Christine May: I think that we were struck by the volume of legislation that is dealt with by a plethora of committees. It made my head ache to think about how anyone could keep a track of the whole process.

Mr Maxwell: I accept what Christine May said about the fact that better regulation does not necessarily mean less regulation, but I hope that, in addition to simplification and codification, part of the remit would be to reduce the overall amount of bureaucracy, if possible. Having read some of the material for the next item on the agenda, I would have thought that one of the points of our inquiry into the regulatory framework in Scotland would be to consider whether certain pieces of subordinate legislation—whether negative or otherwise—are not only well drafted and all the other things that they need to be, but necessary. I would have thought that reducing the number of statutory instruments should be part of the overall agenda that is considered.

Christine May: That is one of the things that the regulatory reform folk look at. They consider whether it is necessary to have instruments at all. However, I do not think that they have yet found an example of one that was not necessary. I am sure that we asked about that.

Mr Maxwell: I was just curious about that.

The Convener: As Murray Tosh did, I thank Alasdair Morgan and Christine May, as well as Alasdair Rankin, the clerk, and Margaret Macdonald, our legal adviser, for their input and for putting together the draft report. I thank Alasdair Morgan and Christine May in particular for giving us the context, which is always very useful. Alasdair Morgan also has the experience of having been at Westminster as an MP.

Christine May: It might be appropriate for you to write to the relevant people at Westminster, in each House, to thank them.

The Convener: Yes, that is agreed.

I bring to an end the public part of the meeting. We move into private for item 11.

11:00

Meeting continued in private until 12:10.

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