

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 22 June 2004  
*(Morning)*

Session 2

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **22<sup>nd</sup> 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 22 June 2004

(Morning)

[THE CONVENER opened the meeting at 10:32]

### Delegated Powers Scrutiny

#### Breastfeeding etc (Scotland) Bill: Stage 1

**The Convener (Dr Sylvia Jackson):** I welcome members to the 22<sup>nd</sup> meeting in 2004 of the Subordinate Legislation Committee. I have received apologies from Gordon Jackson, who is attending this morning's Finance Committee meeting as a substitute. He will attend this meeting if he can.

The first item on the agenda is delegated powers scrutiny. We are considering the Breastfeeding etc (Scotland) Bill at stage 1, which is a member's bill that was introduced by Elaine Smith MSP. The bill aims to encourage breastfeeding by creating the new offence of preventing a child being fed milk in a public place or licensed premises. We have in front of us the bill, the financial memorandum and the policy memorandum. The legal advice is that no significant points arise on the bill. Do members have any points?

**Mike Pringle (Edinburgh South) (LD):** Is Elaine Smith coming to the meeting?

**The Convener:** No, she cannot be with us this morning.

Is it agreed that no points arise on the bill?

**Members indicated agreement.**

## Executive Responses

### Police (Scotland) Regulations 2004 (SSI 2004/257)

10:33

**The Convener:** Agenda item 2 is the consideration of Executive responses. Members will see from the information that we have received on the regulations, and from the legal advice, that various concerns remain. The first is a doubt about whether the regulations are intra vires. The main point, which we raised in point 2 of our letter to the Executive, is that the safeguards on hours of duty that we thought should, under the parent act, be in the regulations do not appear to be there. We also raised another possible intra vires issue in point 1 of our letter.

In point 8, we suggested that the meaning of regulation 8 could be clearer. The information that was requested in point 3 has been supplied by the Executive. In point 7, we mentioned that a devolution issue possibly arises because the provisions on part-timers could involve sex discrimination. The Executive has acknowledged the defective drafting that was pointed out in points 9, 10 and 12 and the failure to follow proper legislative practice that was pointed out in points 4, 5, 6 and 11.

Is it agreed to pass on those points to the lead committee and the Parliament?

**Members indicated agreement.**

### Shrimp Fishing Nets (Scotland) Order 2004 (SSI 2004/261)

**The Convener:** We wrote to the Executive about the timing of the order. Do members agree to pass on to the lead committee and the Parliament the information that the Executive has supplied?

**Members indicated agreement.**

### Advice and Assistance (Scotland) Amendment (No 2) Regulations 2004 (SSI 2004/262)

### Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 3) Regulations 2004 (SSI 2004/263)

### Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2004 (SSI 2004/264)

**The Convener:** We raised several issues on the regulations about legislative practice. It is

recommended that we draw the attention of the lead committee and the Parliament to the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2004 (SSI 2004/264), on the ground of defective drafting, which the Executive has acknowledged. The legal adviser has drawn to our attention the need for a saving provision in the regulations. It has also been suggested that only relevant amendments should be mentioned in footnotes, which would certainly help our legal colleagues when they examine such instruments.

**Christine May (Central Fife) (Lab):** It is not only our legal colleagues who require simplification.

**The Convener:** It is us as well.

**Christine May:** The users of the regulations might well benefit from simplification.

**The Convener:** Yes. Is it agreed to make those points to the lead committee?

*Members indicated agreement.*

### **Food Labelling Amendment (Scotland) Regulations 2004 (SSI 2004/269)**

**The Convener:** We asked about progress on the consolidation of food labelling legislation and have received information. Do members have any comments?

**Christine May:** I welcome what the Food Standards Agency Scotland is doing and encourage it to carry on.

**Murray Tosh (West of Scotland) (Con):** It is nice to be able to be positive about the Food Standards Agency Scotland.

### **Education Maintenance Allowances (Scotland) Regulations 2004 (SSI 2004/273)**

**The Convener:** A devolution issue arose because the reference to the Scottish ministers in paragraph 6(a)(i) of schedule 1 should have been to the Secretary of State for the Home Department. That mistake has now been acknowledged and will be corrected.

### **Waste Management Licensing Amendment (Scotland) Regulations 2004 (SSI 2004/275)**

**The Convener:** Again, we asked for and received information on consolidation, which we will pass on to the lead committee and the Parliament. Are there any other points?

**Christine May:** There was the issue of the transposition note. Perhaps I should devise a form of words that could be referred to as standard paragraph 1 to go into our reports. We should mention the fact that a transposition note was not provided.

**The Convener:** The Executive response states:

"The Department notes the Committee's comments and regrets any inconvenience which the absence of a transposition note may have caused. As the Committee is aware it is not the Executive's policy to prepare such a note on each transposition but the Department will bear the Committee's comments carefully in mind for a future measure of this kind."

**Christine May:** That is standard response (a).

**The Convener:** Yes. It would be useful to send an encouraging letter back.

### **Inshore Fishing (Prohibition of Fishing and Fishing Methods) (Scotland) Order 2004 (SSI 2004/276)**

**The Convener:** It has been suggested that we draw the attention of the lead committee and the Parliament to the fact that the Executive has acknowledged a failure to follow proper legislative practice and that there is defective drafting.

### **Common Agricultural Policy Non-IACS Support Schemes (Appeals) (Scotland) Regulations 2004 (SSI 2004/278)**

**The Convener:** We should make a number of points to the lead committee and the Parliament. The meaning of regulation 4(4) could be clearer and regulation 8 either requires clarification or is defectively drafted. Are there any other points?

**Murray Tosh:** I wonder about paragraph 95 in our legal briefing, which flags up the role of a member of staff in what is presented to us as an external review, but states that that is not a matter for the committee. The issue may not be as dramatic as those of temporary sheriffs or planning inquiry reporters, but questions have been raised about people being genuinely independent from ministers, which have raised issues under the European convention on human rights. If we took a wider view, we could regard this as a devolution issue because it raises ECHR issues. We might want to pursue that matter further with the Executive in order to clarify what its thinking is, and we might want to advise the lead committee of the matter.

**The Convener:** I suggest that we advise the lead committee of that. We do not have time to go back to the Executive, however.

**Murray Tosh:** Is it still worth asking the Executive about it?

**The Convener:** Yes, we should ask the Executive about the general issue.

**Murray Tosh:** I do not pretend to know what the Carltona principle is—as I noted from the briefing, our legal advisers are extremely comfortable with

it—but similar issues might arise again. We should lay down a marker on that general point.

**The Convener:** We will write a letter to the Executive, asking about that matter in a general way. Well done, Murray.

### **Beef Carcase (Classification) (Scotland) Regulations 2004 (SSI 2004/280)**

**The Convener:** There is an issue around the use of the phrase “specified premises”, specifically whether it alludes to a list that might already have been composed. It does not appear in the equivalent English regulations, and there was some concern about why it is in the Scottish regulations. It is suggested that we draw the attention of the lead committee and the Parliament to the regulations, either on the ground that the meaning of regulation 7(2) could be clearer, or that that regulation is defectively drafted.

**Christine May:** The wording could be clearer there, but I do not think that I would go so far as to say that it constitutes defective drafting. Let us report the regulations on the ground that regulation 7(2) could be clearer.

**The Convener:** Is that agreed?

**Mr Stewart Maxwell (West of Scotland) (SNP):** I would not necessarily go to the wall on the matter, but if a regulation is not clear, then surely that implies that it is defectively drafted.

**The Convener:** I think that, when we say that an instrument is defectively drafted, that is more to do with the fact that procedures have not been followed, as opposed to there being a question of clarity of meaning. The legal adviser is nodding her head. I think that it is more a question of meaning in this case. In particular, it is a question of whether a list of premises will be compiled.

**Mr Maxwell:** I agree with the point about the list of premises, which is not clear at all.

**The Convener:** Exactly. Does the committee agree that we will treat the meaning of regulation 7(2) as the main issue, saying that it could be clearer?

*Members indicated agreement.*

### **River Findhorn Salmon Fishery District (Baits and Lures) Regulations 2004 (SSI 2004/259)**

**The Convener:** There is an issue about why the Executive is waiting until the orders applying to the Borders rivers are made before commencing the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

**Christine May:** According to the legal briefing, there was a fair amount of pressure to deal with

this area of legislation. Now, nothing has happened. It is reasonable for the committee to ask, in view of the pressure to get the act on to the statute book, why nothing has happened since it was passed.

**The Convener:** Is that agreed?

*Members indicated agreement.*

**The Convener:** We will draw the attention of the lead committee and the Parliament to the matter, and we will pass on to them the information that we obtained from the Executive. Are you suggesting, Christine, that we write back to the Executive, saying that we are still concerned—

**Christine May:** That the 2003 act has not been commenced, despite the pressure for it to be passed.

**The Convener:** Is it agreed that we do that?

*Members indicated agreement.*

### **Assynt - Coigach Area Protection Order 2004 (SSI 2004/260)**

**The Convener:** Members will have seen the letter from Dennis Canavan, which raises an important point: where there is a second application, the people who were involved with the first application should be informed and automatically involved in consultation. I hope that members agree that there is concern over the fact that that has not been the case. It is also of concern that the response from the Executive does not tell us too much about the consultation.

10:45

**Alasdair Morgan (South of Scotland) (SNP):** Although we could argue—as we might do next week—about whether the Executive has acted within the law, I do not think that it has acted within the principles that the Parliament is trying to espouse. If somebody objects to the first draft of an order, which is then withdrawn because it is seen to be defective, then the very least that we could do, in this day and age, is tell that person when a second order is being made. It might have been advertised in, say, the *John O’Groat Journal*, but I suspect that it might be possible to miss the exciting public information advert among all the other stuff that that journal contains. I do not think that the Executive has done what it should have done in the way of wider consultation.

**The Convener:** I gather that we have enough time to return to the Executive on the matter. We can make those points and ask for more information about who was consulted and about the feedback from the consultation.

**Christine May:** In asking the Executive that, are we going to mention that we are still concerned that the order might not be *intra vires*, because of the actions that have not been taken?

**The Convener:** Yes—because of the way in which the consultation process has been dealt with, particularly in relation to the issues identified by Dennis Canavan.

**Murray Tosh:** Even if we did not have time to go back to the Executive with respect to the order, it is worth asking what it generally does about previous objectors to instruments. Alasdair Morgan is right to suggest that it is not so much a question of the law as of the spirit of the law. When the law is applied, local authorities are expected to be scrupulous in getting back to objectors and telling them what the outcomes of various processes have been. We can derive from that some sort of sense in which the body politic in Scotland is supposed to correspond with people and keep them in touch with what is happening. There is a clear indication that the Executive has not done so in this case. That is perhaps a more general issue, which does not apply just to the order before us. It is about an attitude of mind or a way of working—within a department or within the Executive as a whole. We might usefully explore that in the interest of ensuring, as Alasdair Morgan said, that the Executive lives up to the principles that we have espoused: those of being absolutely open and encouraging good communication and so on.

**The Convener:** Absolutely. We have time to get back to the Executive about the order, so we can make both our specific point and the general point that Murray Tosh has outlined. Is that agreed?

**Members** *indicated agreement.*

## Instruments Subject to Annulment

### TSE (Scotland) Amendment Regulations 2004 (SSI 2004/277)

10:47

**The Convener:** The regulations deal with scrapie and BSE. No points of substance have been identified by the legal team.

**Christine May:** I would like my standard paragraph 1 on transposition notes to be noted.

**The Convener:** That will be included.

### Pig Carcase (Grading) Amendment (Scotland) Regulations 2004 (SSI 2004/279)

**The Convener:** No points have been identified on the regulations.

**Christine May:** That is unfortunate. I was looking forward to some points being identified on what is a very large document.

### Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2004 (SSI 2004/281)

**The Convener:** It is suggested that we ask the Executive to explain the drafting of regulation 3(2), which does not appear to be an amendment of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989/1490), as stated under regulation 3(1). Rather, it seems to be a free-standing provision or an amendment of regulation 2 of the Civil Legal Aid (Scotland) (Fees) Regulations 2003 (SSI 2003/178). I wonder if we should deal with the matter by means of an informal letter—or perhaps our response should be stronger than that.

**Christine May:** We should make our point more strongly, because the question that arises is a serious one.

**The Convener:** We will ask the Executive about the matter.

**Christine May:** There is a further issue on the regulations, which also applies to the regulations that we will consider next: the citing in footnotes of amending instruments that are not relevant. That does not affect the validity of the regulations, but folk should not have to wade through a whole load of stuff that is not relevant. It is incumbent on the Executive to weed that out, rather than expecting people to identify the non-relevant amending instruments.

**The Convener:** That relates to a point that we made previously.



**Christine May:** Yes. We should write an informal letter to the Executive on that point.

**The Convener:** We will write an informal letter.

### **Criminal Legal Aid (Scotland) Amendment Regulations 2004 (SSI 2004/282)**

**The Convener:** No points of substance have been identified.

**Christine May:** As with the previous regulations, irrelevant amending instruments have been cited in a footnote.

**The Convener:** That is the same point that Christine May made on the previous regulations. We can also mention these regulations in the informal letter.

### **Conservation of Seals (Scotland) Order 2004 (SSI 2004/283)**

**The Convener:** No points arise on the order.

### **National Health Service (Borrowing and Loans from Endowments) (Scotland) (No 2) Regulations 2004 (SSI 2004/284)**

**The Convener:** No points have been identified on the regulations, apart from one small matter. The explanatory note cites the Public Appointments and Public Bodies etc (Scotland) Act 2003 and the National Health Service (Borrowing and Loans from Endowments) (Scotland) Regulations 2004 (SSI 2004/16). It is believed that those are unnecessary, as both are given in footnotes in the regulations. We can address that also through an informal letter. Is that agreed?

**Members indicated agreement.**

### **National Health Service (Transfer of Property between Health Boards) (Scotland) (No 2) Regulations 2004 (SSI 2004/285)**

**The Convener:** It is suggested that we ask the Executive to explain what powers authorise regulations 2(c) and 2(d)(vii). Is that agreed?

**Members indicated agreement.**

### **Mental Health Tribunal for Scotland (Appointment of Legal Members) Regulations 2004 (SSI 2004/286)**

### **Victim Statements (Prescribed Offences) (Scotland) Amendment (No 2) Order 2004 (SSI 2004/287)**

**The Convener:** No points have been identified on the instruments.

### **Environmental Protection (Restriction on Use of Lead Shot) (Scotland) Regulations (SSI 2004/289)**

**The Convener:** We now come to an instrument that has caused a bit of concern. There is a big issue in relation to what has been transferred to the regulations from the parent act. Points (a) to (i) of our legal advice show where it is thought that there are serious vices issues. I can go through those points individually or we can just accept them. Do members have any comments on the legal advice?

**Christine May:** No. We have received a fairly lengthy briefing. One specific issue that has been raised is that the Executive should be asked to confirm that the notice of the making of the regulations was published in the *London Gazette* as well as in the *Edinburgh Gazette*. That seems to be a requirement. Given the importance of shooting and sporting activities to the tourism industry in Scotland, I am sure that that is relevant. I have no doubt that committee members read the *London Gazette* regularly.

**Mike Pringle:** Absolutely.

**Alasdair Morgan:** Fascinating although the gazettes are, the main point is the conferral of fairly draconian powers on the police when the parent act may not allow the conferral of those powers. That is something on which we want a speedy answer.

**The Convener:** They are stop-and-search powers. There are serious concerns; therefore, we will write to ask the Executive to clarify those issues. Is that agreed?

**Members indicated agreement.**

### **National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004 (SSI 2004/292)**

**The Convener:** Most of the points that are raised in our legal briefing are drafting points. There are four points altogether. Do members have any comments on the regulations?

**Christine May:** None, other than those that are made in the legal briefing.

**The Convener:** Okay. We will ask the Executive for responses to points (a) to (d) in the legal briefing. Is that agreed?

**Members indicated agreement.**

**Regulation of Care (Scotland) Act 2001  
(Transitional Provisions) Amendment  
Order 2004 (SSI 2004/293)**

**The Convener:** No points on the order are raised in our legal advice. Do members have any points to raise?

**Mr Maxwell:** The order breaches the 21-day rule.

**The Convener:** Yes, it does. However, the Executive explains in its letter to the Presiding Officer that, until the beginning of this month, it was hoped that most, if not all, relevant providers would have applied by the due date. They had not.

**Mr Maxwell:** I hear what the Executive is saying, but that seems over-optimistic and has been proved so.

**The Convener:** A little, yes.

**Mr Maxwell:** The Executive should have expected that not all providers would have applied by the due date.

**Christine May:** We could write an informal letter to the Executive.

**The Convener:** Yes, we could write an informal letter. Is that agreed?

**Members** *indicated agreement.*

**Instruments Not Laid Before  
the Parliament**

**Homelessness etc (Scotland) Act 2003  
(Commencement No 2) Order 2004  
(SSI 2004/288)**

10:54

**The Convener:** No points have been identified in relation to the order.

**Act of Sederunt (Rules of the Court of  
Session Amendment No 4) (Personal  
Injuries Actions) 2004 (SSI 2004/291)**

**The Convener:** No points have been identified in relation to the act of sederunt. Do members have any points to raise?

**Members:** No.

**The Convener:** Right. I thank colleagues for coming to the meeting.

*Meeting closed at 10:54.*

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