

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 29 June 2004
(Morning)

Session 2

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2004.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now
trading as The Stationery Office Ltd, which is responsible for printing and publishing
Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 29 June 2004

Col.

| | |
|--|-----|
| EXECUTIVE RESPONSES | 539 |
| Assynt - Coigach Area Protection Order 2004 (SSI 2004/260) | 539 |
| Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2004 (SSI 2004/281) | 541 |
| National Health Service (Transfer of Property between Health Boards) (Scotland) (No 2) Regulations 2004 (SSI 2004/285) | 541 |
| Environmental Protection (Restriction on Use of Lead Shot) (Scotland) Regulations 2004 (SSI 2004/289) | 541 |
| National Health Service (Vocational Training for General Dental Practice) (Scotland) Regulations 2004 (SSI 2004/292) | 546 |
| INSTRUMENT SUBJECT TO APPROVAL | 547 |
| The Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (East Coast) (Scotland) Order 2004 (SSI 2004/298) | 547 |
| INSTRUMENT SUBJECT TO ANNULMENT | 548 |
| The Education Maintenance Allowances (Scotland) Amendment Regulations 2004 (SSI 2004/301) | 548 |

SUBORDINATE LEGISLATION COMMITTEE

23rd 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 29 June 2004

(Morning)

[THE CONVENER *opened the meeting at 10:18*]

Executive Responses

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

The Convener (Dr Sylvia Jackson): I welcome members to the 23rd meeting of the Subordinate Legislation Committee this year. I have apologies from Murray Tosh, who is attending a meeting of the British-Irish Inter-Parliamentary Body. I also have apologies from Mike Pringle, who made arrangements before the recess dates were changed.

The first item on our agenda is Executive responses. Members will remember that we received a letter from Dennis Canavan outlining his concerns about how this second order was dealt with. The people who objected to the first version of the order were not told that there was a second order.

We have a lengthy brief from the legal adviser. It would appear that although there is nothing to say that the Scottish Executive had to inform the previous objectors, there is no doubt a wee bit of concern that they were not told, especially as there were only 13 of them. More particularly, there is concern that Dennis Canavan was not told about the second order and brought into the consultation process.

Alasdair Morgan (South of Scotland) (SNP): Although the Executive has followed the letter of the law, that is not the point. Dennis Canavan feels—and I think we feel—that in this day and age there should have been a more significant degree of consultation. At a minimum, those people who objected to the first order should have been contacted, especially because the second order is substantially different, as the Executive admits. I do not see that doing that would have incommoded the Executive in any way and it would have been in the spirit of what we hope is our approach to legislation.

The Convener: Absolutely.

Christine May (Central Fife) (Lab): I support that entirely. In support of Alasdair Morgan's view,

I cite the fact that we and the Executive urge the public to become involved, to take an interest and to participate. Here we have an example of people who are doing just that by putting forward their objections, and they are almost being ignored. That is not how to engender public support and trust. If nothing else, the Executive might want to consider what it might do on a formally informal—if I can put it that way—basis from now on in such circumstances.

Mr Stewart Maxwell (West of Scotland) (SNP): I agree with both the members who have spoken. It comes down to natural justice and best practice. The rules of natural justice have been ignored, and this is not best practice. I was unhappy when I read the briefing the first time around. Dennis Canavan makes some very pertinent points, as do the objectors he represents. Clearly, the objectors should have been informed. I do not think that we should leave the issue at that. As Alasdair Morgan pointed out, although the Executive did not break any laws or rules, we should bring the matter to the attention of the Parliament. In particular we should point out to the lead committee what Alasdair Morgan said about lack of consultation.

The Convener: We cannot formally bring the order to the attention of the lead committee, but we could send a letter or a copy of the report.

Mr Maxwell: Rather than just sending a copy of the report and saying nothing, I think that we should at least send a letter to the convener.

The Convener: We will draw the attention of Parliament to the order on the ground that we are concerned about it; that can be documented. We will also draw our conclusions when we have that information from the Scottish Executive. We will write a letter to the lead committee along the same lines and we will include a copy of our report. Do we want to write to the Scottish Executive?

Christine May: My view is that we should let the Executive know the view that we have come to as a result of Dennis Canavan's comments. More important, we should ask the Executive if it proposes to make arrangements or lay down guidelines for dealing with such matters in future.

Alasdair Morgan: The Executive seems to be missing a trick on its own behalf. Although it is not clearly detailed in the letter, presumably some of the objections to the first order were taken into account. So it would be to the Executive's benefit to write to the first set of objectors to tell them that it has listened to them and changed the legislation as a result.

The Convener: Absolutely. Our legal advice says that it is not clear what points have been taken on board. The Executive could have shown that it had done a lot more work on the order.

We will also write a letter to Dennis Canavan, telling him what has happened.

Members *indicated agreement.*

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

The Convener: It is recommended that we draw the drafting of the regulations to the attention of the lead committee and the Parliament. The drafting will not really affect anything, but it is not good. 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: A number of issues arise about the vires of the regulations. Paragraph 28 of the legal brief covers the point about the modification of section 5(5) of the parent act, the Public Appointments and Public Bodies etc (Scotland) Act 2003. If members do not have any additional points to raise, other than what is in the legal brief, I suggest that we draw the attention of the lead committee and the Parliament to the information that has been provided to us. There are still doubts about the vires of the regulations.

Members *indicated agreement.*

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

The Convener: We now come to the regulations that have been causing us most concern. The legal advisers have identified four main points. First, that

"there are very serious doubts as to whether it is intra vires on points 1, 2, 3 and 4 and to a lesser extent on point 6".

Secondly, that there is

"a devolution issue on point 3".

Thirdly, that there is

"defective drafting on points 5, 6 and 7".

And finally, that there has been a

"failure to follow proper legislative practice on points 8 and 9."

It is suggested that a radical rethink is needed. I invite members' views.

Christine May: I wonder how we highlight to the lead committee that we have really serious concerns about the vires and enforceability of the regulations. The regulations seem to have been

got so wrong. We were amused by our earlier discussion about disjunctive ands, but the point is that the regulations should have been advertised in both the *London Gazette* and the *Edinburgh Gazette*, yet that requirement appears simply to have been ignored. That really will not do. We cannot have folk running round the country trying to arrest people on the basis of flawed regulations. That certainly will not do. We need to have wording that expresses our real, serious concern to the lead committee. We suggest that the Executive withdraws the regulations, or that the lead committee asks the Executive to withdraw and re-lay the regulations.

Alasdair Morgan: At certain points in the regulations, the degree by which they are ultra vires is beyond a simple technicality, as is sometimes the case. There are substantive issues, particularly around the power of arrest and the search of persons, as opposed to the search of premises.

Gordon Jackson (Glasgow Govan) (Lab): What kind of Scottish statutory instrument is it?

The Convener: It is subject to annulment.

Gordon Jackson: I wonder what the duty of the committee is in this instance. If we take the view that an instrument is a dud, I do not suppose that we have any right or duty simply to stop the instrument.

The Convener: No.

Gordon Jackson: We could speak against it, or that sort of thing.

The Convener: We could do. We could make a recommendation.

Gordon Jackson: In the case of an affirmative instrument, which comes before the Parliament, would we be entitled to stand up and speak against it, saying that it is our job to check things and we think that the instrument is a dud and should not go through? I am curious about what exactly our powers and duties are.

Christine May: It might be possible to pray against the instrument.

Mr Maxwell: We do not have any powers in this regard, but we certainly have a duty.

Gordon Jackson: Yes—I am just asking what we are meant to do.

The Convener: Any member could speak against the instrument when it comes before the Parliament.

Gordon Jackson: But this instrument will not come before the Parliament.

The Convener: The lead committee is looking at the regulations tomorrow. We need to get something to it speedily.

Mr Maxwell: Which is the lead committee?

The Convener: It is the Environment and Rural Development Committee.

10:30

Alasdair Morgan: When does the 40-day period expire? Will the 40-day period still be live after the recess?

The Convener: No.

Alasdair Morgan: What happens as far as the clock is concerned? Unless the 40-day period expires this Friday, does the clock carry on ticking during the recess, or does it stop?

Alasdair Rankin (Clerk): The clock stops, but there might not be time to accommodate the process of the lead committee recommending to the Parliament that the regulations be annulled. Upon such a recommendation, the Parliamentary Bureau would have to lodge a motion to annul for consideration in the chamber, and there would not be time for all that to happen on the other side of recess.

Alasdair Morgan: Any member may lodge a motion to annul within the 40-day period. Is that something that we could do at the beginning of September, if we were so inclined?

Alasdair Rankin: Under standing orders, that could happen. The parliamentary timetable in early September, following the summer recess, might make it necessary to hold meetings outside of the usual schedule. The Parliamentary Bureau would need to consider the matter. It is for the bureau to lodge a motion to annul for debate in the chamber and it might be necessary to arrange business specifically for that. Your suggestion is possible in theory, but those additional actions would be required.

The Convener: What I am picking up from this is that we must first alert the lead committee to the difficulties with the regulations. What can the lead committee do?

Alasdair Rankin: The lead committee can debate the regulations and recommend that the Parliament annuls them. The bureau would then have to lodge a motion to annul, which the whole Parliament would consider.

Christine May: And that will come up in September. We could recommend that to the lead committee.

The Convener: I think that that is what we should recommend.

Alasdair Morgan: The lead committee could not discuss a motion to annul at its meeting tomorrow, unless the convener were to change the agenda today.

Alasdair Rankin: A motion to annul the regulations would need to be lodged—by any member of the Parliament—at the chamber desk.

Gordon Jackson: I have done it before—I have tried to have an instrument annulled.

The Convener: This committee could ask the convener of the lead committee to lodge a motion to annul at the chamber desk.

Alasdair Rankin: The committee could make that recommendation.

The Convener: Is it for the lead committee to do that? Could we do that?

Alasdair Rankin: The standing orders provide for a debate on a motion to annul to take place at the lead committee. An hour and a half is allowed for that debate, although any member can lodge a motion to annul.

Gordon Jackson: I previously lodged a motion to annul an SSI for consideration at a committee, which held a debate on that motion. I didn't win, right enough.

Alasdair Morgan: It has to happen sometime.

Gordon Jackson: It was quite a big debate on a serious issue.

The Convener: Is the matter on the agenda for discussion by the Environment and Rural Development Committee tomorrow?

Alasdair Rankin: The instrument is on its agenda for tomorrow.

The Convener: Will that committee be having a discussion that could lead to its lodging a motion to annul?

Alasdair Rankin: Yes, but notice of such a motion would normally be expected to be given, so that anyone who wanted to attend the committee's debate on that motion could do so. The Minister for Environment and Rural Development is entitled to speak in that debate. It would need to be publicised so that the minister knew to turn up. In such circumstances, the minister will usually wish to speak to his or her legislation.

Alasdair Morgan: If we do nothing, or if we simply communicate with the lead committee, which debates the instrument tomorrow and decides that it agrees with this committee, then it will not be until after the recess that the lead committee could discuss a motion to annul. That is, unless it were to decide to have another meeting this week.

The Convener: The day that is set aside for committee meetings in the week following the recess is Thursday 9 September. We are trying to check the procedure and due process according to which the instrument would be considered again on that Thursday.

Alasdair Rankin: Normally, when a motion is debated by a lead committee, that is when the

decision would be taken by that committee to recommend annulment. Subsequently, a motion to annul the regulations would be lodged by the Parliamentary Bureau for debate in the chamber. As I understand it, chamber business is to come first during the first week after the recess, so that could happen on the Wednesday of that week, which is 8 September.

Alasdair Morgan: Do we know when the 40-day period ends with respect to the regulations?

Alasdair Rankin: Around mid-September.

Christine May: So we have time.

The Convener: We would have time.

I suggest that, in the first instance, we draw the attention of the lead committee to our grave concern about the instrument. We should do that as swiftly as possible via the clerk, who should write to the lead committee saying that we think that the instrument needs to be radically redrawn.

Christine May: Or relaid, if that is the correct term.

Gordon Jackson: I have a doubt about such issues. Presumably, the Executive lawyers think that they are right. Perhaps that is not the case and they have just dug themselves so far into a hole that they will not stop digging—I do not know what is going on in their minds. However, I have always thought that once the Executive lawyers adopt a position, the only place where that can ultimately be tested is in court, once somebody has been charged. It is hard for us, whether we are lawyers or not, to arbitrate on such issues. We have experienced that problem before. Once the Executive lawyers adopt a legal interpretation, part of me just says, "Hell mend them." If their position works, it works; if it does not, it does not. I never quite know how the Parliament decides on a legal argument.

Alasdair Morgan: Given human nature, they might just have dug themselves into a hole. As far as is possible, we need to test whether that is the syndrome.

Gordon Jackson: Absolutely.

The ideal solution would be to take evidence from Executive officials, but I do not know whether that is possible.

The Convener: Could we do that after the summer recess?

Alasdair Rankin: We would need to hear that evidence on 9 September.

Christine May: In the absence of a detailed explanation of what the Executive lawyers have based their arguments on, the matter is very difficult.

Gordon Jackson: Without committing myself to anything, I must say that, on the surface, the Executive lawyers' arguments do not look good. However, they might be right.

The Convener: Given that the 40 days do not finish until the middle of September, could we take evidence from the Executive officials on 14 September?

Alasdair Rankin: Leaving the matter until the second week after the recess—until our meeting on 14 September—would be rather late, given the practicalities. The lead committee would need to debate a motion, and the Parliamentary Bureau would need to lodge a motion and timetable it into parliamentary business.

The Convener: We have two alternatives. We can draw the matter to the attention of the lead committee as swiftly as possible and write to the Scottish Executive to express our concern. Alternatively, or additionally, we can ask Scottish Executive officials to give evidence at our first meeting after the summer recess, which would need to be on Thursday 9 September.

Christine May: My preference is that we do elements of both. We should draw the regulations to the attention of the lead committee and express our grave concern, as we have already agreed to do. In addition, although we might prefer not to have a meeting in the first week back in September, we should take that opportunity to hear a detailed explanation from the Executive, if it agrees. It is always possible to stop or withdraw regulations; it is more difficult to lay another instrument at the last minute.

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

Members indicated agreement.

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

The Convener: Several issues should be drawn to the attention of the lead committee and the Parliament. First, the meaning of the date within five years of which training must be completed for the purposes of regulation 2(1)(b)(ii) should be made clearer. The Executive has, as requested, supplied an explanation of that and has confirmed that the date referred to is the date of the application for a vocational training number that is made under regulation 2(1). Secondly, an explanation was requested from and supplied by the Executive. Thirdly, defective drafting has been acknowledged in part by the Executive on points 3 and 4.

Is that agreed?

Members indicated agreement.

Instrument Subject to Approval

The Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (East Coast) (Scotland) Order 2004 (SSI 2004/298)

10:39

The Convener: The legal team has identified no points on the order.

Instrument Subject to Annulment

The Education Maintenance Allowances (Scotland) Amendment Regulations 2004 (SSI 2004/301)

10:39

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

I thank members for attending and wish them a happy and relaxing holiday from which I hope they come back renewed.

Meeting closed at 10:40.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 6 July 2004

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75

Special issue price: £5

Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF1 2BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation
Helpline may be able to assist with additional information
on publications of or about the Scottish Parliament,
their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID TYPETALK calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers