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SUBORDINATE LEGISLATION COMMITTEE

26th Meeting 2004, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

- *Mr Adam Ingram (South of Scotland) (SNP)
- *Mr Stew art Maxwell (West of Scotland) (SNP)
- *Christine May (Central Fife) (Lab)
- *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 CLERK

Bruce Adamson

LOC ATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 September 2004

[THE CONVENER opened the meeting at 10:33]

Interests

The Convener (Dr Sylvia Jackson): I welcome everyone to the 26th meeting this year of the Subordinate Legislation Committee. I particularly welcome Adam Ingram, who is joining the committee, and I ask him to declare any relevant interests.

Mr Adam Ingram (South of Scotland) (SNP): I have no relevant interests.

Delegated Powers Scrutiny

School Education (Ministerial Powers and Independent Schools) (Scotland) Bill: as amended at Stage 2

10:34

The Convener: The committee will recall that we raised a number of issues about the bill, mostly concerning section 4(2).

I welcome Gordon Jackson, who has just joined the meeting.

It appears from the information that we have received that what we requested with regard to the delegated powers has been agreed to by the Executive.

Members indicated agreement.

Fire (Scotland) Bill: Stage 1

The Convener: Although we were generally content with the delegated powers in the bill and with the procedures proposed by the Executive, there were a number of issues on which we wanted further explanation. The first of those concerned sections 10 and 42, which go together. We sought assurance about the consultation process. Is the committee content with the assurances that have been given regarding consultation, or do members want anything further?

Murray Tosh (West of Scotland) (Con): Yes.

The Convener: You want something further.

Murray Tosh: No—my answers are yes and no respectively.

The Convener: The committee is content with the Executive's assurances.

The second area of concern was section 36, which is to do with the national framework document. It would appear that there are adequate administrative measures in place to ensure publication of the national framework document. Are we happy with the assurances that we have been given?

Members indicated agreement.

The Convener: Section 41 is about directions for public safety purposes. It is suggested that using the negative procedure would give greater flexibility than the affirmative procedure.

Christine May (Central Fife) (Lab): That may well be the case. Nonetheless, we are advised that, if a motion to annul were successful, the legality of any action that had already been taken under the negative procedure could be called into

question. In this instance, the affirmative procedure would perhaps be more appropriate.

The Convener: There is time to raise the matter with the Executive. Should we question the Executive on the matter, giving our views as to why the affirmative procedure could be used with as much flexibility?

Mr Stewart Maxwell (West of Scotland) (SNP): It does not seem to me that there would be more flexibility in the negative procedure compared with the affirmative procedure. I do not understand the logic behind the argument, and I think that we should ask the Executive about that.

The Convener: That is agreed.

Section 54 concerns the power to make regulations about fire safety. Members will note that the Fireworks Act 2003 requires a regulatory impact assessment to be made, and the question is why the Fire (Scotland) Bill cannot do the same.

Mr Maxwell: I do not have a problem with there not being such a requirement in the bill. That requirement might well be contained in the 2003 act, but I understand that there is none in any other act. It seems perfectly reasonable to proceed as the Executive has suggested.

The Convener: So we are content that such a requirement is unnecessary in this case.

Members indicated agreement.

The Convener: We move on to creating new offences by regulation. A rather interesting account of the matter has been provided by the legal adviser—I hope that nobody will get life imprisonment as a result of this. The issue is serious, however; it is suggested that we follow the matter up with the Executive.

Christine May: Our first question to the Executive might be whether it is appropriate to leave the power to create offences to subordinate legislation. I do not know what my fellow members think but, if it is in order for that to be done, should the regulatory powers at least limit the nature of the offences and the penalties that might be imposed?

Gordon Jackson (Glasgow Govan) (Lab): I agree with that. I am looking in particular at paragraph 33 of our legal briefing paper, which sums it up for me. I have no huge problem with minor offences being created in this way, but the idea of there being a blank cheque to create criminal offences through subordinate legislation strikes me as extremely unusual and over the top. I suspect that most people would be uncomfortable with that. Of course, the Executive would say that it would never use the power for such purposes but, if that is the case, then why have the power?

The Convener: We should also ask why no maximum penalty is set out.

Gordon Jackson: I see no reason why that cannot be set out in the bill.

The Convener: We shall pursue those points with the Executive.

Section 72 deals with the meaning of "relevant premises". Are we happy with the Executive's response on that point?

Members indicated agreement.

The Convener: Sections 75 and 83 deal with inquiries and commencement. Are we happy with the replies that we received on those?

Members indicated agreement.

Water Services etc (Scotland) Bill: Stage 1

The Convener: Part 1 of the bill provides for the introduction of the new water industry commission and the phasing out of the old water industry commissioner. Does the committee agree that the negative procedure is a reasonable approach to dissolving the office of the water industry commissioner for Scotland? The legal adviser suggests that we may not need even the negative procedure, but it would give a limited safeguard. Are we agreed that the negative procedure is okay?

Members indicated agreement.

The Convener: Section 4 will prohibit common carriage on the public water supply and retail competition in water services for domestic customers. Exercise of the power under section 4(7) will be subject to the affirmative procedure and must be the subject of prior consultation. However, the Parliament cannot amend an affirmative instrument. Is the matter appropriate for subordinate legislation, or should it be on the face of the bill?

Mr Maxwell: Clearly, the power should not be a matter for subordinate legislation. To give the Executive the power to make regulations that dictate the circumstances in which prohibitions do not apply would be to allow it a very wide power. For example, the power could be used effectively to privatise Scottish Water or large chunks of it. That should be possible only through primary legislation. I am sure that, as Gordon Jackson said in our discussion of the previous item, the Executive will say that it has no intention to do such a thing. However, if it has no such intention, it should not provide a power that some future Executive could use in that way.

Gordon Jackson: At this stage, I would be content that we give the Executive the point of view that has been expressed in the committee.

There is a genuine issue, but the Executive might provide an explanation that makes me feel okay about it. Stewart Maxwell has raised a legitimate question, but we need raise the matter only as a question at this stage to see what the Executive says about it.

Mr Maxwell: I am quite happy that we just ask the question. Some detail from the Executive would be extremely helpful.

The Convener: We have a genuine concern. Is it agreed that we raise that question with the Executive?

Members indicated agreement.

The Convener: Section 5(7) is on exemptions to offences in relation to the public sewerage system. The issue that we have with section 5(7) mirrors that with section 4(7), so we shall ask the same question for both sections. Is that agreed?

Members indicated agreement.

The Convener: Section 7(2) deals with the granting of a water services licence. Are we agreed that what is suggested is okay?

Members indicated agreement.

The Convener: Paragraph 66 of the legal adviser's briefing paper also makes an interesting point about the guidance that is mentioned in section 7. The procedure seems reasonable. Are we agreed on that?

Members indicated agreement.

The Convener: Section 9(5) deals with the commission's power to charge fees. Are we agreed that that presents no problems?

Members indicated agreement.

The Convener: Section 16(3) deals with notices of discontinuation of the water supply and the information that must be included in such notices. The provision appears acceptable. Is that agreed?

Members indicated agreement.

The Convener: Section 17 deals with the disconnections code. An interesting point to consider is whether a more formal parliamentary procedure, such as the code's being laid before the Parliament, should be required.

Christine May: My view is that the code should be subject to parliamentary approval. Parliament has a legitimate interest in the conditions under which disconnections might be carried out. We could suggest how that might be done and ask the Executive to say which its preferred route is.

Gordon Jackson: Presumably, there is no technical reason why a disconnections code could not be put into subordinate legislation and laid before the Parliament.

Mr Maxwell: We should make that sensible suggestion to the Executive.

The Convener: Is that okay with the committee?

Members indicated agreement.

The Convener: Section 19 will give powers to the Scottish ministers to adjust the core functions of Scottish Water. Do we agree with the legal advice that the procedure seems reasonable?

Members indicated agreement.

10:45

The Convener: In section 20, which deals with the meaning of "eligible premises", section 20(3) provides the power to change the meaning of "dwelling". The legal adviser suggests that we should ask whether such changes to a definition should not be made under the affirmative procedure.

Christine May: Let us ask the question.

Gordon Jackson: The Executive might give us an answer that satisfies us that the power is okay.

The Convener: We shall ask the question then.

No points arise in relation to section 26 on ancillary provision. Similarly, no points arise in relation to section 27 on orders and regulations. The same applies to section 30 on the short title and commencement. No substantive points arise in relation to licence applications or notices of licence applications under schedule 2. Is that all agreed?

Members indicated agreement.

The Convener: On paragraph 1(7) of schedule 2, the legal adviser suggests that exemptions from the provisions should perhaps be made under the affirmative procedure. Do we need an answer on that?

Christine May: Let us ask the question.

The Convener: Okay.

Paragraphs 11(1) and 11(2)(g) of schedule 2 deal with the register of licences. Do members agree that those provisions seem okay?

Members indicated agreement.

The Convener: The legal adviser makes an additional observation about the provisions for replacing the charging regime. Have members any points about that?

Gordon Jackson: The legal advice can perhaps be summed up as, "This is interesting, but it's none of our business."

The Convener: Well said.

Executive Responses

Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 2004 (draft)

10:47

The Convener: Under item 5, the first Executive response that we must consider concerns the draft order dealing with functions exercisable in or as regards Scotland. It is suggested that the committee should draw the attention of the lead committee and the Parliament to the fact that we are now content that the required explanation has been given. Is that agreed?

Members indicated agreement.

Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004 (SSI 2004/383)

The Convener: It is suggested that we draw the attention of the lead committee and the Parliament to the defective drafting of the regulations, which has now been acknowledged by the Executive. Is that agreed?

Members indicated agreement.

Community Health Partnerships (Scotland) Regulations 2004 (SSI 2004/386)

The Convener: It is suggested that we draw the attention of the lead committee and the Parliament to the regulations on the grounds that are listed in points (a) to (f) of the legal adviser's briefing. Most of the points are about the need to make meanings clearer and to improve the drafting. Are we happy to make those points?

Christine May: Yes, we are happy to make those points.

I want to make it clear that the point that I raised last week about whether the chairman and general manager should be one and the same person was a point that was raised with me locally. I do not know whether that was subsequently raised with the Executive, but I imagine that it was. I am glad that the Executive has accepted that the drafting is unclear. However, if the point was previously formally raised, it is unfortunate that the necessary amendments were not made before the regulations were laid before the Parliament.

Mental Health (Advance Statements) (Prescribed Class of Persons) (Scotland) Regulations 2004 (SSI 2004/387)

Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2004 (SSI 2004/388)

The Convener: Discussion has already taken place between the legal adviser and the Executive about the vires of the regulations. The Executive intends to remake the instruments to make the changes that have been recommended.

Christine May: We welcome that.

National Assistance (Assessment of Resources) Amendment (No 2) (Scotland) Regulations 2004 (SSI 2004/389)

The Convener: The committee might want to consider drawing the attention of the lead committee and the Parliament to the regulations on the ground that information was requested on the consolidation of the principal regulations. I am sure that members made a few points about that.

Christine May: We did.

Mr Maxwell: We certainly asked the Executive about consolidation of the regulations and its response is best described as less than helpful. Frankly, the Executive does not seem to pay much attention to consolidation, even though we seem to raise the issue almost every week. Given that the principal regulations have been so heavily amended, it might be worth sending a separate letter to the Executive, to indicate that it will have to pay attention to consolidation exercises. The Executive always seems to send us an answer in which it says that it will undertake consolidation when time and resources permit. In my view, that is not good enough. I accept that people are busy, but perhaps that is a resourcing issue for the Executive.

The Convener: I agree that we should do that, because the issue is on-going—we encounter it almost weekly. Is that suggestion agreed?

Members indicated agreement.

Teachers (Medical Requirements for Admission to Training and Registration) (Scotland) Amendment Regulations 2004 (SSI 2004/390)

The Convener: The committee might want to draw the attention of the lead committee and the Parliament to the regulations on the ground of defective drafting, which the Executive has acknowledged. Is that agreed?

Members indicated agreement.

Fireworks (Scotland) Regulations 2004 (SSI 2004/393)

The Convener: Although the first point that was asked about has been answered and the Executive has supplied the relevant information, point 2, which is about Crown application and the binding of the Crown, has not really been answered at all. Unfortunately, there is no time to go back to the Executive, so it has been suggested that we draw what is an important issue, along with point 1, to the attention of the lead committee and the Parliament.

Gordon Jackson: Is there a procedure whereby, if we have only one meeting at which to consider an instrument and the information that we receive in response to our request does not answer our question, we can get the relevant official to come to the next meeting? Can we do that when the legal adviser becomes aware that we do not have a good answer, given that if we do not get the official to come to that meeting, it will be too late to do anything about the situation? I wonder whether there is any way of doing that, as it would be helpful in cases such as the present one.

Let us say that we discovered last Thursday that we had not received a good answer to our question. Given that we knew that we had to deal with the regulations this week, it would have been nice to have had the officials at today's meeting, because we could have told them that their answer was not very good and asked them for an explanation.

The Convener: With some of the bills that we have considered, we have had Executive officials available to come to our meetings. That might be the procedure that we should try to follow.

Gordon Jackson: We are obviously not going to ask the Executive to send its civil servants to the next meeting every time that we ask a question, because nine times out of 10 the answer that the Executive provides is fine. It is only occasionally that we might need to have a procedure whereby we bring people into a meeting, even though we have not planned that ahead.

The Convener: I will ask the clerk whether we must request such a procedure formally, in a letter, or whether we can do it informally.

Alasdair Rankin (Clerk): That could be done on an ad hoc basis.

Murray Tosh: That raises a follow-up question. If we bring along a civil servant or an official who suddenly agrees with our point, does that person have the authority to change the instrument in question? Who makes those decisions and how do we get at the decision maker? Points are

bandied backwards and forwards, but how does the Executive decide when we are right? Do we know how it decides that? That is perhaps a theological question.

The Convener: The relevant minister will obviously make the decision. Gordon Jackson is talking about another opportunity for us to voice our concerns and get back a bit more information. That would avoid our being in a situation of being able to do nothing more.

Gordon Jackson: At the very least, it would allow the lead committee to be provided with a much more intelligent report.

Christine May: I wanted to make two points, one of which Gordon Jackson has just made. If an Executive lawyer agreed with the point that we were making, the Executive could go back to the lead committee and say that, on reflection, it thought that we had a good point.

My second point is about when it might be necessary to adopt such a procedure. Could the committee not agree to delegate responsibility for deciding when to do so to the convener, the deputy convener and the senior clerk?

Gordon Jackson: Absolutely. I am just saying that the present case is an example of a situation in which it might have been legitimate to say that we needed a better answer. When that happens, we should perhaps just bring the relevant officials to the meeting there and then, because we do not have an extra week. We do not need the whole committee to decide that.

The Convener: I understand that that is all doable.

Members will remember that committee representatives went to a meeting of the Environment and Rural Development Committee to make a point about an issue that we were concerned about—I cannot remember what it was—because there was no further time for it to be dealt with, so we have taken such action in the past.

Murray Tosh: Are there any other areas in which we might consider the scheme of delegation to get quicker responses? On some occasions, the legal advisers obviously feel that they want the strength of the committee behind them before they raise certain questions, but on other occasions they go straight to the originators of the legislation to try to get the answers for us. I am not clear which conditions operate in which contexts. It may be that scope exists to consider the scheme of delegation and to identify where we can streamline procedures even further.

The Convener: That is another good suggestion but, in all fairness, many discussions already take place between the legal adviser and Executive officials. The evidence of that is the fact that regulations have been withdrawn and then brought back to us. However, there is no harm in adding your suggestion to those that have been made. Is that agreed?

Members indicated agreement.

The Convener: We will just have to pass on our point about the regulations to the lead committee and the Parliament.

Christine May: Can we please emphasise to the lead committee and the Parliament the seriousness of our concern?

The Convener: Absolutely.

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment (No 3) Regulations 2004 (SSI 2004/399)

The Convener: The committee might wish to consider drawing the attention of the lead committee and the Parliament to the defective drafting that the Executive acknowledged in relation to point 1 and the information that the Executive has supplied in response to the second point that the committee raised at last week's meeting, which I am sorry that I was not here for.

Christine May: Can we also point out to the lead committee and the Parliament that, in the circumstances, a transposition note would have been most helpful?

The Convener: I think that we should go further than that, by adding the point about the transposition note to the separate letter that we are sending about consolidation. Those are both on-going issues. Is that agreed?

Members indicated agreement.

Instruments Subject to Annulment

Mental Health Tribunal for Scotland (Disciplinary Committee) Regulations 2004 (SSI 2004/402)

10:57

The Convener: No points have been identified on the regulations and members have nothing to add

Building (Scotland) Regulations 2004 (SSI 2004/406)

The Convener: The legal adviser has suggested that there are three points to ask the Executive about. Do members agree to do that?

Members indicated agreement.

Instruments Not Laid Before the Parliament

Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement) Order 2004 (SSI 2004/401)

10:58

The Convener: This order is an example of a case in which the legal adviser has spoken to officials. The order will be remade and will return to us for consideration next week. The legal adviser has taken the initiative and that has worked well.

Building (Scotland) Act 2003 (Commencement No 1, Transitional Provisions and Savings) Order 2004 (SSI 2004/404)

Criminal Procedure (Amendment) (Scotland) Act 2004 (Commencement, Transitional Provisions and Savings) Order 2004 (SSI 2004/405)

Nature Conservation (Scotland) Act 2004 (Commencement) Order 2004 (SSI 2004/407)

Youth Justice and Criminal Evidence Act 1999 (Commencement No 11) (Scotland) Order 2004 (SSI 2004/408)

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

Regulatory Framework Inquiry

10:59

The Convener: Item 8 is on our inquiry into the regulatory framework in Scotland. We have produced another paper to go to the Conveners Group. It gives much more information than did the previous version about why videoconferencing would not be particularly appropriate to our inquiry, and why it would not allow us to produce the quality of product that we would wish. Does anybody wish to add any points to what is contained in the paper, as it has been redrafted?

Gordon Jackson: When would we expect to be told the decision of the Conveners Group?

The Convener: The Conveners Group meets this Thursday. It is very important that we agree the paper today, so that it can be sent to the group directly. The problem at the previous stage was that the group had a very short time in which to consider the paper as it was drafted then.

Mr Maxwell: In the second paragraph under heading three, "Justification", the greater volume of secondary legislation compared to primary legislation should be quantified to emphasise the point. People do not necessarily recognise the vast difference between the amount of primary legislation and the amount of secondary legislation that we pass.

Gordon Jackson: They do not realise that we are doing serious work. That is the truth.

The Convener: I gather from the clerk that we are talking about 1,300 statutory instruments, compared with 65 acts.

Mr Maxwell: That is quite a difference.

The Convener: It is a huge number. We know about the volume of instruments that are going through from our weekly meetings.

I thank members for their attendance. I hope to see you again next week.

Meeting closed at 11:01.

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