

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 16 November 2004

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

31st 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 Stewart Maxwell (West of Scotland) (SNP)
Christine May (Central Fife) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Alex Johnstone (North East Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Stewart Stevenson (Banff and Buchan) (SNP)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 16 November 2004

[THE CONVENER opened the meeting at 10:39]

The Convener (Dr Sylvia Jackson): I welcome members to the 31st meeting this year of the Subordinate Legislation Committee.

I have apologies from Murray Tosh, who is at another parliamentary engagement, although he might make it for the end of the meeting. I also have apologies from Christine May.

Delegated Powers Scrutiny

Edinburgh Tram (Line One) Bill: Preliminary Stage

Edinburgh Tram (Line Two) Bill: Preliminary Stage

10:40

The Convener: Members have been furnished with the appropriate bills and our legal adviser's comments on them. You will remember that we previously discussed whether we should examine the delegated powers within private bills. The Edinburgh Tram (Line One) Bill has seven such powers and members have been given a memorandum that will assist them.

The first delegated power comes in section 39 and it deals with the extension of time limits for the exercise of powers of acquisition. The delegated power would enable the extension of the period of five years that is specified in the bill. What are the committee's views on that? It is suggested that the power should be subject to the negative procedure. Does the committee think that that is sufficient? Should the time limit be extended for an unlimited time, as it is detailed in the bill?

Mike Pringle (Edinburgh South) (LD): Before we go on to talk about that, I point out that the delegated powers in the Edinburgh Tram (Line One) Bill are exactly the same as those in the Edinburgh Tram (Line Two) Bill, so I put it on the record that anything that we say about the Edinburgh Tram (Line One) Bill will be said of the second bill, which will save us going through the same thing a second time, if that is possible.

The Convener: That is correct, and it is a very good way to proceed. We are considering both bills at the same time.

Mr Stewart Maxwell (West of Scotland) (SNP): I understand why the promoters would want the ability to extend the five-year period. That seems entirely reasonable, because objectors might try to use the legal system to delay the project beyond any finite date, if there is such a thing as a finite date. At the same time, I sympathise with those who might have property in the area that might then be blighted for many years to come if there was an infinite ability to extend the time limit. Although I am happy with a period of five years and I am not unhappy with an extension to that if it is necessary, it does not seem reasonable that the promoters of the bill will be able to go back to ask for an extension of the time limit for ever more. We must ask the promoters about that.

We should also suggest that it might be better if there was a fixed period beyond the five years; perhaps the extension should be in five-year blocks, for example. The promoters would then have to come back to the Parliament to ask for any further extension. Also, as you said, convener, the procedure should be affirmative rather than negative because if the powers were continually being brought back for the Parliament to approve, it would have a much greater opportunity effectively to block such orders at some point and say, "You have had your chance" and "Enough is enough; people cannot be left hanging on and waiting indefinitely for years into the future".

Although I am happy with the extension of the time limit, it should be limited in some way and we should write to the promoters of the bill and ask them for their opinion on that point.

Gordon Jackson (Glasgow Govan) (Lab): With some hesitation, I find myself thinking that whether the proposed order should be subject to the negative procedure is our business, but the other point is not. I have a feeling that the point about whether the promoters should have extensions and how long they should be is a policy issue, as opposed to being part of the methodology and whether the order should be subject to the negative or affirmative procedure. We might have strayed into discussing the substance of the bill in a way that is not our concern.

I am not saying that to be rude in any way, but because the committee has always been very jealous of its credibility in that way; we are just legal nitpickers and we do not get involved in discussions about policy. The minute we become involved in talking about policy, the committee becomes political and it should not.

Mr Maxwell: That is a reasonable point to make. I certainly did not intend to stray into policy because you are quite right, we should not do that. The point that I was trying to make was about whether we are comfortable with such an unlimited power in subordinate legislation.

Gordon Jackson: Okay.

Mike Pringle: I take Gordon Jackson's point but, for the reasons that Stewart Maxwell has set out, we have to limit the powers. I think that Stewart's suggestion is a good one, but I accept the point about policy.

10:45

Gordon Jackson: I accept that and only flagged up my concern because when we move from talking about subordinate legislation into talking about policy that is always a grey area. I suppose that the committee could say that it seems rather a lot to do by statutory instrument. I take Stewart Maxwell's point entirely. There are two ways of looking at the issue and I am happy with the way in which he is looking at it.

The Convener: Stewart Maxwell's point is a good one in terms of the balance of the delegated power. It is a fair question to be asking.

We will ask the promoters about the balance within the provision and present the reasoning that the affirmative procedure would be better than the negative for this power.

Members indicated agreement.

The Convener: Before we leave this point, I mention that because the bill is a private bill, the questions will go to the promoter. The clerk has assured me that the private bill committee will also get this information.

Section 42 is on the operation of part 3 of the bill and it deals with penalty fares in circumstances where passengers are unable to produce a valid ticket. Are there any points on that?

Gordon Jackson: This is Government at the highest level. I can see the cabinet sitting up at night thinking, "Will we get the penalty fares now or not?"

The Convener: Are there any points to raise or is it fairly straightforward?

Gordon Jackson: It is straightforward.

Mike Pringle: It is okay.

The Convener: Section 44(3) is about the amount of penalty fare. We have a few points to discuss about the section. At the moment, section 44 of the bill sets the level of penalty fare at £40 or 10 times the amount of the full single fare, whichever is the greater amount.

Mr Maxwell: Again, although I take Gordon's point about the previous area we were considering, we are talking about the limits on a power. As it stands, the power to raise the penalty is unlimited and there is no maximum in place; maximum limits for fines are usually set. The bill seems to be a bit confused about the ability to raise the fines. Can the promoters raise the £40 to whatever they like? Can they increase the penalty from 10 times the amount of the full single fare to 20 times or 30 times the full fare? There is a lack of clarity about what will happen.

Although I understand that a minimum figure should be set, a maximum figure should also be set. If there is a clause that says that the limit should be 10 times the fare, surely it will be the fare that determines the fine, because the fare will rise. I am not therefore sure that it would be reasonable for the promoters to amend the 10 times figure. If the fare happened to be £5 then the penalty fare would be £50. If the fare then went up to £6, the penalty fare would be 10 times that. I am not so sure that ministers should have the ability to amend the 10 times figure. The real point is about clarification because there do not seem to be any limits on the powers.

Gordon Jackson: My point is the same as before; I think that we are treading in that grey area but I have no problem with asking the question.

I am trying to get worked up about this, but I am struggling.

The Convener: In all fairness to what Stewart Maxwell is saying, section 44(3) says:

"Scottish Ministers may by order prescribe that the amount of penalty fare shall be higher than the amount specified in subsection (1)."

As our legal advisers have pointed out, that provision is unclear. It could be that ministers will be able to increase the £40 or the 10 times figure. There is no maximum in the bill. We should be asking that the bill be a bit more specific about what is being recommended.

Mike Pringle: I agree. It has to be clear that the penalty fare should be 10 times the full single fare. There is no maximum at the moment, but if it is specified that the maximum can only be 10 times the full fare and not 15 times, 20 times or 30 times, there will be a maximum, which, as the fare goes up over the years, will be whatever 10 times the fare is. That seems to be entirely clear, but at the moment the bill is not clear and it needs to be made so.

The Convener: I take it that if the provision were clearer, we would not be so worried about the instrument being a negative one. Clarity is the big issue.

Mr Maxwell: Given that this is a Henry VIII power, we usually take the view that the affirmative and not the negative procedure should be used. However, if the power is clarified and we are happy with the explanation it becomes an administrative matter and I would be happy for the negative procedure to be used in this instance.

The Convener: I have a question for the clerk. We ask these questions of the promoter. Do we get replies in the same way as we do from the Executive?

Alasdair Rankin (Clerk): Yes, we will receive answers within exactly the same timescale as we would for questions to the Executive.

The Convener: Right. I thought that I should know what the procedure is. I welcome Murray Tosh who has joined us earlier than he thought would be the case.

Murray Tosh (West of Scotland) (Con): I thought that you would have finished by now.

The Convener: No. We are having a really exciting time with the Edinburgh Tram (Line One) Bill.

We move on to section 59, which is the power to make byelaws. Are members agreed that no points arise on the section?

Members indicated agreement.

The Convener: Section 61 deals with insulation against noise. It is linked to section 62: section 61 outlines the scheme and section 62 sets out the process for getting an order for insulating new buildings. Are members agreed that no points arise on the section?

Members indicated agreement.

The Convener: Section 63 concerns the repeal of sections 61 and 62. Obviously, if a national scheme for insulating buildings were to be brought into force, sections 61 and 62 would need to be repealed. Are we agreed that this is a sensible provision?

Members indicated agreement.

The Convener: However, paragraphs 29 and 30 of our legal briefing draw our attention to two points. The first raises the issue that, given that the power is a Henry VIII power, the affirmative procedure should have been used. The counter argument could be put that the power is consequential on the need to repeal sections 61 and 62 if a national scheme were to come into force. Are members happy with my explanation of the point that has been drawn to our attention?

Mr Maxwell: I am happy with your explanation, convener. I agree that, as the section 63 power is consequential, I am not concerned about the use

of the negative procedure in this case. The provision makes it clear that public inquiries would have to be held. Enough safeguards are built into the section and I think that we can therefore leave it alone.

The Convener: The second point that has been drawn to our attention relates to section 63(2). There is a discrepancy in the wording between this section and section 79(2)—in particular there is a reference to “savings” in section 63(2) that was missed out of section 79(2). It would be better if the provisions of both sections were brought together, perhaps in section 79(2). If that were to be done, section 63(2) would not be needed. Are members agreed that we should ask the question of the promoter?

Members indicated agreement.

The Convener: Finally, because of Mike Pringle’s kind suggestion that we deal with lines one and two together, as the delegated powers to do with both bills are the same, I assume that members are agreed on the recommended actions for the Edinburgh Tram (Line Two) Bill?

Members indicated agreement.

Executive Responses

Holyrood Park Amendment Regulations 2004 (draft)

10:53

The Convener: Members will remember that, when we dealt with the regulations last week, we put three questions to the Executive as a result of our discussions. I think that the response to the first question answers the point that we raised.

Murray Tosh: The question was well worth asking, convener, and the answer is satisfactory. I am sure that the matter would have dominated the weekend newspapers had it not been for the sterling efforts of some of our colleagues to distract the national media.

The Convener: Thank you, Murray.

Our second question concerned a point that Mike Pringle raised about who the charges would go to. Members will see that they are to go into Historic Scotland's coffers.

Our third question was on the rather more serious matter of vires. Following our questioning, the Executive has withdrawn the original instrument, redrafted and relaid it. Members will find the new instrument under item 6 of our agenda. Are members content with the Executive response?

Members indicated agreement.

Abolition of Feudal Tenure etc (Scotland) Act 2000 (Prescribed Periods) Order 2004 (SSI 2004/478)

The Convener: Members will remember that we asked the Executive for further explanation, which we have received. Are members content with the information?

Members indicated agreement.

The Convener: Are members agreed that we pass the instrument to the lead committee and the Parliament?

Members indicated agreement.

Draft Instrument Subject to Approval

Tenements (Scotland) Act 2004 (Consequential Provisions) Order 2004 (draft)

10:55

The Convener: Are members agreed that no points arise on the draft order?

Members indicated agreement.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2004 (SSI 2004/484)

10:55

The Convener: Are members agreed that no points arise on the order?

Members indicated agreement.

Draft Instrument Subject to Annulment

Holyrood Park Amendment Regulations 2004 (draft)

10:56

The Convener: We now consider the draft regulations that I mentioned earlier, which have been redrafted and relaid. Are members agreed that no points arise on the regulations?

Members indicated agreement.

Instruments Subject to Annulment

**Public Finance and Accountability
(Scotland) Act 2000 (Economy, efficiency
and effectiveness examinations)
(Specified bodies etc) Order 2004 (SSI
2004/482)**

**Police Pensions Amendment (Scotland)
Regulations 2004 (SSI 2004/486)**

10:56

The Convener: Are members agreed that no points arise on the instruments?

Members indicated agreement.

**Plant Health (*Phytophthora ramorum*)
(Scotland) Order 2004 (SSI 2004/488)**

The Convener: Now, I have been asked to read out the title of the next order. It is the Plant Health (*Phytophthora ramorum*) (Scotland) Order 2004—even with my scientific background, that was difficult.

Mike Pringle: Well done, convener.

The Convener: Members will note that a number of issues arise in connection with the order. We are concerned in the main with two issues, the first of which concerns article 5(1) on page 3 of the order. It provides that the material that is covered by the article must meet the requirements of schedule 2. However, the conditions that the schedule imposes are relevant only to material that is covered by article 6. We should ask the Executive to explain the purpose and effect of the provision in article 5(1).

The second issue concerns article 14 on page 7 of the instrument. Whereas the introduction to the article refers only to article 12, paragraph (d) refers to articles 12 and 13. We should ask the Executive to explain the discrepancy. As members have no further points to raise, are we agreed that those two further questions should be put to the Executive?

Members indicated agreement.

**Homeless Persons (Unsuitable
Accommodation) (Scotland) Order 2004
(SSI 2004/489)**

The Convener: No substantial points have been identified on the order. However, our attention has been drawn to the fact that some words might be missing from the introduction to article 2(3) on

page 2 of the order. Do members wish to raise that in an informal letter?

Members indicated agreement.

**Tenements (Scotland) Act 2004 (Notice of
Potential Liability for Costs) Amendment
Order 2004 (SSI 2004/490)**

The Convener: Some important issues arise in respect of the order. Members will note that we are to consider the commencement order under item 8. The problem is that the commencement dates of the two orders are different, with this order commencing five days later than the commencement order. That raises complications for people who move into a property. During the time gap between the two orders, a purchaser will not be in full possession of information about their legal obligations with regard to any changes that might have to be made in future. I am looking for solutions.

Mike Pringle: I was a member of the Justice 2 Committee, which was the lead committee for the Tenements (Scotland) Bill. One of the issues that concerned us was the rights of purchasers. The gap in time between the commencements of the two instruments must be closed in some way. The Executive must change the commencement date of either this order or the commencement order. The two orders need to commence on the same date, or a purchaser could find himself with a real liability about which he knew nothing. We must solve the problem.

Mr Maxwell: I know that we are talking about only five days of a difference, but it is inevitable that someone will be caught out. It seems bizarre that this has happened. We should suggest to the Executive that it should either move the commencement date of the amendment order or, as Mike Pringle said, move that of the commencement order. The Executive has to move one back or bring one forward so that the two orders come into force at the same time.

We should perhaps also ask why on earth this has happened. It seems a bit bizarre that the two pieces of legislation should create such an anomaly. I am sure that it has not been done on purpose, but we should ask why it has happened and whether there is the proper co-ordination between the efforts of whoever is doing these things.

Mike Pringle: I would suggest that if the same person had been doing both orders there probably would not have been a problem. It is likely, however, that the work of two people, albeit in the same department somewhere, has not been relayed together.

The Convener: It does look a bit that way.

Mr Maxwell: If the Executive agrees to our suggestion, that will cause the 21-day rule to be breached. However, I think that that is the lesser of two evils in this case.

The Convener: Are we agreed on that line of action?

Members *indicated agreement.*

The Convener: The legal advisers have also indicated a minor point concerning the word "Schedule" in article 2(2), which we might raise in an informal letter.

Instruments Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2004 (SSI 2004/481)

11:00

The Convener: No points arise on the act of adjournal.

Tenements (Scotland) Act 2004 (Commencement No 1) Order 2004 (SSI 2004/487)

The Convener: We have already referred to this order this morning, but the legal advisers point out a further technical issue that should previously have been picked up by the legal advisers and the drafting team. It is rather complicated to say the least. Paragraph 77 of the legal brief outlines the issue. It says:

"This Order falls into a well-known trap as a result of what is assumed to be a drafting defect in the parent Act. The Order is made as a statutory instrument. As the Committee is aware, an instrument can only be made in the form of a statutory instrument if the enabling Act so provides. However the relevant provision of this Act is section 32 which (unusually) did not come into force on Royal Assent."

The rest follows from that. It is a matter of pointing that out to the Executive and asking it why the order has been made in the form of a statutory instrument when the relevant section of the parent act, section 32 of the Tenements (Scotland) Act 2004, was not commenced on royal assent.

Murray Tosh: When asking the Executive for an explanation of the matter, could we also ask whether its tracking system will pick this kind of thing up? The legal brief advises us that such instances are "not uncommon". It might be something that ought to be included in a checklist. I am not sure whether the Executive's tracking system will simply reflect time sequences, or whether it will include certain checks that must be made. If the latter is the case, then instances such as this should perhaps be included in a list of standard checks.

The Convener: I would even go a little further than that and ask not just whether, but how the tracking system will ensure that such things do not happen. We would like to know a bit more about how the mechanism works. Is that agreed?

Members *indicated agreement.*

The Convener: I thank colleagues for attending today. I look forward to seeing you next week.

Meeting closed at 11:03.

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