

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 30 November 2004

Session 2

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CONTENTS

Tuesday 30 November 2004

Col.

INTERESTS	675
DELEGATED POWERS SCRUTINY	676
Further and Higher Education (Scotland) Bill: Stage 1	676
EXECUTIVE RESPONSE	681
Scottish Environment Protection Agency (SEPA) and Sustainable Development, Statutory Guidance to SEPA made under Section 31 of the Environment Act 1995 (SE/2004/257)	681
DRAFT INSTRUMENT SUBJECT TO APPROVAL	682
Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2004 (Draft)	682
INSTRUMENT SUBJECT TO APPROVAL	682
Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Order 2004 (SSI 2004/500)	682
INSTRUMENTS SUBJECT TO ANNULMENT	683
Agricultural Holdings (Fees) (Scotland) Order 2004 (SSI 2004/496)	683
Agricultural Holdings (Forms) (Scotland) Regulations 2004 (SSI 2004/497)	683
Sea Fish (Marketing Standards) (Scotland) Regulations 2004 (SSI 2004/498)	684
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE	685
Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (Scotland) Revocation Order 2004 (SSI 2004/501)	685
Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (East Coast) (No 3) (Scotland) Revocation Order 2004 (SSI 2004/502)	685
INSTRUMENT NOT LAID BEFORE THE PARLIAMENT	686
Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) Amendment (The Debt Arrangement Scheme (Scotland) Regulations 2004) 2004 (SSI 2004/505)	686

SUBORDINATE LEGISLATION COMMITTEE

33rd 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

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 30 November 2004

[THE CONVENER *opened the meeting at 10:41*]

Interests

The Convener (Dr Sylvia Jackson): I welcome committee members to the 33rd meeting in 2004 of the Subordinate Legislation Committee. Adam Ingram has submitted his apologies today, and we welcome Stewart Stevenson as the SNP substitute for Stewart Maxwell, who is away at the moment. I invite Stewart Stevenson to declare any relevant interests.

Stewart Stevenson (Banff and Buchan) (SNP): I draw attention to my entry in the register of interests, which makes a number of statements under the "miscellaneous" heading that could touch from time to time on the business of the committee. Today, I draw attention to my ownership of a small amount of agricultural land, as that registered interest could be held to be relevant to some of the instruments that will be discussed under item 5.

Delegated Powers Scrutiny

Further and Higher Education (Scotland) Bill: Stage 1

10:42

The Convener: As members will know, the Further and Higher Education (Scotland) Bill will dissolve the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council and will bring into operation the combined Scottish further and higher education funding council, which will be referred to as the council.

There are a number of delegated powers in the bill, and the first one that we shall consider today is in section 2. The legal adviser has raised no matters of particular concern in relation to this first power, but I want to double check and ask whether members have identified any other issues.

Members: No.

The Convener: We move now to section 5(7), which relates to fundable further and higher education and concerns the types of programmes and courses for which there could be an alteration to the definition. The legal adviser has highlighted a few issues, the main one being the use of the word "modify", which is rather a wide provision. Do members consider that the affirmative procedure would be more appropriate for this power? I am looking for views.

Christine May (Central Fife) (Lab): The Enterprise and Culture Committee has had quite a lot of discussion on the bill. Although the terms of this provision did not give the committee any difficulty, I take the legal adviser's point. It is a wide use of the Henry VIII power and I think that we should say, in the first instance, that we wish it to be subject to the affirmative procedure. The Enterprise and Culture Committee considered a number of provisions for which the negative procedure has been specified and considered that that would be appropriate. In this instance, given the legal advice that we have had this morning on the wide interpretation of "modify" and the possibilities that that gives, we should insist that, at the very least, the affirmative procedure must be used.

It is also reasonable that there should be provision in the bill for changes to courses or to the bodies overseeing those courses, which ministers might wish to include. Other members will have views on how the provisions are laid out, but I feel that we must strike a balance between allowing ministers the flexibility to respond to changes in the training and learning environment

and in the economic environment. They have to be able to respond quickly and I suggest that they should be able to do it without having to amend primary legislation. We must find an appropriate balance that does not allow ministers to make sweeping changes that were never intended by the original bill, but which still leaves flexibility.

10:45

Stewart Stevenson: I have difficulty with sections 5(1) to 5(6), because they draw together in one place and under one proposed secondary power both the specific qualifications. Section 5(1)(b), for example, refers to

“a qualification awarded by the Scottish Qualifications Authority”,

and section 5(5) specifies Scottish vocational qualifications—and the general kinds of education. Those are entirely different characters of things and should be dealt with in different ways. I think that it would be appropriate to draw the Parliament's attention to that conflation of two entirely different things in one power. It is an inappropriate way of drawing up legislation.

The Convener: If Murray Tosh also agrees with the points that have been made, I suggest that we write back to the Executive raising those points. Stewart Stevenson's point is additional to what we have in the legal brief, but we can ask for clarification. Is that agreed?

Members indicated agreement.

The Convener: We now move on to section 7(1), on further provision for fundable bodies. This section tries to introduce a provision whereby there can be updating, mergers and so on. The legal brief suggests that we might again want to consider whether the affirmative procedure would be more appropriate than the negative procedure. I am open to members' views.

Christine May: At the Enterprise and Culture Committee, the Deputy First Minister and Minister for Enterprise and Lifelong Learning suggested that he would be amenable to such a power being subject to the affirmative procedure. That committee felt that the affirmative procedure was appropriate.

The Convener: Do members agree that we should suggest that?

Members indicated agreement.

The Convener: No issues have been raised on section 7(2)(i). If members have no further points, it has been suggested that we ask the Executive for clarification on the drafting of section 7(4), because there is considerable overlap between that power and the power in section 7(2)(i). Is that agreed?

Members indicated agreement.

The Convener: We now come to the power to issue guidance. Members will remember that when we have discussed guidance before—I am sure that Murray Tosh will remember this—we thought that it was useful, particularly the first time that guidance was issued, for it to be laid before Parliament. In the case of the guidance relating to the bill, that is not being suggested, but it is a little unclear exactly what the nature of the guidance will be, so we might want to ask for clarification on that point. Is that agreed?

Members indicated agreement.

The Convener: We now come to section 8(6), and section 8(7) is obviously linked. I have read the extract from the *Official Report* of the lead committee's discussion, and it has obviously been concerned about the issue. Christine May is a member of that committee, so she brings a bit of expertise. The question that arises in relation to these subsections is whether it would be possible to bring in top-up fees through the legislation. The Enterprise and Culture Committee sought reassurances from the Executive on that issue.

The legal brief is suggesting that we consider whether the affirmative procedure would be more appropriate for these powers, particularly in the light of the difficulties that have been outlined.

Christine May: As you said, there was considerable debate at the Enterprise and Culture Committee and the minister was questioned closely on top-up fees, as were a number of witnesses who raised the issue as part of their evidence. The assurance that the committee had from the minister was that the provisions were largely to ensure that, for those courses for which there were already variable fees, the benefit of that higher support for students could be recovered from the funding body, which might not always be the Scottish body.

In this instance, the minister agreed that the Executive would not object to the affirmative procedure being used. That was the feeling that we got. Technically, it was accepted that, although a malign Government could, if it wished, introduce top-up fees by the back door, the Executive had other policy intentions not to introduce top-up fees. There would be a direct contravention there.

By and large, the Enterprise and Culture Committee was reassured by what the Deputy First Minister and Minister for Enterprise and Lifelong Learning said. The only other way round the matter would be to put something explicit about it in the bill, ruling out the possibility that I have just described. It is for this committee to determine whether or not such a course of action would be more appropriate with respect to subordinate legislation. Personally, I do not think

that we need go that far; I think that the affirmative procedure is sufficient in this instance.

The Convener: If we are dealing with the matter as a delegated power, we would like that power to be stronger and to come under the affirmative procedure.

Murray Tosh (West of Scotland) (Con): It helps to have Christine May's impression from the Enterprise and Culture Committee that the minister is receptive to the affirmative procedure being used. As is the case with the sections of the bill that we have already discussed, the important thing is not necessarily the modesty of any specific change that ministers might wish to make subsequently; we must examine the width of the power that ministers are giving themselves and the wording of the proposal. If ministers lump powers together and give themselves sweeping powers, they must be prepared to put even relatively modest orders before the Parliament through the affirmative procedure. They might find that tedious and onerous, but it is a matter of drafting and of ensuring that the Executive does not introduce such wide proposals subsequently.

Stewart Stevenson: In view of the sensitivity of the issue, I think that it would be convenient for us to suggest to the minister that he confirm that the provisions do not provide him with the total powers that would be necessary to introduce top-up fees.

The Convener: Okay. If that is agreed, we will move on to section 8(7), where a bigger concern is highlighted. If section 8(7) is read with section 8(6), it gives wide powers to the minister to specify fee levels. It has been suggested that we might even want to consider the super-affirmative procedure. What is the committee's view on that?

Murray Tosh: The officials of the Minister for Parliamentary Business suggested that the Executive was open to the principle of the super-affirmative procedure, if we could find appropriate instances in which to use it. Perhaps this is an appropriate instance to refer to the Executive. The policy area is admittedly controversial and difficult, so the Executive might like to pilot its use of the super-affirmative procedure here.

Members indicated agreement.

The Convener: It has also been suggested that we get clarification on the effect of section 8(7) on setting fees. The legal advisers feel that it is not entirely clear. We will ask about that and we will pursue the point about the super-affirmative procedure.

Section 22(4)(j) is on consultation and collaboration. Section 22(4) is a list of bodies and persons to be consulted. It is suggested that the list may be added to. The legal advisers wondered whether the Executive is thinking only about

adding persons or whether it might be considering amending the list in other ways. Should we ask for clarification on that point?

Members indicated agreement.

The Convener: Section 24(1) deals with requirements as to the new council's functions. There are no particular concerns about that section. Is that agreed?

Members indicated agreement.

The Convener: No issues of substance have been identified on section 26(1)(b).

Section 31 is on ancillary provision, and section 34(2) is about commencement. An inconsistency between the two relevant provisions in those sections has been highlighted. We will ask for clarification on that. Is that agreed?

Members indicated agreement.

The Convener: We turn now to paragraph 6(1)(c) of schedule 3. It amends section 44 of the Further and Higher Education (Scotland) Act 1992, which is on the designation of institutions. No issues have been identified.

That brings us to the end of our consideration of the Further and Higher Education (Scotland) Bill.

Executive Response

Scottish Environment Protection Agency (SEPA) and Sustainable Development, Statutory Guidance to SEPA made under Section 31 of the Environment Act 1995 (SE/2004/257)

10:54

The Convener: Members will recall that we asked about the reference to prorogation in the guidance and the fact that that phrasing was not right for the Scottish Parliament, and did not take note of the recess. The Executive acknowledges what we have said and will consider the matter at the first opportunity.

Murray Tosh: I understand that the same issue might arise elsewhere and that some sort of trawl might be about to take place or might be appropriate. What would we find out from that? What report would be made to us to the effect that such a trawl had been conducted and that the need to do that had been identified?

The Convener: There is certainly no problem with asking for that. The legal advisers have made it known in the legal brief that there should not be a big problem as far as this item and the guidance are concerned.

Murray Tosh: I appreciate that, but a bigger, more general issue has been highlighted, and we might therefore wish to quiz the Executive on the matter. Such problems are liable to recur. We would want to know that the Executive is treating the matter seriously and to find out what its timescale is for completing its review and making any amendments that prove necessary in the fullness of time.

The Convener: Absolutely.

I have just been reminded by the clerk that I must finish my brief on the guidance. Does the committee agree to report the guidance to the Parliament and the lead committee, with reference to the feedback from the Executive?

Members indicated agreement.

Draft Instrument Subject to Approval

Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2004 (Draft)

10:57

The Convener: Members will recall that there have been some issues with the draft order. We were hoping that the instrument would have been withdrawn and relaid. There have been negotiations between our legal advisers and the Executive, but we do not as yet know whether that will happen. If the draft order is not withdrawn by the relevant date, 5 December, we would have to convey our views on the instrument to the lead committee and the Parliament. Is it agreed that we do that, while hoping that the instrument will be relaid and will come before us again in the near future?

Members indicated agreement.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Order 2004 (SSI 2004/500)

10:57

The Convener: The legal advisers have identified no issues on the order.

Instruments Subject to Annulment

Agricultural Holdings (Fees) (Scotland) Order 2004 (SSI 2004/496)

10:58

The Convener: No points arise on the order.

Agricultural Holdings (Forms) (Scotland) Regulations 2004 (SSI 2004/497)

Stewart Stevenson: I draw attention to my entry in the register of interests, which indicates that I own 3 acres of rough grazing, which are rented to a farmer for up to 364 days a year. I believe that that falls outwith the scope of the order, but I think that it is appropriate to draw your attention to that, convener, in case my judgment is incorrect.

I have a small point to raise in relation to the form. Under schedule 2 of the regulations, provision is not made for the owner who is giving notice that he is about to transfer land to provide his address. Given that the original registration of interest could apply for up to five years prior to the owner giving such notice, it would be appropriate for the form to have the address that is current at the time of giving notice, so that the party or parties who have given notice of interest are able to respond within the timeframe to the owner at his current address.

The Convener: We should report that very good point to the Executive.

Christine May: To amplify what Stewart has said I—and I suspect many others in their constituency work—have come across instances where it is impossible to contact landowners because an up-to-date list of addresses is not available. People have therefore missed out being informed on fairly major issues with implications for their particular landholding. If the opportunity arises, the issue could be flagged up in other pieces of subordinate legislation that might need to include an up-to-date address. That would be very welcome, although I do not know how we would do it.

The Convener: Obviously, I am averse to giving more work to the Executive and I am wondering how that might be flagged up. Perhaps we could do it only with forthcoming orders, but it would be quite useful.

Stewart Stevenson: I have a general observation based on constituency work and previous legislation in which I have been involved. There is no legal obligation for owners to be

registered and that can create a real difficulty. In the case of these regulations, the address is already known and in the public domain, but it might have changed. Christine makes a more general point that is probably well beyond the remit of the Subordinate Legislation Committee, but the committee might be minded to take the opportunity to take cognisance of the issue.

I have a constituency issue where for 10 years it has been impossible to find out the owner of something that matters to a local community. That is to the community's great detriment and it is a very big and complex issue.

The Convener: We can take up Christine May's point with reference to regulations such as those we are considering. We would like the Executive to consider the issue for future similar instruments.

Murray Tosh: It might also be appropriate for our legal advisers to reflect on this discussion. As Stewart Stevenson says, it might not be a matter for the committee, but we have discussed some general issues that must be in someone's remit and someone somewhere should scrutinise them. Perhaps the legal advisers could reflect on that and come to a considered and informed position.

The Convener: We will pass that on to the appropriate committee, which is possibly the Environment and Rural Development Committee. We will find out and pass it on.

A minor error has also been picked up and we will bring that to the Executive's attention.

Sea Fish (Marketing Standards) (Scotland) Regulations 2004 (SSI 2004/498)

The Convener: No points arise on the regulations.

Instruments Not Subject to Parliamentary Procedure

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (East
Coast) (Scotland) Revocation Order 2004
(SSI 2004/501)**

**Food Protection (Emergency Prohibitions)
(Diarrhetic Shellfish Poisoning)
(East Coast) (No 3) (Scotland) Revocation
Order 2004 (SSI 2004/502)**

11:03

The Convener: No points arise on the orders.

Instrument Not Laid Before the Parliament

**Act of Sederunt (Debt Arrangement and
Attachment (Scotland) Act 2002)
Amendment (The Debt Arrangement
Scheme (Scotland) Regulations 2004) 2004
(SSI 2004/505)**

11:03

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

With that, I thank colleagues for coming to the meeting today and I hope to see you next week.

Meeting closed at 11:03.

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