

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 14 December 2004

Session 2

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SUBORDINATE LEGISLATION

COMMITTEE

35th 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 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 14 December 2004

[THE CONVENER *opened the meeting at 10:31*]

Delegated Powers Scrutiny

Further and Higher Education (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 35th meeting this year of the Subordinate Legislation Committee. I have received no apologies for today's meeting. We move swiftly on to delegated powers scrutiny and the Executive's responses to our questions on the Further and Higher Education (Scotland) Bill. We did not receive those responses until last Tuesday evening, so we are dealing with them this week. Ruth Cooper, the clerk, will quickly transmit our responses to the lead committee, which I think meets this afternoon.

Christine May (Central Fife) (Lab): I will attend this afternoon's meeting of the Enterprise and Culture Committee. If this committee agrees, I will update that committee on the basis of the note that I believe our clerk will send to the clerk to the Enterprise and Culture Committee.

The Convener: That would be very useful. Is that agreed?

Members indicated agreement.

The Convener: The first power on which we need to make a decision is under section 5(7) of the bill. It relates to programmes of learning, and allows ministers to modify the descriptions of programmes under the two headings of "fundable further education" and "fundable higher education". The Executive points out that section 5(8) states:

"Before making an order under subsection (7), the Scottish Ministers must consult the Council",

referring to the proposed new Scottish further and higher education funding council. However, the order-making power is very wide. We were concerned that it should be subject to the affirmative procedure instead of the negative procedure, as has been proposed.

Christine May: I support that view. Under the next section that we are to consider, the Executive has conceded the same point. It is entirely reasonable that the same logic should apply in the

case of section 5. I think that we should report to the lead committee as such.

The Convener: Is that agreed?

Members indicated agreement.

Mike Pringle (Edinburgh South) (LD): I see no reason why the affirmative procedure should not be used. It is baffling that the Executive did not agree to that. We should push that point.

The Convener: Yes. The legal brief also highlights a point about the Further and Higher Education (Scotland) Act 1992. We are a bit worried about the fact that the Executive keeps referring to it. We were wondering how much scrutiny was made of that.

I welcome Gordon Jackson to the committee. We are discussing section 5(7) of the Further and Higher Education (Scotland) Bill, and we have agreed that the power under section 5(7) should be subject to the affirmative procedure.

Section 7(1) covers further provision in relation to fundable bodies. It is to do with when bodies might merge, close or change their name. The Executive's response says that

"section 7 contains further restrictions",

referring to sections 7(1) and 7(2). The Executive is amenable to the possibility of amendment, however, if we still think that the power should be subject to the affirmative procedure. Should we pursue that?

Members indicated agreement.

The Convener: Section 7(4) is also on further provision in relation to fundable bodies. This is more technical. If members are content with the response that we have received, then I think that we will leave the matter where it is.

Members indicated agreement.

The Convener: Section 7(5) is on the power to issue guidance. We were concerned whether guidance under the bill should be laid before the Parliament. Our question was one of clarification. We have now received that. What are members' feelings on the issue?

Christine May: Although there is no explicit requirement on the proposed new funding council to pay heed to the guidance, I think that the council would be very foolish if it did not do so, and that it might at the very least find itself the subject of ministerial comment. I suggest that we should be content with the response that we have received.

The Convener: Is it agreed that we leave the matter there?

Members indicated agreement.

The Convener: Section 8(6) is on the funding of the new funding council. This is the matter that the lead committee was most concerned about. We raised the issue of using the affirmative procedure in this case. The Executive has said that, at stage 2, it will modify the procedure to be used. I think that we should be happy with the Executive's response, which we welcome.

Members indicated agreement.

The Convener: Section 8(7) is also on the funding of the new council. The provision gives ministers the power to specify fee levels. We were fairly concerned about the power. Members will recall that we suggested that the affirmative procedure should become the super-affirmative procedure in this case. We know that there have not been many occasions on which the super-affirmative procedure has been used, and we very much want to consider how it might be used in the future under our review of subordinate legislation. The Executive clearly does not want to use it at this stage. It is considering a possible amendment to make a statutory requirement for consultation. We could fall back on that and say that that is okay. However, we would want to ensure that such consultation was taken notice of. We might want to frame that in our response to the Executive. We might also want to say that we still think that the super-affirmative procedure should be considered for the future.

Christine May: I spoke earlier about the new funding council needing to take heed of guidance. In this instance, it is not reasonable to assume that ministers will take heed of a consultation just because one has been carried out. It would be appropriate for such a requirement to be written into the legislation. I note the Executive's point about the use of the super-affirmative procedure. Perhaps we ought to postpone any further confrontation on the matter until we have done our review and clarified our thoughts a little more. I see no harm, however, in mentioning again our view that the super-affirmative procedure can be a useful tool.

The Convener: I ask Ruth Cooper to frame that for us in our response. I think that we are all agreed on our position.

Members indicated agreement.

The Convener: We come now to section 22(4)(j), which is on consultation and collaboration. We raised a point about careless drafting, which has been accepted. Are we okay on that?

Members indicated agreement.

The Convener: We will draw the matter to the attention of the lead committee.

We come now to sections 31 and 34(2). I am sure that Murray Tosh will have read about this with great interest, as it is to do with ancillary provisions and commencement. The legal advisers have highlighted all the surrounding issues. We will be considering this subject in the course of our review. At this point, we will simply note the Executive's response.

Members indicated agreement.

The Convener: I thank members very much for their consideration of the bill, which we had to finish today.

Executive Responses

Building Standards Advisory Committee (Scotland) Regulations 2004 (SSI 2004/506)

10:39

The Convener: Members will remember that we raised the issue of appointments. Our legal advice indicates that we might want to leave it up to the ministers to clarify the issue when they are writing their letters of appointment. Are members content with that?

Members indicated agreement.

Road User Charging (Exemption from Charges) (Scotland) Regulations 2004 (SSI 2004/519)

The Convener: We were concerned that regulation 3(b) confers discretion, but because of the introduction to the regulation it is expressed as an obligation. We asked for clarification on that point, which we have received, and I suggest that we pass that on to the lead committee and Parliament.

Members indicated agreement.

Draft Instruments Subject to Approval

Scotland Act 1998 (Modification of Schedule 5) Order 2005 (draft)

10:40

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

Scotland Act 1998 (River Tweed) Order 2005 (draft)

The Convener: Our legal adviser has consulted various people and tells us that there is an important issue in relation to part 1, article 1(2) on page 5 of the order, which reads:

“Section 53 of the Scotland Act shall not apply to any function of the Scottish Ministers under this Order.”

Our legal adviser is fairly convinced that that makes no sense and that we should be asking for clarification. We have a lot of detail about why article 1(2) of the draft order does not apply, so I suggest that we put all that into the letter to the Executive when we ask for clarification. Is that agreed?

Members indicated agreement.

The Convener: The legal adviser is still talking to other people to get further clarification.

Murray Tosh (West of Scotland) (Con): I presume that paragraph 58 of the legal briefing refers to the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. I know that we have asked the question before, but let us not assume the answer; let us ask the question.

The Convener: That is fine.

The legal brief lists three other points, about article 10, article 4(1) and a question as to whether, in the definition of enactment, “either” should read “any”. We will add those three points to those we raised earlier.

Members indicated agreement.

The Convener: I gather that we have time to get the information back and work on it.

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2004 (draft)

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

Instruments Subject to Annulment

Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 (SSI 2004/518)

10:42

The Convener: Our legal adviser has raised some minor points on these regulations and on some of the others to come. We usually send such points to the Executive in an informal letter. Rather than go through them all, I suggest that we write informally to the Executive as a matter of course, if members agree.

Members indicated agreement.

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

Environmental Information (Scotland) Regulations 2004 (SSI 2004/520)

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

Christine May: Although this might not be a point of substance, it is at least interesting to note that the United Kingdom legislation requires the affirmative procedure to be used, and it is being proposed here that the negative procedure be used. It is reasonable to ask why the negative procedure is being proposed here when the UK legislation uses the affirmative procedure.

The Convener: There is no harm in that. The legal adviser does not think that there are any substantial points on the order, but I see no harm in asking the question.

Members indicated agreement.

Race Relations Act 1976 (Statutory Duties) (Scotland) Amendment Order 2004 (SSI 2004/521)

The Convener: No substantial points arise on the order.

Protection of Children (Scotland) Act 2003 Determination Regulations 2004 (SSI 2004/523)

10:45

The Convener: There are some points on the regulations. On page 13 of the legal brief, members will see that it is suggested that we should ask the Executive the following question:

"A number of the provisions of the Schedules for example paragraphs 3(2) to (4) and 8(4) of Schedule 1 and paragraphs 2(2) to (4) and 7(4) of Schedule 2 include provisions that are already to be found in the parent Act. As the enabling power authorises the Scottish Ministers only to make 'further' provision as to the procedure that is to apply to determinations, the Executive is asked to explain the vires for these provisions."

I just wanted to make that clear.

Gordon Jackson (Glasgow Govan) (Lab): I am curious to know what difference it would make. What does it matter if the Executive legislates twice? If something is legislated on twice, the new legislation is not intra vires only because the old legislation is still there. It is all right to ask the question, but what difference does it make if they re-enact the legislation? It is different if something is ultra vires and someone comes along later and says, "That was ultra vires," because then we have lost that legislation. We are only saying that we have the legislation already.

The Convener: I am told that it is a technical issue.

Gordon Jackson: It is fairly technical.

Christine May: We are doing it for neatness and tidiness.

The Convener: Yes; neatness and tidiness.

Murray Tosh: We are content.

Gordon Jackson: We should ask the question.

The Convener: The clerk is suggesting that we could do that informally.

Gordon Jackson: I am not saying that we should not ask the question; we should ask the question properly. I cannot see how legislation is ultra vires just because it has been enacted twice.

The Convener: Okay, we will ask the question. Are we agreed?

Members indicated agreement.

Plastic Materials and Articles in Contact with Food Amendment (Scotland) Regulations 2004 (SSI 2004/524)

Contaminants in Food (Scotland) Regulations 2004 (SSI 2004/525)

Police Act 1997 (Criminal Records) (Protection of Children) (Scotland) Regulations 2004 (SSI 2004/526)

The Convener: No substantial points have been raised on the regulations.

Fire Services (Appointments and Promotion) (Scotland) Regulations 2004 (SSI 2004/527)

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

Christine May: This is an interesting one. The legal adviser has drawn our attention to the question of whether it is material that the word "role" is used in the regulations, as opposed to the word "rank", which was used in the previous regulations. I am aware that there are proposals to change how the fire service operates and to base appointments on job descriptions rather than rank. It might be that the regulations are intended to support that. However, it is reasonable to ask the question. It might make no material difference to the purposes of the regulations, but I think that we should ask.

The Convener: Are we agreed?

Members *indicated agreement.*

Salmonella in Laying Flocks (Sampling Powers) (Scotland) Regulations 2004 (SSI 2004/536)

The Convener: I gather from our legal adviser that the regulations are an improvement on the English draft. Do we want to question the Executive about paragraph (2) of regulation 6, particularly about what offence will be covered by the paragraph?

Members *indicated agreement.*

Draft Guidance Subject to Annulment

Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2004/276)

10:48

The Convener: No substantial points have been raised on the guidance.

Instruments Not Laid Before the Parliament

Protection of Children (Scotland) Act 2003 (Commencement No 1) Order 2004 (SSI 2004/522)

Standards in Scotland's Schools etc Act 2000 (Commencement No 7) Order 2004 (SSI 2004/528)

Act of Sederunt (Sheriff Court Bankruptcy Rules) 1996 Amendment 2004 (SSI 2004/534)

Diseases of Animals (Approved Disinfectants) Amendment (Scotland) Order 2004 (SSI 2004/537)

Church of Scotland (Property and Endowments) (Amendment) Act 1933 Order 2004 (SSI 2004/538)

10:49

The Convener: No substantial points have arisen on the instruments.

Meeting closed at 10:49.

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