

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 December 2004

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

36th 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 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 December 2004

[THE CONVENER *opened the meeting at 10:30*]

Item in Private

The Convener (Dr Sylvia Jackson): I welcome members to the 36th meeting this year of the Subordinate Legislation Committee. I have received no apologies. I am therefore expecting a few more members to arrive in a few minutes.

Under item 1, I ask members whether they wish to take item 7, which is to do with a paper on the next stages of our review of the regulatory framework, in private, as we will be listing potential witnesses. Is that agreed?

Members *indicated agreement.*

Executive Correspondence

Title Conditions (Scotland) Act 2003 (Notice of Potential Liability for Costs) Amendment Order 2004 (draft)

10:30

The Convener: We have received a letter from the Deputy Minister for Justice, Hugh Henry. Members will recall that a similar case arose in relation to the Tenements (Scotland) Act 2004 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI 2004/490) and the 21-day rule. Members will see from the minister's letter that there are similar concerns about the draft Title Conditions (Scotland) Act 2003 (Notice of Potential Liability for Costs) Amendment Order 2004. The minister is basically saying that he does not think that the 21-day rule needs to be breached. However, he is open to our guidance on the matter.

Christine May (Central Fife) (Lab): In this instance, it is more important that the legislation is changed and got right, rather than that the committee adheres to its normal practice of criticising instances when the 21-day rule is breached. I think that we should tell the minister, the lead committee or whoever is to receive our response that we consider it much more important that the matter be corrected, for the avoidance of possible legal action or disputes between sellers and purchasers. That is much more important in this instance than adhering to the principle of not breaching the 21-day rule.

The Convener: I think that you are right. The legal advisers have highlighted the possibility of legal difficulties. Although I know that the minister has told us that he does not anticipate any such difficulties, I tend to agree with Christine May. What are members' feelings on the matter?

I welcome Murray Tosh, who has just arrived.

Mike Pringle (Edinburgh South) (LD): I agree with Christine May, although I thought that it was a good letter from the Deputy Minister for Justice.

The Convener: So you think that our response to the minister should say that the 21-day rule should be breached in this case so as to ensure that we avoid or minimise any legal difficulties.

Mike Pringle: Yes.

The Convener: Is that agreed?

Members *indicated agreement.*

Executive Responses

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

10:33

The Convener: We highlighted a number of errors in the draft order. The Executive has decided to withdraw its current draft and lay a new draft order in the new year. I suggest that we bring the Executive's response to the attention of the Parliament and the lead committee. Is that agreed?

Members indicated agreement.

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

The Convener: There is a difference between what has happened at Westminster and what has happened up here in Scotland as concerns the regulations. That is simply because in Scotland the Executive used section 2(2) of the European Communities Act 1972 for the purposes of drawing up the regulations. The United Kingdom regulations have been subject to the affirmative procedure; the Scottish regulations are subject to the negative procedure. I would like to hear whether members think that we should consider moving to the affirmative procedure, too. I stress, however, that the respective regulations have been drafted differently, which is why the negative procedure has been used in one case and the affirmative procedure has been used in the other.

Christine May: Normally, I would recommend that we go for the affirmative procedure, because I believe that such things should be scrutinised by the Parliament, rather than being subject to somebody noticing them and lodging a motion to annul. In this particular instance, the timescale is short. If the committee agrees, we might tell the lead committee that we have noticed the issue and that we would normally recommend the affirmative procedure but that, in this instance, we are not doing so, because of the timescale. The committee might want to examine this matter in its review of the regulatory framework.

The Convener: Are members happy with that?

Members indicated agreement.

The Convener: The shortness of time is a problem, unfortunately. We will report to the Parliament and the lead committee, explaining why we recommend that we should keep the negative procedure for the regulations, although we recognise the advantages of the affirmative procedure. We will take up the wider issue in our

review, referring to section 2(2) powers under the 1972 act.

Members indicated agreement.

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

The Convener: We asked the Executive why the regulations contained powers already contained in the parent act. Gordon Jackson made a few technical points about that last week. It is a question of whether we are content with the Executive's response. The Executive acknowledges that there is some duplication, but thinks that that is of benefit to the reader of the regulations. Should we pass the response on, or should we say that we think that legislative practice has not been adhered to in this case? Do you have any further comment on the matter, Gordon?

Gordon Jackson (Glasgow Govan) (Lab): As you know, it is not a matter that I find myself terribly concerned about. I do not think that the regulations are ultra vires in the normal sense.

Christine May: I understand that, technically speaking, it is not good legislative practice to repeat in regulations provisions that are already in the parent act. I appreciate the reasons for which the Executive has done so in this instance, which is to help the reader or user of the regulations to be absolutely clear about what matters are covered.

I note that a doubt has been expressed about such repetition when matters might be subject to criminal penalties, and that it is considered good practice to adhere to the letter of an act when drafting subordinate legislation.

I am inclined to side with the Executive in this case. If I were using the regulations, would it be more important for me that they were absolutely technically correct or that I was clear about what was contained in them? I think that I would come down on the side of the latter. I am not a lawyer, however. Therefore, I might be technically way out of line. I do not know whether other committee members agree.

The Convener: I would only add that the legal advisers have said that proper legislative practice has not been followed in this instance. We should possibly note that.

Murray Tosh (West of Scotland) (Con): That is an important principle. In the last two cases where we decided not to stand on our normal grounds, we did so on the basis that there was a greater public good to be served, given the timescale involved. I think that this is a case of poor practice, however, and that we should comment on that.

There are other ways in which the Executive can make instruments clearer; we have talked to them about including explanatory memoranda and writing the instruments in more comprehensible language. If the Executive thinks that it has done the right thing, that is fine, and it will not mind our drawing its attention to the fact that, technically, it has not done things in the right way. I think that we should stick with that view.

The Convener: I am tempted to agree with Murray Tosh. In our review, it might be useful to examine the extent to which provisions should be repeated. Do members agree with the approach that Murray Tosh has suggested?

Members *indicated agreement.*

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

The Convener: We wrote to the Executive about the change from “rank” to “role” in the regulations. The Executive responded that it sees the term “role” as having the same meaning as “rank”, and that there is not really an issue here. Are we in agreement about passing that on?

Members *indicated agreement.*

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

The Convener: Members will remember that the committee asked the Executive to explain the purpose of paragraph 2 of regulation 6, because the offences to which the paragraph refers are covered by paragraph 1. Our legal adviser has seen the response from the Executive and suggests that the committee might want to report the regulations on the ground of defective drafting. It is for the committee to consider whether the Executive should amend the regulations, although given the timescale the Executive does not propose to do so. Members will remember that the powers in the regulations relate to a survey that is to be undertaken, so would operate only in the short term.

Christine May: The survey is due to be completed by the end of October 2005. I am feeling magnanimous today; again, it is probably appropriate for the committee to accept the Executive's position and report the instrument on the ground of defective drafting.

The Convener: In our report to the lead committee we could mention that the regulations need to be amended, but because they will apply only in the short term—

Christine May: It would probably not be worth while to amend them.

The Convener: Yes. Is that agreed?

Members *indicated agreement.*

Draft Instruments Subject to Approval

10:41

The Convener: The instruments under this agenda item appear to be well drafted.

Council Tax (Discount for Unoccupied Dwellings) (Scotland) Regulations 2005 (draft)

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

Waste (Scotland) Regulations 2005 (draft)

The Convener: No substantial points have been identified on the regulations, but they contain a typo, to which we should perhaps draw attention in an informal letter. Is that agreed?

Members *indicated agreement.*

Instrument Subject to Annulment

General Teaching Council for Scotland Election Scheme 2004 Approval Order 2004 (SSI 2004/542)

10:41

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

Instruments Not Laid Before the Parliament

Education (Listed Bodies) (Scotland) Order 2004 (SSI 2004/539)

10:41

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

Environment Act 1995 (Commencement No 22) (Scotland) Order 2004 (SSI 2004/541)

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

Christine May: It has been pointed out to the committee that the order is the 22nd commencement order to be made under the Environment Act 1995 and I believe that there are more such orders to come. The legislation has the potential to be confusing for the reader and the user.

The Convener: Absolutely. We might remember that point in our review.

The committee will now move into private session.

10:42

Meeting continued in private until 10:53.

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