

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 January 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

1st Meeting 2005, 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

THE FOLLOWING ALSO ATTENDED :

Margaret Macdonald (Legal Adviser)

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 January 2005

[THE DEPUTY CONVENER *opened the meeting at 10:00*]

Delegated Powers Scrutiny

Transport (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): Welcome to the first meeting in 2005 of the Subordinate Legislation Committee. I should wish people a happy new year, but there it is.

The main item on our agenda is stage 1 of the Transport (Scotland) Bill. This is a big bill and I suspect that it will give rise to considerable argument about policy. I remind members that that is not our business. There is a lot of subordinate legislation associated with the bill and a number of issues require clarification.

Section 1 concerns the establishment of regional transport partnerships. The basic question that we must ask is whether we are happy for subordinate legislation to be used to do that or whether we think that there should be more on the face of the bill.

Christine May (Central Fife) (Lab): In my experience, the approach that is taken in the bill is a tried and tested way of dealing with such matters. For example, the original area tourist board structure was established in this way in 1994-95. As I recall, individual area tourist boards were set up through subordinate legislation. That approach seems to make sense in this case. Although the regional transport partnerships will not be identical, much of the work to establish them will be very similar.

The Deputy Convener: I have no problem with what is proposed. However, I am grateful to our legal adviser for pointing out that it is unclear how sections 1 and 2 will work together. Margaret Macdonald has identified a list of problems with sections 1 and 2. I propose that we take up those points with the Executive, as they are real issues. We should ask the Executive how the two sections will relate to each other. Is that agreed?

Members indicated agreement.

The Deputy Convener: No issues arise in relation to section 3, on funding and borrowing.

Section 5 is entitled "Formulation and content of

regional transport strategies". Guidance will be issued on section 5(3), but the bill makes no provision for it to be laid before Parliament in any shape or form. I am wondering whether the bill should make such provision. I appreciate that ministers can lay the guidance before Parliament, even if that is not specified in the bill. I am not even suggesting that it should be included in a statutory instrument, but the bill should make provision for it to be laid before Parliament.

Christine May: We made the same recommendation in respect of the National Parks (Scotland) Act 2000 and subsequent pieces of legislation which were likely to place a statutory duty on bodies to have regard to guidance.

The Deputy Convener: On sections 5 and 6, we should at least say to the Executive that there ought to be some method of laying the guidance before Parliament, either as a statutory instrument or in another way. We should ask the Executive to comment on what it considers to be the best method of doing that. Is that agreed?

Members indicated agreement.

The Deputy Convener: We have identified no issues in section 7.

It is suggested that we ask the Executive for clarification of which public bodies might be included in an order under section 8. There are also other questions that we could ask. Do we agree to ask the Executive to provide the clarification that we seek?

Members indicated agreement.

The Deputy Convener: Section 10 confers one of our favourite Henry VIII powers. Do we think that some form of super-affirmative procedure might be more appropriate? There is also a question about whether functions can be transferred in more than one direction. It is not clear whether the provision for functions to be transferred only one way is merely a drafting issue or deliberate Executive policy.

Murray Tosh (West of Scotland) (Con): I am always in favour of pursuing super-affirmative procedure.

The Deputy Convener: On this occasion, we can at least suggest that. We will also ask the other question that Margaret Macdonald has raised—whether it is policy for functions to be transferred in only one direction.

It has been asked whether the requirements of section 11 need to be set out in a more formal legislative context, rather than just as guidance.

Murray Tosh: This is the same point that was made earlier. The general directions constitute legislation and should be subject to a more elaborate procedure. We are again dealing with the super-affirmative principle.

The Deputy Convener: Do we agree to raise that issue with the Executive?

Members indicated agreement.

The Deputy Convener: We have no problems with sections 12, 13 and 16.

One issue has been raised in relation to section 17(1). The New Roads and Street Works Act 1991 enabled regulations to provide for the charging of a fee for registration. Clearly, there is no provision for that in the bill. We are asking whether that is a deliberate policy or something that the Executive has missed. Normally, we object to people being charged fees. However, we should point out that the provision is missing and ensure that that was intended, rather than inadvertent. There are no other issues in section 17.

No issues arise in section 18.

Murray Tosh: Paragraph 113 of the legal brief notes the absence in section 115 of the 1991 act of any provision equivalent to section 115A(5). Should we check that with the Executive?

The Deputy Convener: We should do so. The same point arises in section 19. We should check with the Executive whether a provision has been missed out deliberately or inadvertently.

Section 23 relates to enforcement. The committee must consider whether the right balance between subordinate and primary legislation has been struck. Even if penalties were specified on the face of the bill, some subordinate legislation would be needed to change them, as penalties are altered from time to time. For that reason, I am not necessarily concerned about the issue.

Murray Tosh: In the view of our legal adviser, is this an oversight or does the Executive intend to rely on some aspect of Henry VIII powers?

The Deputy Convener: We did not consider it to be an oversight. We have asked the Executive about possible oversights, but we did not think that this was one.

Murray Tosh: How do we think that the Executive expects the provision to work?

The Deputy Convener: Do you want us to put that question to the Executive?

Murray Tosh: The legal brief raises a fairly significant question.

The Deputy Convener: Indeed.

Christine May: Normally, the power to introduce a penalty appears on the face of the bill and the detail is left to subordinate legislation. It seems odd that that is not the case here. We should ask the Executive about that.

The Deputy Convener: We will go back to the Executive on the issue and ask how it expects the provision to operate in practice, if there has not been an oversight.

No issues have been identified in section 24.

Section 28 is entitled "Power of road works authority to require undertaker to resurface road". Only the first regulations would be subject to the affirmative procedure; subsequent regulations would be subject to the negative procedure.

Murray Tosh: It is not clear to me what is meant by "the first regulations". Does it mean the first regulation in each category, or a number of regulations, until the issue has been sorted out?

Margaret Macdonald (Legal Adviser): The first set of regulations in each category would be subject to the affirmative procedure. Those regulations might all be included in one instrument. Afterwards, the regulations would be subject to the negative procedure.

The Deputy Convener: We are talking about new regulations, rather than amendments to existing regulations. Are members content with the section?

Members indicated agreement.

The Deputy Convener: A similar issue arises in section 29. There will be a new subsection that will allow criminal offences to be created in regulations, rather than by the act. We have always had subtle reservations about that.

Mike Pringle (Edinburgh South) (LD): Is that normal?

The Deputy Convener: I think that it is becoming increasingly normal. Do we want to take up anything on the matter?

Christine May: For consistency, should we not at least ask about it?

The Deputy Convener: The legal advisers have raised certain things on which we have reservations. In particular, do ministers have the powers that they think they have? We should ask the Executive about the proposed powers to clarify the points that the legal advisers have raised.

Section 29 adds new section 132E to the New Roads and Street Works Act 1991. It says:

"road works authorities and undertakers shall have regard to the code of practice"

when carrying out their functions. It has been pointed out that breaches of the regulations made under the new sections of the 1991 act may attract criminal sanctions, so the code of practice could have some legislative effect. Should there be some more formal procedure for that?

Murray Tosh: As there is a potential legislative effect, a formal procedure ought to be in place.

The Deputy Convener: We are agreed on that. We will raise the matter with the Executive for its comment.

Points that we have raised on earlier sections are relevant to section 30. A fairly large section of the legal brief is on section 32, which concerns fixed-penalty offences. The new section that is inserted into the 1991 act by section 32 contains yet another Henry VIII power. Leaving aside the question whether we like that whole idea—it is not as draconian as it might seem, in fact—there seems to be a drafting problem. That may or may not be an oversight, but it could cause problems, as it would mean that the commencement orders do not cover what they are meant to. Have I got that right?

Margaret Macdonald: The point is that orders under that power have not been declared to be statutory instruments.

The Deputy Convener: We should raise the matter with the Executive. It might just be a matter of someone clarifying it for us.

There is the old question of whether to apply the negative or the affirmative procedure with respect to the powers under section 33. It concerns civil penalties—not criminal penalties—for certain offences. The powers allow ministers effectively to decriminalise offences by subordinate legislation. Should affirmative, rather than negative, procedure be used?

I must say that I would be more worried about making things criminal, rather than decriminalising them. Perhaps that is the old criminal lawyer in me. If the committee is of the view that we should apply the affirmative procedure in this instance, as it involves taking quite an important step, I am willing to suggest that.

Members indicated agreement.

The Deputy Convener: To be fair, the Executive tends to be fairly reasonable in making things subject to the affirmative procedure when we ask it to do so.

There are no issues around section 34.

Should the powers under section 35 be subject to the affirmative procedure, rather than the negative procedure? The issue is similar to that which we raised with respect to section 32.

Murray Tosh: I think that we require to make that suggestion, to be consistent with the line that we are taking on previous sections.

The Deputy Convener: Section 36 is headed “Civil penalties for certain offences under the Roads (Scotland) Act 1984.”

Murray Tosh: The same applies here.

The Deputy Convener: It is the same issue again.

Section 37 is on national travel concession schemes. No substantial issues have been raised, although it is suggested that we ask the Executive for some clarification, and I think that we will do so.

Members indicated agreement.

The Deputy Convener: There are no issues with respect to sections 43, 46 and the schedules.

What is the timescale for this? Would we expect to get answers back from the Executive next week?

Ruth Cooper (Clerk): Yes.

The Deputy Convener: So we will be dealing with the Executive's responses on the bill at our next meeting.

Draft Instrument Subject to Approval

Remote Monitoring Requirements (Prescribed Courts) (Scotland) Regulations 2005 (draft)

10:13

The Deputy Convener: There are not many issues to raise for the rest of our agenda. Nothing has been identified on the draft regulations. There are some minor matters, but if members are agreed we could deal with those by informal letter.

Members *indicated agreement.*

Instruments Subject to Annulment

Ethical Standards in Public Life etc (Scotland) Act 2000 (Devolved Public Bodies) Order 2004 (SSI 2004/543)

10:13

The Deputy Convener: Item 3 starts with ethical standards in public life.

Christine May: There are none.

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

Sweeteners in Food Amendment (Scotland) Regulations 2004 (SSI 2004/548)

Murray Tosh: There is a consolidation issue with respect to the regulations.

The Deputy Convener: We will deal with that.

Solicitors (Scotland) Act 1980 (Compensation for Inadequate Professional Services) Order 2004 (SSI 2004/550)

Title Conditions (Scotland) Act 2003 (Notice of Potential Liability for Costs) Amendment Order 2004 (SSI 2004/552)

The Deputy Convener: No points arise on the orders.

Instruments Not Subject to Parliamentary Procedure

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (Orkney)
(No 4) (Scotland) Revocation Order 2004
(SSI 2004/547)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (No 10) (Scotland) Partial
Revocation Order 2004 (SSI 2004/549)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (No 7) (Scotland) Partial Revocation
Order 2004 (SSI 2004/553)**

10:14

The Deputy Convener: We have our usual shellfish orders. No doubt, Mr Tosh's friends will be objecting to them in a different place, but there is nothing for us to deal with.

Murray Tosh: These are revocation orders.

The Deputy Convener: Oh, I see; so even Mr Davidson will not be opposing them. Even he will say that they are okay.

Murray Tosh: It is good to see that you are well briefed, convener.

The Deputy Convener: Yes—I see that they are revocation orders. It is just that when I see the word “amnesic”, I assume that Mr Davidson will have something to say on the matter.

Instruments Not Laid Before the Parliament

**Tobacco Advertising and Promotion Act
2002 (Commencement No 8) (Scotland)
Order 2004 (SSI 2004/546)**

**Protection of Children (Scotland) Act 2003
(Commencement No 1) Amendment Order
2004 (SSI 2004/556)**

**Local Governance (Scotland) Act 2004
(Commencement No 2) Order 2004
(SSI 2004/558)**

10:14

The Deputy Convener: No points arise on the orders.

Unless anyone has anything else to raise, that brings the meeting to a close. Thank you.

Meeting closed at 10:14.

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