

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 18 January 2005

Session 2

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CONTENTS

Tuesday 18 January 2005

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DELEGATED POWERS SCRUTINY	721
Transport (Scotland) Bill: Stage 1	721
EXECUTIVE RESPONSE	728
Sweeteners in Food Amendment (Scotland) Regulations 2004 (SSI 2004/548)	728
DRAFT INSTRUMENT SUBJECT TO APPROVAL	728
Land Reform (Scotland) Act 2003 (Modification) Order 2005 (draft)	728
INSTRUMENTS SUBJECT TO ANNULMENT	729
Food Labelling (Added Phytosterols or Phytostanols) (Scotland) Regulations 2005 (SSI 2005/1)	729
National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2005 (SSI 2005/3)	730
Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2005 (SSI 2005/9)	730

SUBORDINATE LEGISLATION COMMITTEE

2nd 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

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 18 January 2005

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

Delegated Powers Scrutiny

Transport (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): Good morning and welcome to the 2nd meeting in 2005 of the Subordinate Legislation Committee. We have apologies from Adam Ingram. We are light on the ground, but I take it that that is because there is snow on the ground. However, there are enough of us to crack on.

We are looking at the Executive's responses to our points on the Transport (Scotland) Bill. To be fair to the Executive, it has tried to give us quite a full response. The first point was about sections 1 and 2. We asked for clarification as to how the two sections would interact. According to one view, it is possible under section 2 to do anything to the legislation. Therefore, there was a fear that it was at least possible that, having set up the new regional transport partnerships, the Executive could then do anything that it wanted with them, including abolishing them and never setting them up again. Personally, I think that that fear is exaggerated, but members may think that it is appropriate at least to highlight the issue to the lead committee, so that there is a record of the potential problem.

Christine May (Central Fife) (Lab): I agree that it is worth highlighting that. Although the Executive would have an obligation to reconstitute a regional transport partnership, the time lapse between dissolution and reconstitution might cause extreme difficulties for contractual arrangements, staffing and so on. It is worth pointing out that the theoretical threat exists, so that the lead committee is aware of it.

The Deputy Convener: The lead committee could recommend ways of redrafting the provision, so as to remove any doubt.

Mr Stewart Maxwell (West of Scotland) (SNP): I agree with Christine May. There is a possibility of a state of limbo being created and of things being left in the lurch. I agree that the fear that you mentioned is extreme, but there is still a question mark here, and we should flag up the matter to the lead committee.

Murray Tosh (West of Scotland) (Con): The case for redrafting has been made, and the legal brief mentions the balance between subordinate and primary legislation. I think that the primary legislation should be clearer.

The Deputy Convener: I am sure that, between our report and reading what we say this morning, our reservations will be made clear.

Section 5 is about parliamentary procedure for transport strategies. We asked whether the guidance that is issued on preparing transport strategies should be laid before the Parliament for some form of scrutiny. The Executive does not intend for that to happen, although it will place a copy of the guidance in the Scottish Parliament information centre. Are we content with that, or do we wish to tell the lead committee that some requirement to lay the guidance would be appropriate?

Murray Tosh: I think that we should stick to our original position: we feel that the guidance is of sufficient significance to be laid before the Parliament.

The Deputy Convener: I have no difficulty with that.

Christine May: Nor have I.

The Deputy Convener: In what form should that be? Should there simply be a requirement to lay the guidance before the Parliament?

Murray Tosh: A requirement to lay the guidance would give sufficient notice for a committee to instigate any work that it might feel necessary on the detail of the documents.

The Deputy Convener: Section 6 is the same, yet slightly different: it also concerns transport strategies. I am not sure what other members thought, but I did not have much disagreement with the Executive on the powers in the section, because of the flexibility that would apply across the country.

Christine May: I would be content on the matter, given that, in order for the transport partnerships to obtain consent to spend, they will need to have the transport strategies agreed, and there will therefore need to be considerable dialogue. I do not think that there is a need for the strategies to be laid before the Parliament.

Murray Tosh: The legal brief points out that the strategies and the decisions on them might be "essentially local in character". The localities in some areas might involve half or a quarter of Scotland—huge areas of territory, requiring significant amounts of expenditure. The services to be provided there are very important. I think that ministerial approval of the strategies is a significant development. If we accept what the

Executive is proposing, it rather cuts the Parliament out.

Mr Maxwell: I agree with Murray Tosh. The issue is the definition of local. If the word is used in the sense in which most of us use it, to mean a very small area or a small community, then the Executive's approach is probably right. However, Murray's point about a quarter or half of Scotland effectively being covered by some of the regional transport partnerships is entirely reasonable.

The Deputy Convener: There are only four of us here, and I am not going to get into a dispute over this. If members think that there should be more scrutiny of something, I will always run with that. We will recommend that in this case—although I was not particularly bothered about it.

Section 8 is about the duty of councils and other public bodies with respect to transport strategies. The Executive has referred to the list of public bodies concerned. I think that we should simply report that response to the lead committee.

Members indicated agreement.

The Deputy Convener: On section 10, we asked whether some form of super-affirmative procedure might be more appropriate. The Executive takes the view that the normal affirmative procedure can achieve the same ends. However, it is not quite right to say that. There are certain requirements that the super-affirmative procedure brings in that nothing else does. The question is whether we are content with the level of scrutiny that has been set out by the Executive. Do we wish to recommend that, on this occasion, some form of super-affirmative procedure be used? Again, I am fairly neutral on the matter.

Mr Maxwell: We should stick to our original thoughts on the matter. The provisions grant a wide Henry VIII power and the super-affirmative procedure would be more reasonable. As the legal advisers point out in the brief, that would provide an

"opportunity for the Parliament to suggest amendments to the order."

That is extremely important in this instance. We should stick to our original comment and recommend the super-affirmative procedure.

The Deputy Convener: Once again, if the committee wants more scrutiny rather than less, I will not disagree.

There is a further issue in section 10, which the Executive is considering. There are a number of instances where the Executive is still considering an issue. One could take the view that that is just to avoid our getting too involved, but I think that in this case the Executive is genuinely considering the matter. Where it is considering issues further,

we should draw that to the attention of the lead committee. We should also point out on the record that that is not the end of our involvement, and that we will monitor the position at stage 2. Members may be reminded that we in this committee, either individually or collectively, can attend stage 2 of the bill's consideration and raise these issues. I am sure that the clerks will monitor the situation. We will not push for a reply before stage 2, but we should make it clear on the record that we are still at the game as far as these matters are concerned, and that we will monitor proceedings at stage 2.

Christine May: I agree.

Mr Maxwell: I also agree. If we were in a benevolent frame of mind, then we might conclude that the Executive was taking extra time to consider our wise words. However, with a rather more cynical head on, we might suggest that the Executive was trying to avoid answering the questions at this stage, knowing full well that it is perfect possible for there to be less scrutiny of this stuff at stage 2 than there would be if it had come directly to this committee at stage 1.

The same situation has arisen once or twice before, but it seems rather odd for it to have arisen four times on one bill. I do not think that I remember that happening before. I think that we should highlight the matter and ensure that the lead committee and the Executive are aware that the questions that we put are not closed, and that we will continue to monitor the situation and be involved at stage 2, if that is felt necessary.

The Deputy Convener: On this occasion, unusually, I might be in the naive party and Stewart Maxwell in the cynical party. Either way, it is the same result: the Executive will know that we are still involved.

Section 11 is on the manner of the performance of RTPs' functions. We considered that ministerial directions might have a legal effect. The Executive does not believe that such directions need to be in a more formal legislative document. Are we going to recommend to the lead committee that there be some form of parliamentary scrutiny here? That seems to be the committee's general approach, so I suppose that we will do so.

Members indicated agreement.

The Deputy Convener: I am now getting the drift of where the committee is going on these issues.

Section 17 contains one of a number of issues on which the Executive has taken on board our wise words and—

Mr Maxwell: I am sorry—where are we?

Christine May: Did you say section 17?

The Deputy Convener: I am just mentioning it.

Christine May: I beg your pardon.

Murray Tosh: The convener is referring to paragraph 2 in the legal brief, which outlines those sections on which the Executive has effectively accepted our position.

The Deputy Convener: Indeed. I am dealing with the points in the order in which they appear in the wee fancy briefing that I get, you see. In any event, the Executive has agreed with us on section 17, so we will simply point out its undertaking to the lead committee. I think that the same applies to sections 18 and 19: what we said has been accepted and will be the subject of amendments at stage 2.

Section 23 replaces criminal sanctions with civil penalties. We asked how that would work in practice and why the Executive thinks that the penalties should all be set out in subordinate legislation. The Executive has explained in its response that that is very much a last resort provision. I do not know how other members feel about that, but, on this occasion, I am reasonably content with it, partially because the Executive is criminalising the matter downwards, as it were. Do members agree with my view?

Members indicated agreement.

The Deputy Convener: A number of points arise on section 29. With regard to new section 132D(1), we have pointed out that no power is conferred on ministers to alter the level of the fine and the Executive is considering that matter further. As we said in relation to section 10, we should let the Executive know that, while it is acceptable for it to consider the matter, it should not think that we have forgotten about it.

With regard to new section 132E, which is also proposed by section 29, we thought that the proposed code of practice might have some legislative effect and that there was a case for it being subject to some formal procedure. The Executive, of course, does not think so.

I know that this committee is always in favour of having more procedure but, of course, there are other codes of practice under the New Roads and Street Works Act 1991 that are not subject to procedure. The question is, do we want consistency or do we take the view that consistency is not the be-all and end-all and that the proposed code of practice should be subject to some form of procedure?

Christine May: When the Enterprise and Culture Committee, on which I sit, considered the political aspects of this matter, it became apparent that this was one of the areas of the bill that was particularly contentious, given the proposal to have an almost limitless obligation on undertakers

to carry out repairs and reinstatements of roads. It would therefore be imperative that the regulations be as clear as possible. Should there be a time limit on the obligations on undertakers? It is possible that the bill should be clear about the length of time beyond which an undertaker would not be required to carry out repairs and so on.

I would like the matter that we are discussing to be subject to greater scrutiny than is currently proposed.

The Deputy Convener: Does the committee agree to take the route that involves more scrutiny, rather than consistency?

Members indicated agreement.

Murray Tosh: It is important to point out that it is a poor argument that says that, because some codes of practice in the 1991 act are not subject to scrutiny, nothing comparable ever should be. Apart from the fact that there have been changes in procedures since that act was introduced, there is far more scrutiny now. We should never argue for poor practice on the basis that there is already poor practice somewhere else.

Mr Maxwell: That is what I was going to say.

The Deputy Convener: I think that the clerks will be pretty clear about what we want to do in that regard.

Section 33 allows ministers to decriminalise offences by subordinate legislation. We thought that there should be an affirmative rather than a negative procedure. The Executive starts off by saying that the situation is similar to other decriminalising regimes, such as the regime of decriminalised parking offences, but ends by saying that it is considering the point raised and might amend the procedure.

This committee always likes to have affirmative procedures for such matters—we are quite fussy about that—so I think that we should recommend that and continue to monitor what the Executive does at stage 2. Similar points arise in relation to sections 35 and 36.

We asked for clarification of section 37. I find that the matters relating to this section are quite difficult. The provisions in the section are handled differently to others and the Executive has pointed out that that is because they are intended to address different circumstances. How do we feel about that? Should we flag up our concerns? We missed some of these issues before—that is to say, I did; I am not suggesting that our legal advisers did—and did not ask the Executive about all our concerns.

I do not think that this is the biggest issue in the world, but I think that our report to the lead committee should flag up the fact that we believe

that there is a problem relating to the suggestion that different parts of a section would be dealt with by different procedures.

Mr Maxwell: It is a matter of there being a lack of consistency. I agree with your suggestion, convener.

The Deputy Convener: Earlier, we talked about other provisions that relate to different circumstances. We should make the lead committee aware of the Executive's explanation, without putting the case too strongly. Is that agreed?

Members indicated agreement.

The Deputy Convener: The draft report on the bill will be circulated by e-mail as soon as possible because the lead committee has to receive it soon.

Ruth Cooper (Clerk): It has to be with the lead committee by 2 February.

The Deputy Convener: That is a week tomorrow.

We have covered most of the issues and have flagged up our concerns where necessary. We have also made it clear that we are not going to let the outstanding items disappear into stage 2 without going after them.

Murray Tosh: It might be courteous to advise the Executive that there is an additional point at the tail-end of section 37 that we intend to raise with the lead committee, but which we accept that we did not raise with the Executive before.

The Deputy Convener: Yes.

Executive Response

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

10:15

The Deputy Convener: We asked the Executive what progress has been made towards the consolidation of this series of regulations. The Executive has given us a full explanation of its proposals in this direction and I suppose that we should draw that to the attention of the lead committee.

Draft Instrument Subject to Approval

Land Reform (Scotland) Act 2003 (Modification) Order 2005 (draft)

10:15

The Deputy Convener: No points arise on the order.

Instruments Subject to Annulment

Food Labelling (Added Phytosterols or Phytosteranols) (Scotland) Regulations 2005 (SSI 2005/1)

10:16

The Deputy Convener: My briefing note says that no points have been identified on the regulations, but the situation is not quite as simple as that, is it Mr Maxwell?

Mr Maxwell: My concern does not relate to a legal point that has been identified but it is worth putting on the record nevertheless, as it concerns something that is creeping into our legislation ever more frequently. As our legal advisers point out, the drafter of the regulations

“has simply ‘put a kilt’ on the English regulations”.

When English regulations are used in that way, we end up with Scottish regulations that use language that is inconsistent with that which is used in our legislation. It does not make a great deal of difference, but is another example of the sort of thing that means that we end up talking about the Forth estuary rather than the Firth of Forth. The Executive should be aware that it is not acceptable to rubber stamp—or to put a kilt on—regulations that have come from elsewhere. Regulations should use the language that has been used in previous Scottish legislation, which means that these regulations should use the term “food authority” rather than the English term “local authority”.

The Deputy Convener: I am experiencing déjà vu. A well known sheriff from Ayrshire—David Smith; Murray Tosh will remember him—used to send me regular e-mails on this subject. He had a legitimate point about the danger of forgetting our roots and language. Oddly enough, I am not totally unsympathetic to that point, because I think that there is a sense in which language is important. However, I do not think that there is much that we can do about it other than doing what Mr Maxwell has done and flagging it up as something that the Executive should look out for when it is drafting legislation.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2005 (SSI 2005/3)

Sexual Offences Act 2003 (Prescribed Police Stations) (Scotland) Amendment Regulations 2005 (SSI 2005/9)

The Deputy Convener: No points arise on the regulations.

Thank you all very much for attending. As they say, have a nice day.

Meeting closed at 10:17.

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