

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 12 April 2005

Session 2

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **11<sup>th</sup> 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 12 April 2005*

[THE CONVENER *opened the meeting at 10:37*]

**The Convener (Dr Sylvia Jackson):** I welcome members to the Subordinate Legislation Committee. I have apologies from Mike Pringle. I also had apologies from Murray Tosh, but he is with us and, helpfully, did not have the long meeting that he thought he would have.

**Gordon Jackson (Glasgow Govan) (Lab):** He is still sorry, but he is here.

**The Convener:** Our legal adviser, Margaret Macdonald, is unfortunately ill with viral meningitis, so we have two other legal advisers, Michael Carey and Greg Thomson, who will be with us for some time while Margaret recovers. I suggest that we send a card and flowers to her, as she is in hospital.

**Members indicated agreement.**

## Delegated Powers Scrutiny

### Smoking, Health and Social Care (Scotland) Bill: Stage 1

10:38

**The Convener:** Agenda item 1 concerns delegated powers scrutiny for the Smoking, Health and Social Care (Scotland) Bill at stage 1. On 22 March, the committee raised a number of issues on the delegated powers in the bill with the Executive. The first of those, which is perhaps also the most important, concerned the meaning of “no-smoking premises” under sections 4(2) and 4(7). The committee asked whether it would be appropriate to use a super-affirmative procedure in those sections so that the Parliament could debate proposals for the definition of no-smoking premises before a draft instrument was laid.

The Executive’s reply describes the large amount of consultation that is taking place on the draft regulations at present. However, our concerns related more to subsequent consultations, on which there does not seem to be much change from what is currently proposed in the bill. I am open to suggestions from members on how we should proceed.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I agree with what you have just said. I imagine that, like me, most members are happy with the level of consultation and the fact that the first draft instrument has been issued for consultation. My concerns relate to whether the Executive has got the balance right in respect of possible future amendments to the bill. Although it has said that it will consult persons as it considers appropriate, the consultation will not be on a draft instrument. It may be appropriate to publish a draft instrument for consultation on this particularly contentious issue not just initially, but when changes are proposed in the future.

Given that the first draft instrument was circulated and consulted on widely, and that the consultation was not restricted to those whom ministers regard as appropriate, the same approach should be taken in respect of future changes. At the very least, we should write to the minister and seek his opinion on that point. We should also point out to the lead committee that there may be a case for changing the balance slightly, so that the requirement is slightly more onerous in the future. I make that suggestion on the basis that this is a particularly contentious issue in which there is wide interest throughout Scotland.

**The Convener:** Obviously, we need to distinguish between fairly technical changes that

we would not want to be subject to an elaborate procedure and more radical changes. If the committee is agreeable, we could suggest to the minister a change to section 34(4) of the bill, which deals with the consultation process. It would be fairly simple to include in the bill a requirement for consultation on a draft instrument, which is what we are seeking. Would that be a better way forward than use of the super-affirmative procedure?

**Murray Tosh (West of Scotland) (Con):** If we are writing to the minister, it would be sensible to draw his attention to the concerns that members expressed at the committee's previous meeting, in particular, and to invite the Executive to consider the wording of an amendment to section 34(4) that might meet our objectives without enmeshing the Executive in the requirement to undertake elaborate procedures every time that it wanted to make a minor technical change.

**Gordon Jackson:** If such a provision were included on the face of the bill, would a draft instrument need to go out to consultation even if it made only a technical change? That is the difficulty that I have with the proposal. You are saying that we do not want the super-affirmative procedure to be used for a technical change, but once we say on the face of the bill that the Executive must consult on a draft instrument, there will need to be consultations on extremely trivial changes. We have consultation overload. I do not know how to solve the problem.

**The Convener:** Ruth Cooper has pointed out that the provisions on the face of the bill require there to be a consultation. The only change that we are proposing is that the draft instrument should be part of the consultation, instead of emerging from it.

**Gordon Jackson:** Are you saying that the provisions on the face of the bill require every change to be consulted on?

**The Convener:** Section 34(4) states:

"The Scottish Ministers must consult such persons as they consider appropriate before laying a draft of a statutory instrument".

**Gordon Jackson:** You are saying that they should draft the instrument and then consult on it, as they have done in this case.

**The Convener:** Yes—they should use the instrument as the basis for the consultation.

**Gordon Jackson:** That is okay.

**Christine May (Central Fife) (Lab):** When we write to the minister, it is important that we keep in the back of our mind the fact that we do not want the committee to be responsible for a procedural sledgehammer to crack a nut. If there are aspects

of the descriptions of premises, for example, that have proved to be unenforceable or that it has been possible to circumvent, it is entirely reasonable that changes should be made quickly, without the Executive's having to consult everyone and their granny. I am also slightly worried about how the Executive will know what it wants to put in a draft instrument until it has carried out consultation or received feedback. I am content that we ask the minister the question, but we should keep it in the back of our minds that we might be asking for the impossible.

10:45

**Gordon Jackson:** What is the timescale? We are not in a hurry, are we?

**The Convener:** Yes, we are—that is the problem. I think that the lead committee is meeting on Thursday. [*Interruption.*] Sorry, the clerk tells me that we have to issue our report by Thursday.

**Gordon Jackson:** Yes, but I meant that the issue could continue right through stage 2.

**The Convener:** Yes.

**Gordon Jackson:** As we are not in a desperate hurry, we can flag up the issue to the Executive now without reaching a final conclusion. We can tell the Executive what our questions and worries are and ask how it intends to handle the matter. If the issue is not resolved by the end of stage 1, that will not be the end of the world; the issue can run through stage 2.

**The Convener:** Exactly. Christine May raised a slightly different issue. The bill states:

"The Scottish Ministers must consult such persons as they consider appropriate".

That gives flexibility on slightly technical issues, rather than the bigger issues. However, Christine May's point is about a different type of consultation, so we will raise that issue in our letter, too. The deadline for our report is Thursday, so we will flag up the points that have been mentioned this morning. We will also write to the minister directly to flag up the issues, as Gordon Jackson suggested.

Section 11 is on charges for certain dental services. As members will see from the response, the Executive considers that the negative procedure has worked well in similar situations, because of the need for flexibility. Do members accept the response?

**Members indicated agreement.**

**The Convener:** Section 18 is on the functions of health boards in relation to the provision and planning of pharmaceutical care services. Again, the Executive has given a useful response on what is a technical issue. Are members happy with it?

**Members** *indicated agreement.*

**The Convener:** Section 24 is on payments to certain persons who were infected with hepatitis C as a result of NHS treatment. The issue is particularly sensitive, but the Executive has not really changed its view.

**Christine May:** The scheme should be subject to some form of parliamentary scrutiny and the committee should say that.

**The Convener:** Yes. The scheme should be laid before Parliament.

**Christine May:** Another point—which may be a slight aside but which is probably relevant—is that the Executive's response refers to the payments as non-statutory and ex gratia, although the bill will clearly put the scheme on a statutory footing. If the Executive is going to tidy things up, it should tidy that up.

**The Convener:** Yes. Are there any other points on that?

**Members:** No.

**The Convener:** Section 28 is on the registration of child care agencies and housing support services. We were concerned about the issue because our legal advice was that the power in section 28(4)(e) was a Henry VIII power. We therefore thought that there should be more scrutiny of it. The Executive points out that it does not anticipate that the power will ever be used and that it is very limited. Is that a reasonable case for keeping the power as it is?

**Members** *indicated agreement.*

## Executive Response

### Additional Support Needs Tribunals for Scotland (Appointment of President, Conveners and Members and Disqualification) Regulations 2005 (SSI 2005/155)

10:48

**The Convener:** We raised two points on the regulations. I could read out all the information—

**Gordon Jackson:** Read the conclusion.

**The Convener:** I will try to summarise. On regulation 5, the nub of the issue seems to be that, although the parent act—the Education (Additional Support for Learning) (Scotland) Act 2004—makes the convener of a tribunal a member of it, that is certainly not clear in the regulations. Margaret Macdonald pointed out that the regulation is ultra vires. I gather from the legal advice that we have not really moved any further forward on the point.

**Mr Maxwell:** I know that you have clarified that point, but I seek further clarification.

**The Convener:** About the legal side? Sorry, I should have mentioned that.

**Mr Maxwell:** There is a contradiction in that members of the tribunals are not allowed to be legally qualified, but conveners should be legally qualified. However, conveners are also members, so effectively it goes round in a circle. There is a basic contradiction and I agree with the original advice. I think that the Executive is incorrect and that the regulation is ultra vires or, at the very least, defectively drafted.

**The Convener:** We report to the lead committee and to Parliament at this stage. Clearly, that is our big concern.

The second issue that we raised was the failure to cite all relevant enabling powers in the preamble to the regulations. Is it agreed that we should also mention that in our report?

**Members** *indicated agreement.*

## Draft Instrument Subject to Approval

### Producer Responsibility Obligations (Packaging Waste) Amendment (Scotland) Regulations 2005 (draft)

10:50

**The Convener:** There are no substantive points on the draft instrument, but there are minor points that we should raise in an informal letter. There are also some minor points on later instruments. Do members agree that we should incorporate all those points in an informal letter?

**Members** *indicated agreement.*

## Instrument Subject to Approval

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 3) (Scotland) Order 2005 (SSI 2005/208)

10:51

**The Convener:** No points have arisen on the order.

## Instruments Subject to Annulment

### Invergarry-Kyle of Lochalsh Trunk Road (A87) Extension (Skye Bridge Crossing) Toll Order (Revocation) Order 2005 (SSI 2005/167)

10:52

**The Convener:** There are no points of substance on the order. Are there any further points?

**Mr Maxwell:** It seems strange that it is necessary to revoke something that was not properly assigned: it was illegal to charge tolls in the first place. However, the order is perfectly all right.

**Gordon Jackson:** Robbie the Pict will be proud

**Christine May:** He will indeed. An instrument was in place so it had to be revoked.

**The Convener:** There are no substantive points.

### Advice and Assistance (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/171)

**The Convener:** I do not know whether members want to raise the issue of consolidation.

**Christine May:** Yes.

**The Convener:** I gather that this is the seventh time that the regulations have been amended.

### Building (Forms) (Scotland) Regulations 2005 (SSI 2005/172)

### TSE (Scotland) Amendment Regulations 2005 (SSI 2005/173)

### Mental Health (Fee Payable to Designated Medical Practitioners) (Scotland) Regulations 2005 (SSI 2005/175)

### Mental Welfare Commission for Scotland (Prescribed Persons) Regulations 2005 (SSI 2005/176)

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

**National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/179)**

**The Convener:** The regulations breach the 21-day rule. Although we have received an explanation, which is that the Executive wanted to bring the regulations out at the same time as the English ones, I wondered whether we should ask further why that was not accommodated in our time schedule.

**Mr Maxwell:** I think that we should. It is stretching credulity a bit far to suggest that it came as a surprise and a shock to the Executive that those regulations were on the horizon. Its explanation for breaching the 21-day rule may be correct, but it seems unlikely. We should at least ask the Executive when it first knew that the regulations were coming.

**Members indicated agreement.**

**The Convener:** The drafting of regulation 6 is arguably defective as there is no cross-reference to the principal regulations. Is that agreed?

**Members indicated agreement.**

**Police Pensions Amendment (Scotland) Regulations 2005 (SSI 2005/200)**

**The Convener:** There are no substantive points on the regulations.

**Intensive Support and Monitoring (Scotland) Amendment Regulations 2005 (SSI 2005/201)**

**The Convener:** We made a number of recommendations on the principal regulations. Members will be pleased to hear that most of those have been acted on.

The first point that we raised was a concern about the vires of regulation 4. A new regulation 4, which removes the provision that was of concern and deals with the committee's concern in relation to regulation 6(e), has been made. I think that we will be content with that.

**Members indicated agreement.**

**The Convener:** Our second concern was that the definitions of "crisis response service" and "movement restriction care plan" in the principal regulations went beyond mere definitions and imposed substantive requirements. The amending regulations remove the definitions.

**Mr Maxwell:** It is interesting that the Executive initially rejected the committee's arguments but then sneaked in the changes that we proposed. However, it is good that the Executive agreed with us.

**The Convener:** We must welcome the Executive's about-turn.

The third issue was the breach of the 21-day rule, but given that the timescale for the principal regulations was okay and the Executive has addressed our concerns, we can excuse the breach.

However, we are still not happy about the fourth point, which was the failure to cite section 70(12) of the Children (Scotland) Act 1995. The Executive might argue that section 70(13) of the 1995 act deals with the matter—that relates to the issue about regulation 6(e) of the principal regulations, which I mentioned. However, our legal advice is that section 70(12) should be cited. Do members agree to ask the Executive about that?

**Members indicated agreement.**

**Mental Welfare Commission for Scotland (Authorised Persons) Regulations 2005 (SSI 2005/205)**

**Mental Health (Provision of Information to Patients) (Prescribed Times) (Scotland) Regulations 2005 (SSI 2005/206)**

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

## Instruments Not Subject to Parliamentary Procedure

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 7) (Scotland) Order 2004 Partial  
Revocation (No 2) Order 2005 (SSI  
2005/177)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 9) (Scotland) Order 2004 Partial  
Revocation Order 2005 (SSI 2005/191)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 13) (Scotland) Order 2004  
Revocation Order 2005 (SSI 2005/202)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 5) (Scotland) Order 2004 Partial  
Revocation Order 2005 (SSI 2005/203)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 10) (Scotland) Order 2004  
Revocation Order 2005 (SSI 2005/204)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning) (West  
Coast) (No 6) (Scotland) Order 2004  
Revocation Order 2005 (SSI 2005/210)**

10:56

**The Convener:** No substantive points have been identified on the orders.

## Instruments Not Laid Before the Parliament

**Mental Health (Care and Treatment)  
(Scotland) Act 2003 (Commencement  
No 4) Order 2005 (SSI 2005/161)**

10:57

**The Convener:** No substantive points have been raised on the order.

**Vulnerable Witnesses (Scotland) Act 2004  
(Commencement) Order 2005  
(SSI 2005/168)**

**The Convener:** Minor points were identified on the order. First, article 3 contains a definition of "the 2004 Act", although the term does not appear in the order, which throughout uses the full title of the Vulnerable Witnesses (Scotland) Act 2004. We could ask the Executive the purpose of including the definition.

Secondly, article 3 defines "the 1995 Act". Although that term is used in the order, the drafting is inconsistent and sometimes the full title of the Criminal Procedure (Scotland) Act 1995 is given. Do members agree to ask the Executive about the inconsistency?

*Members indicated agreement.*

**Salmon and Freshwater Fisheries  
(Consolidation) (Scotland) Act 2003  
(Commencement) Order 2005  
(SSI 2005/174)**

**Fire (Scotland) Act 2005 (Commencement  
No 1) Order 2005 (SSI 2005/207)**

**The Convener:** No points have been identified on the orders. Do members agree?

*Members indicated agreement.*

**The Convener:** I thank members—

**Christine May:** I remind the convener and members that I will not be able to attend next week's meeting, because I will be away with the Enterprise and Culture Committee.

**The Convener:** Okay.

*Meeting closed at 10:58.*

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