

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 26 April 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

13th 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 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 26 April 2005

[THE CONVENER opened the meeting at 10:31]

Delegated Powers Scrutiny

Environmental Assessment (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): Welcome to the 13th meeting in 2005 of the Subordinate Legislation Committee. I have received apologies from Mike Pringle.

The first item on our agenda is delegated powers scrutiny of the Environmental Assessment (Scotland) Bill. The main purpose of the bill is to provide for assessment of the environmental aspects of certain plans and programmes, including plans and programmes that are covered by directive 2001/42/EC of the European Parliament and of the Council.

The legal advisers raise a number of points, the first of which relates to the fairly broad Henry VIII powers in sections 5(5), 6(2), 7(3) and 14(5). At the moment, those powers are subject to the negative resolution procedure and the committee needs to decide whether they should be subject to the affirmative procedure instead. We have not received much explanation from the Executive as to why those powers are subject to the negative procedure.

Christine May (Central Fife) (Lab): This committee has consistently taken the view that, other than in extremely specific cases—such as the one that we will come to shortly—Henry VIII powers should be subject to the affirmative procedure. We should stick to that general rule. It is good legislative practice and gives the Parliament an additional opportunity to scrutinise the use of such powers. In the interest of good law making, it makes sense from the point of view of those who have to implement the regulations.

Mr Stewart Maxwell (West of Scotland) (SNP): Given that we have enough time and that there are many instances in the bill of Henry VIII powers that are subject to the negative resolution procedure, we should write to the Executive to ask for an explanation.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: I believe that you wanted to raise an issue relating to section 6(1)(a), Stewart.

Mr Maxwell: My query is to do with whether the power in that section will be exercised only in relation to individual schools. That is not clear. Could we ask the Executive to confirm exactly what its intention is with regard to the use of that power? The situation might be fine, but it would be helpful to have the issue clarified.

The Convener: There are two issues. One concerns section 6(1)(b) in relation to section 6(1)(a), and the other concerns section 6(2).

Murray Tosh (West of Scotland) (Con): The Executive has to be careful here, given that many of the major schools procurement exercises could be seen to fall within this definition, where the Executive is the promoter—not at first-hand, but at second remove—and is certainly the funder of many schemes, some of which are controversial in themselves and others of which are controversial on environmental grounds. The Executive must be absolutely clear about how and why the order should or should not impact on procurement projects in which the Executive participates and on which it is the arbiter of when an environmental impact assessment will and will not be required. The Executive must be very careful about that.

The Convener: That is a good point. Do we further agree to write to the Executive about the sensitive issue that Murray Tosh has raised?

Members indicated agreement.

The Convener: I welcome Adam Ingram and Gordon Jackson to the meeting.

Section 2(4)(f) relates to the provision for the Scottish ministers to specify further responsible authorities in addition to those listed in section 2(4)(a) to (e) and gives ministers the power to add to the list of responsible authorities, set out at section 2(4),

“any other person, body or office-holder of a description (and to such extent) as may be specified ... by order.”

The Executive argues that it is not possible to include an exhaustive list of bodies at section 2(4) until evidence is available from the operation of the environmental assessment regime, as established by the bill. Orders made under this power are subject to annulment in pursuance of a resolution of the Parliament.

The legal advice suggests that the situation is okay, as the provision will have been subject to scrutiny through the bill process. Are members happy with the power?

Members indicated agreement.

The Convener: Section 6(1)(b) provides for the Scottish ministers to make additional exclusions

and allows them to specify, by order subject to the negative resolution procedure, types of plan or programme to be excluded from the description of plans and programmes set out in section 5(4). The legal advice is that the situation is okay. Are members happy with that?

Members indicated agreement.

The Convener: Section 22 is on ancillary provision. I know that we have long-standing issues about the concept of supplemental provisions. Our legal advice is that the power is okay. It is subject to the draft affirmative procedure—in fact, it is the only Henry VIII power in this bill that is subject to the draft affirmative procedure. Are members content with the power as drafted?

Members indicated agreement.

The Convener: Are members happy with section 25, which is the commencement power and appears to be fairly standard?

Members indicated agreement.

Executive Responses

Fire (Scotland) Act 2005 (Relevant Premises) Regulations 2005 (draft)

10:37

The Convener: We raised a number of technical points and the Executive has agreed to make some changes. However, it cannot make the change that we suggested be made to the preamble. Are we content with what the Executive is saying?

Mr Maxwell: I am happy about the changes that are being made and am satisfied that the Executive has gone as far as it can go at the moment, given the situation that it faces. However, I still think that we should report the instrument to the lead committee and the Parliament on the ground of failure to follow normal drafting practice.

The Convener: Absolutely. Do we agree to do that?

Members indicated agreement.

Miscellaneous Food Additives Amendment (Scotland) Regulations 2005 (SSI 2005/214)

Smoke Flavourings (Scotland) Regulations 2005 (SSI 2005/215)

The Convener: The committee was concerned that the consultation requirement contained in article 9 of regulation EC 178/2002 of the European Parliament and of the Council is not referred to in the preambles to these regulations. The Executive is still saying that it is normal drafting practice not to include a reference to article 9 in the preambles to orders and regulations made under European directives. Members will be aware that that approach is different to the approach that is taken in Westminster.

Initially, we were concerned that there was a vires issue but we have to be content that the consultation has taken place and that there is no vires issue. We are simply talking about drafting practice. We can take this up in our review and suggest that, in the interests of transparency, it would be better if the preambles included a reference to article 9 of regulation EC 178/2002. The Executive points out that the footnotes to the preambles contain a form of reference to article 9, but it is not terribly transparent; it would be possible to mention article 9 by name. Perhaps we could go for the middle ground by suggesting that the Executive could be a little clearer in the footnotes and by returning to deal with the issue in our review.

Christine May: I do not disagree, and I am prepared to support the recommendation. However, for the record, I say that we appear to have reached an impasse. We are not going to get agreement. There is a legal basis for the route that the Food Standards Agency has taken, and we have to accept that. Nevertheless, I find the reason for refusing to countenance a reference to article 9 of regulation EC 178/2002 in the preambles a little perverse—maybe that is too strong a word, but it is almost perverse. The fact that such a thing was never done in the old Scottish Office is not a good enough reason for not doing it now. Practice has been changed at Westminster in the interests of transparency and clarity. It is reasonable that reference to article 9 be given the same prominence in our instruments. I hope that we will refer to that point in our report on our review of the regulatory framework.

Gordon Jackson (Glasgow Govan) (Lab): I agree. It has not been Scottish practice, but one is tempted to say, “So what?”. Westminster has said that whether including a reference to the article is strictly necessary or not, it makes instruments clearer and it is better practice. It is not clear to me why we should sit on our high horse and say, “We’ve never done it like that.” Maybe I am missing something.

The Convener: I do not think that you are.

Mr Maxwell: I support what colleagues have said on the ground of clarity. That is the important point. The convener’s opening remarks referred to being different from Westminster, but whether we are different from Westminster is neither here nor there. The problem is that the Executive has not explained why the particular route was chosen. If it gave us a solid reason we might feel that it was all right, but we do not know. The driving force behind what we are saying is that the regulations must be made as clear as possible for the user, which I absolutely support. Whether the situation is the same as or different from Westminster is irrelevant.

Murray Tosh: I have no objection to the convener’s suggestion, which is an attempt to get us closer to some sort of agreement. I agree with colleagues. The regulations fall short of the standard of drafting that we have asked for. The drafting is defective and we should stick to our guns. I agree that there is probably no point in writing letters backwards and forwards to get the same old answer. I have no difficulty with simply stating in all our reports on orders that do not cite article 9 of regulation EC 178/2002 that the drafting is defective. We can note our position, but we should make it clear and hold to it until the Executive either comes up with a really convincing explanation or—as I think it will have to do at the end of the day—accepts the consistency and logic of what we say.

The Convener: Adam, do you have any further points?

Mr Adam Ingram (South of Scotland) (SNP): No. Colleagues have covered the ground. Your suggestion is fair enough, convener.

The Convener: As Murray Tosh said, we will inform the lead committee and the Parliament that the drafting is defective, which we can elaborate in our letters to them. We will take the issue further in our review of the regulatory framework, so that we get the clarity to which Christine May and Stewart Maxwell alluded. We will send a letter to the Executive informing it of our position, but we are not going to go backwards and forwards. We will address the issue in our review and take it up later.

Mr Maxwell: Are you going to include your suggestion on making the footnote clearer?

The Convener: Yes.

Plant Health (Import Inspection Fees) (Scotland) Regulations 2005 (SSI 2005/216)

The Convener: Members will see from the brief that there is an issue with the regulations, because the 10 per cent uplift is difficult to justify legally. There is a general issue, because the procedure might be used again. What happens with other countries that do not have the euro?

Mr Maxwell: The Executive’s explanation of the practical reasons for proceeding in this way was clear and detailed and I have no problem with it. However, the question is not about the practical reasons for proceeding in this way, but about the fact that that way does not appear to be legally acceptable. The Executive was given two options, but it chose neither. Instead, it chose to include the 10 per cent uplift. The question is whether the Executive has a legal basis for doing that, not whether it is a practical solution to the difficulty that it faces. We have to draw the measure to the attention of the Parliament on the basis that it appears to be ultra vires. The Executive is in difficulty, but it also looks as if it is technically wrong.

10:45

Christine May: I agree entirely. I note from the briefing that the Department for Environment, Food and Rural Affairs has used the same measure in the English regulations. It might be worth asking the Executive by informal letter or some other means to check with its colleagues in DEFRA whether the advice of the European Commission was sought and, if so, what that advice was.

The Convener: That would be a good avenue to pursue.

Mr Ingram: We also need to address the point on having a level playing field for importers throughout the UK.

The Convener: Yes, that is important. The discussions with Westminster have been helpful in terms of the level playing field. I acknowledge Stewart Maxwell's point that the Executive has had to deal with a difficult situation, which reinforces the view that we should examine the general as well as the specific issue.

Murray, do you want to add anything?

Murray Tosh: I am not sure that I am adding anything, but I think that the general picture is important. I wonder if these are the only fees that are or will be affected in this way, or whether there is a bigger picture of which we should be aware. If there is a question of the legality of some or all such fees, they should be scrutinised.

The Convener: I will summarise. We will bring to the attention of the lead committee and the Parliament our concerns about the legal basis. We could also comment on the general issue and state that we are taking it further. In a letter to the Executive we can address the points raised by Christine May on the discussions that Westminster has had with the Commission.

Christine May: I suggest that we ask whether advice was sought from the Commission not just on the uplift in these regulations but in other regulations, as Murray Tosh mentioned. I presume that a legal opinion was sought from the Commission, perhaps in addition to opinions from the different directorates general.

The Convener: It has been suggested to me that we send a copy of our letter to the Executive to the lead committee as well, so that it is kept fully informed. That is a good idea. Is that agreed?

Members *indicated agreement.*

Draft Instruments Subject to Approval

Mental Health (Medical treatment subject to safeguards) (Section 234) (Scotland) Regulations 2005 (draft)

Mental Health (Medical treatment subject to safeguards) (Section 237) (Scotland) Regulations 2005 (draft)

10:48

The Convener: No substantive points arise on the regulations.

Instrument Subject to Approval

Farm Business Development (Scotland) Variation Scheme 2005 (SSI 2005/219)

10:48

The Convener: No substantive points arise on the scheme.

Instruments Subject to Annulment

Education (Student Fees and Support) Temporary Protection (Scotland) Amendment Regulations 2005 (SSI 2005/217)

10:49

The Convener: No substantive points arise on the regulations.

Production of Bovine Collagen Intended for Human Consumption in the United Kingdom (Scotland) Regulations 2005 (SSI 2005/218)

The Convener: The same issue arises that we raised earlier, regarding reference to European Council obligations to consult in the preamble. Is that agreed?

Murray Tosh: Will we report the defective drafting to the lead committee?

The Convener: Yes, exactly as we agreed to do earlier.

Mr Maxwell: And will we raise the other points in an informal letter?

The Convener: Absolutely.

Food Labelling Amendment (Scotland) Regulations 2005 (SSI 2005/222)

The Convener: These regulations fail to cite in the preamble the EC obligation to consult on the regulations—the point that we raised earlier. Christine May will say something about the second point, on transposition notes.

Christine May: I am delighted to note that the Executive has provided a transposition note with the regulations, as part of a trial run. I believe that that was also the case with an instrument last week, when I was not here. I note the comment that, while these are straightforward regulations, in other instances where the instrument has been complex, such a note has been welcome.

First, I welcome the transposition note, and ask that those comments be passed on to the Executive. Secondly, I hope that the feedback that the Executive is getting from the trial run will be so positive that it will mainstream transposition notes and have them as a permanent run.

The Convener: We all hope so. I am sure that we can make points to that effect.

The third point concerns regulation 8. Members will see that regulation 8(b) includes the words “Food Labelling Regulations 1996” in new regulation 50(13)(b) of the Food Labelling Regulations 1996 (SI 1996/1499), whereas every other reference in the principal regulations is to “these regulations”. That should be made clearer. Is that agreed?

Members indicated agreement.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 9) (Scotland) Order 2004 Partial Revocation (No 2) Order 2005 (SSI 2005/220)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 7) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/221)

10:51

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

Meeting closed at 10:52.

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