

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 3 May 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

14th 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 3 May 2005

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

Delegated Powers Scrutiny

Environmental Assessment (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 14th meeting in 2005 of the Subordinate Legislation Committee. I have received apologies from Mike Pringle; everyone else is here.

We considered the Environmental Assessment (Scotland) Bill at stage 1 at last week's meeting. Members will remember that we raised several points with the Executive and we now have the Executive's response plus legal advice on that response.

Sections 5(5), 7(3) and 14(5) contain powers that will be used only when European environmental impact assessment directive 2001/42/EC is amended. Are we content with the explanation given? Our legal advisers seem to be happy with the Executive's response.

Members indicated agreement.

The Convener: The power in section 6(2) is quite a narrow Henry VIII power and for that reason the negative procedure is appropriate. Are we content with that?

Mr Stewart Maxwell (West of Scotland) (SNP): The Executive has clarified the point about the power being applicable only to individual schools, which was my main concern, so that is fine. I understand that there might be a slight anomaly in the way that the Henry VIII power is being used, but it is fairly narrow and I have no particular issue with it.

The Convener: Is that everyone's opinion?

Members indicated agreement.

Management of Offenders etc (Scotland) Bill: Stage 1

The Convener: The main purpose of the bill is to make provision for reforming the planning and co-ordination of offender management services in Scotland with the aim of achieving greater

integration of the work of different criminal justice agencies.

Section 2(1) of the bill is to do with community justice authorities, or CJAs. Members will have read the legal advice on the power set out in section 2(1), which is subject to the affirmative procedure. I suppose that we always need to bear in mind the general question of which provisions should be set out in legislation and which should be left to orders. However, our legal advice suggests that we might wish to consider asking the Executive for further information on whether it considers that the bill ought to contain a requirement to consult interested parties on draft orders to be made under section 2(1). I realise that we have discussed this issue before, but I seek the committee's views.

Christine May (Central Fife) (Lab): It is reasonable to ask that question. After all, our legal advice makes it quite clear that the Executive is consulting on the first set of orders. Although the Executive will probably consult on future orders, it would be useful to ask its intention and then consider any action that we might want to take.

Gordon Jackson (Glasgow Govan) (Lab): It might be worth asking the Executive to put on record that it intends to consult, even if that is not stipulated in the bill. That said, to be fair to the Executive, whatever else it does, at least it consults. In fact, most people I meet in the real world have consultation overload; they are fed up with it. Although I do not think that the Executive is guilty of not consulting, it might be useful to get it to say that it will consult.

The Convener: Are members agreed?

Members indicated agreement.

The Convener: Section 2(7) gives ministers the power to amend through subordinate legislation the list of a CJA's general statutory functions set out in section 2(5). That power is subject to the affirmative procedure. Are members agreed that that is appropriate?

Members indicated agreement.

The Convener: Section 2(5)(c)(i) sets out the power of a CJA to issue directions to local authorities. Section 2(10) sets out the power of ministers to issue directions and guidance to CJAs. Our legal advisers seem to think that the powers are okay, although they suggest that we could ask the Executive about a laying power for any directions or guidance.

Murray Tosh (West of Scotland) (Con): I note that an interesting argument about laying such matters before Parliament is made later in the legal brief. As a result, it is appropriate to ask about the Executive's intentions and to suggest

that it looks positively at the idea of laying such directions and guidance before Parliament.

The Convener: It can do no harm to raise the question. Are members agreed?

Members indicated agreement.

The Convener: Section 2(16), which concerns the designation of “partner bodies”, is one of the few provisions in the bill that are subject to the negative procedure. Such an approach seems to be fitting. Are members agreed?

Members indicated agreement.

The Convener: Section 5(6) enables ministers to issue an enforcement direction to a CJA where they consider that a failure persists, even after the period of time for remedies set out in the preliminary notice. Section 5(11) obliges ministers to prepare a report whenever they issue, vary or revoke an enforcement direction and to lay that report before Parliament. Are members agreed that both provisions are adequate?

Members indicated agreement.

The Convener: Section 5(12) sets out the power to amend section 5(2), which lists the bodies—including the chief inspector of prisons for Scotland and Audit Scotland—that may report to the minister on the failure of a CJA or a local authority to carry out its functions properly. Section 5(12) allows ministers by order to add to, amend or omit from that list.

Although the power in section 5(12) is a Henry VIII power and is, as we would expect, subject to the affirmative procedure, we have to take into account the issue of consultation. I do not know whether members have any further points to raise on the matter.

Murray Tosh: According to our legal advice, it is inconceivable that the Executive would not consult the bodies involved. Even so, it is appropriate to ask the Executive about its intentions with regard to consultation to ensure that it agrees with our advice.

The Convener: Are members agreed?

Members indicated agreement.

10:45

The Convener: Section 7(2) confers on ministers the power by order to transfer the functions listed in section 27(1) of the Social Work (Scotland) Act 1968 from local authorities to CJAs. Given that such a transfer would be applicable only within the area of the relevant CJA, section 7(4) allows ministers in any such order to make different provisions for different CJAs.

The power to make the order that transfers these functions is subject to the affirmative procedure. Are we agreed that that is appropriate?

Murray Tosh: Again, we should raise the issue of consultation.

The Convener: Christine, do you want to raise that?

Christine May: For the sake of consistency, we should ask that question.

Mr Maxwell: This is not just a question of consultation; I think that we should also ask about the process and about how the Executive will use this power. Presumably, it will enforce the matter only when the bodies involved fail to agree. For clarity's sake, it would be worth asking the Executive not just about the consultation but whether it will define the process and set out the circumstances in which it will use the power.

The Convener: I believe that your question centres on how sections 7(2) and 7(3) will work together. We could ask the Executive about those specific provisions.

Gordon Jackson: I agree that we should ask about consultation. However, a wee bit of me wonders whether we are not crying wolf about this matter. We are reaching the stage at which we will be looking for bills to provide for consultation on almost every occasion when the Executive seeks to introduce a statutory instrument. Such an approach might well be rational, but I think that it will lead to overload in bills. Perhaps we should be a bit more selective and target the matters that really require consultation.

The Convener: In all fairness—

Gordon Jackson: I am not saying that that is the case in this bill.

The Convener: In all fairness, I think that Stewart Maxwell is right about this.

Gordon Jackson: The question about process is different, and I accept Mr Maxwell's point.

The Convener: We need to clarify the process that will be used and the relationship between sections 7(2) and 7(3). Perhaps we can revisit the matter when things are a bit clearer.

Mr Maxwell: I agree with Gordon Jackson that if we consult all the time it becomes meaningless. However, as I understand it, we are not trying to force the Executive to refer to consultation in the bill. We are simply asking about its intentions. Such a provision would not necessarily have to go into the bill.

Gordon Jackson: I am just flagging up my slight concern that we might be crying wolf.

The Convener: I entirely take your point, Gordon. I gather from Ruth Cooper that we have time to revisit the issue, so we should probably ask the Executive about the process first of all.

Gordon Jackson: There is nothing wrong with asking all these questions.

The Convener: Section 9(3) sets out the power to specify persons who must co-operate with the responsible authorities. That power is subject to the negative procedure. Are members agreed that that is appropriate?

Members indicated agreement.

The Convener: Section 9(5) sets out the power for ministers to issue guidance to responsible authorities. Are members agreed that the provision seems okay?

Members indicated agreement.

The Convener: Section 9(7) enables ministers to amend the list of responsible authorities. The power is a Henry VIII power and is therefore subject to the affirmative procedure. Are members agreed that that is appropriate?

Members indicated agreement.

The Convener: We move on to the part of the bill that amends the Prisoners and Criminal Proceedings (Scotland) Act 1993. Section 11(3), which proposes to insert new section 3AA into the 1993 act, sets out the power to amend the home detention curfew scheme. In particular, the powers set out in proposed new section 3AA(6) appear to be very wide. However, our legal advice has set out a number of reasons why, given the other powers that are available, the provision seems to be okay. I seek members' views on the matter.

Murray Tosh: It is always legitimate to cite precedent in favour of what one is doing. However, I am not sure that we should ever be over-impressed by precedent that has been set in pre-devolution legislation. Because something is missing from the 1993 act, it does not mean that, per se, it is okay to leave it out of the 2005 act. I would rather that the legal brief argued from first principles; precedent might be a useful guide, but it does not always present a substantive argument.

Nevertheless, in this case I accept that, as use of the more substantive amendment powers in the 1993 act is not subject to consultation, it would be strange to impose a requirement to consult on using the relatively less important amendment powers that are proposed in new section 3AA(6). I always prefer arguments to be made on the basis of an analysis of what is appropriate rather than just on the basis of whether something has been missed out. However, I do not think that people

looked as closely at such aspects of legislation in 1993.

The Convener: Perhaps they did not. Do members have any other points?

Mr Maxwell: It is worth noting that ministers already have much wider powers to amend such definitions for all prisoners. It would seem bizarre to impose a tougher requirement for consulting on amending an aspect that would affect only some prisoners. My bottom line is that the power is probably okay.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: Section 11(8) sets out the conditions that are to be included in the licence for persons who are released under the new home detention curfew scheme. New section 12AA(3) will confer on ministers the power by order to prescribe the standard conditions, which may be different for different prisoners. I gather that the section provides for a fairly standard procedure, for which the negative procedure is appropriate. Is that agreed?

Members indicated agreement.

The Convener: Section 11(8) will also have an effect on ministerial powers to specify monitoring devices. Are members happy with that?

Members indicated agreement.

The Convener: Section 11(11) will have an effect on ministerial powers to make rules and issue directions to the Parole Board for Scotland. Are members happy with that?

Members indicated agreement.

The Convener: Section 13 provides for powers to make regulations to recover compensation payments that are made under the criminal injuries compensation scheme. The section will confer on Scottish ministers two subordinate legislation-making powers. The first will allow ministers to make regulations under section 7A(1) of the Criminal Injuries Compensation Act 1995, which will be subject to the affirmative procedure. Legal advice indicates that that is perfectly okay. The second will allow ministers to make an order under section 7B(3), which will also be subject to the affirmative procedure. Again, that appears to legal advice to be appropriate.

Gordon Jackson: The subordinate-legislation making powers are to do with the administration of the scheme rather than any great policy or huge change.

The Convener: Absolutely. Do members agree that the powers are appropriate?

Members indicated agreement.

The Convener: Section 14(1)(b) confers on ministers the power by order to amend, add or omit any of the functions of local authorities that are set out in section 27(1) of the Social Work (Scotland) Act 1968. The provision is a Henry VIII power, so any such order would be subject to the affirmative procedure. The issues that arise about the power are similar to those that arose under section 7(2), which we have already considered. I assume that the comments that we made about the powers under section 7(2) will also go for the powers under section 14(1)(b). Is that agreed?

Members indicated agreement.

The Convener: Section 14(2)(a) provides ministers with powers to modify by order the definition of “relevant service”. Any such order will be subject to the affirmative procedure. It is suggested that that is appropriate. Are we agreed?

Members indicated agreement.

The Convener: Section 15 provides ministers with powers to make supplementary, incidental and consequential provisions and so on. We have met such powers often before. Are we agreed that no points arise on section 15?

Members indicated agreement.

The Convener: Finally, the bill contains a commencement power, which is of the normal type. Are we agreed that no points arise on that?

Members indicated agreement.

Executive Response

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

10:53

The Convener: We move to agenda item 3. In its response to the point that we raised about the regulations, the Executive acknowledges that the reference should simply refer to “these regulations”. As members will recall from last week, we raised that as inconsistent drafting. The Executive has undertaken to revisit the provision at the next legislative opportunity. I suggest that we highlight the defective drafting to the lead committee. Is that agreed?

Members indicated agreement.

Draft Instrument Subject to Approval

Water Environment (Controlled Activities) (Scotland) Regulations 2005 (draft)

10:54

The Convener: Under agenda item 4, a couple of points arise on the draft regulations. First, we should ask the Executive to confirm that the enabling powers that are cited in the preamble, which are not yet commenced, will be commenced before the earliest commencement date that is provided for in regulation 1. Something seems to have been forgotten.

Christine May: It is always useful for an Executive to be able to do something before it actually does it.

The Convener: Secondly, we should ask the Executive to explain the purpose of regulation 20(1). Members will see that, by virtue of regulation 20(1), regulation 12 is to apply to variations by the Scottish Environment Protection Agency. However, it is not terribly clear how the two things will work together. In addition, a few minor points arise, which can be highlighted to the Executive in an informal letter.

Are those points agreed?

Members indicated agreement.

Instruments Subject to Annulment

Horse Passports (Scotland) Regulations 2005 (SSI 2005/223)

10:55

The Convener: The regulations are familiar to me from my membership of the cross-party group on animal welfare. Three points arise. First, why has the Executive used enabling powers under section 2(2) of the European Communities Act 1972 in preference to the powers under the Animal Health Act 1981, under which the Horse Passports Order 1997 (SI 1997/2789) was made? Secondly, why do the regulations apply only to domestic horses, whereas in England—I did not know this previously—European Council directive 90/426/EEC applies to wild or domesticated horses?

Mr Maxwell: I think that wild horses are found in parts of England, whereas I am not aware of any wild horses in Scotland—apart from the two that ran on to the M8 yesterday.

Murray Tosh: Legally, of course, it would still be perfectly competent for the regulations to apply to wild horses in Scotland. Just as we banned mink farms even though none existed in Scotland, the regulations could apply to wild horses in Scotland just in case any ever came into existence.

The Convener: We will ask the question.

Thirdly, we should ask the Executive to explain why European Commission decision 2000/68/EC is only now being implemented, whereas article 4 of the decision requires member states to ensure compliance

“as from 1 July 2000 at the latest”.

Is it agreed that we ask those three questions?

Members indicated agreement.

The Convener: If members have no other major points, we can pick up the other minor points that we have via an informal letter.

Land Management Contracts (Menu Scheme) (Scotland) Regulations 2005 (SSI 2005/225)

The Convener: Three points arise on the regulations. First, we will seek an explanation for the drafting of regulation 3(1), which refers to a paragraph that does not appear in the regulations. A wee error in the legal advice mentions “regulation 3(4)”. Secondly, we will ask whether regulation 21(3), which deals with offences and penalties, means that proceedings shall not be

commenced six months after the date on which an offence was committed. Thirdly, we will ask why a regulatory impact assessment was not carried out, given the impact that the regulations will obviously have on farming businesses. Do we agree to raise those three points?

Members indicated agreement.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 2) (Scotland) Revocation Order 2005 (SSI 2005/227)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 11) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/228)

10:57

The Convener: No points arise on the orders.

Instruments Not Laid Before the Parliament

Emergency Workers (Scotland) Act 2005 (Commencement) Order 2005 (SSI 2005/229)

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 2) Order 2005 (SSI 2005/235)

10:58

The Convener: No points arise on the orders.

Work Programme

10:58

The Convener: Agenda item 8 is our draft work programme, which outlines the committee's upcoming work until the summer recess. Do members have any comments? Is the programme too onerous? Does it strike a balance between the various bills and statutory instruments that we will need to consider?

Mr Maxwell: It is probably unavoidable that we will face the usual splurge of Scottish statutory instruments in June. As there is no way round that, I suppose that I agree to the draft work programme. Our timetable is very much dictated by when the Executive introduces legislation.

The Convener: We talked to the Executive about that and it is trying to timetable such things a little better. We can keep making the point, but you are right that we expect a high volume of SSIs in June.

Mr Maxwell: I want to make a point about our inquiry. The draft work programme refers to the need to consider a draft report for phase 1 of our inquiry and to discuss the terms of reference and the planning for phase 2 of the inquiry. Should we set aside time at a committee meeting or hold an away day before the start of phase 2 of the inquiry to discuss the direction that we should take after phase 1? It would be useful for us all to take stock at that point to decide what we should do.

11:00

The Convener: That is a good point. Our work programme indicates that the phase 1 report will be published towards the end of June. A general call for evidence for phase 2 of the inquiry will then be issued. Would it be best for us to have an away day before the summer recess or before we reconvene after the summer?

Mr Maxwell: It would be best for the away day to be held in the gap between our agreeing the final report on phase 1 of the inquiry and our issuing a call for evidence for phase 2.

The Convener: Would mid-June be appropriate?

Mr Maxwell: The work programme indicates that the phase 1 report will be published on 21 June. That is hardly mid-June.

The Convener: Perhaps the away day should be held more towards the end of June.

Christine May: I suggest that we leave it until after the recess, when it will serve two purposes. First, it will refresh our memories of the evidence that we took during phase 1. We will also have

had time over the summer to consider the contents of the report. Secondly, the clerks, legal advisers and others will have had an opportunity to consider in depth which of the issues raised in the report we want to investigate and the approach that we should take. Holding an away day after the summer would also allow us to look at what might be in our work programme during the three to six months after the recess and to slot in and plan work more effectively.

The Convener: I agree with you generally. However, Stewart Maxwell has raised the issue of how detailed our general call for evidence for phase 2 can be when we have not discussed the matter. That is a good point. Perhaps we should spend half a day on the phase 1 report around the time that it is published, as we will have agreed the report by then. We could spend another half day on it later.

Christine May: If we meet on 28 June to deal with SSIs in the wash-up, we could set aside some time to discuss the phase 1 report. I know that members may not be keen to have such a discussion at the end of the parliamentary term, but when else can we have it?

Mr Maxwell: That is not my concern. However, we are expecting a high volume of work throughout June. I suspect that on 28 June we will be dealing with normal business—SSIs and Executive responses—and will be left with little time to discuss effectively what is a major piece of work.

The Convener: We will circulate a list of Mondays and Fridays on which a discussion of the phase 1 report could take place. In the past, we have found that Mondays are more convenient than Fridays.

Mr Maxwell *indicated disagreement.*

The Convener: We will try to arrange a half day around the end of June on which we can go through the report together, before we issue the call for evidence for phase 2. That would be useful. Is that agreed?

Members *indicated agreement.*

The Convener: There are no further points on the draft work programme.

Meeting closed at 11:03.

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