

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 28 June 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

22nd 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

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 June 2005

[THE CONVENER *opened the meeting at 10:32*]

The Convener (Dr Sylvia Jackson): I open the Subordinate Legislation Committee's 22nd meeting in 2005. I begin by wishing Christine May well, as this is her last meeting as a member of the committee. The committee is not every MSP's cup of tea, but Christine has served us well and always has many questions, which is good.

Christine May (Central Fife) (Lab): Thank you, convener.

Murray Tosh (West of Scotland) (Con): Can you explain why, convener?

The Convener: I cannot explain why Christine asks questions, if that is what you mean.

Murray Tosh: No, I mean can you explain why it is her last meeting?

Christine May: It is because of a change of committee.

Murray Tosh: I was unaware of that and was seeking enlightenment. I just wondered whether she had had enough of us.

The Convener: No. Far from it, I am sure.

Christine May: I will keep an eye on you, do not worry.

Mike Pringle (Edinburgh South) (LD): I bet you will.

The Convener: I have received no apologies as yet, so we expect Gordon Jackson and Adam Ingram to arrive later.

Item in Private

10:33

The Convener: I ask the committee to agree to take item 6, which is consideration of our draft consultation paper for phase 2 of the committee's inquiry into the regulatory framework in Scotland, in private. We still have arrangements to make about potential witnesses. Is that agreed?

Members *indicated agreement.*

Executive Responses

Products of Animal Origin (Third Country Imports) (Scotland) Amendment Regulations 2005 (SSI 2005/323)

10:33

The Convener: Committee members might remember that we asked the Executive for an explanation of the delay between Council regulation (EC) No 1774/2002 becoming applicable and the coming into force of the regulations. We have a response, which states that the regulations required cross-departmental consultation and that the Executive regrets the delay. What is the committee's response?

Christine May: We have consistently urged the Executive to undertake cross-departmental consultation and, throughout our regulatory framework inquiry, consistently heard industry's views on regulations being made without cross-departmental co-operation, so we should welcome the fact that, in this instance, there has been cross-departmental consultation. However, other committee members might wish to comment on the length of time that the consultation has taken.

Mr Stewart Maxwell (West of Scotland) (SNP): Council regulation (EC) No 1774/2002 became applicable on 30 April 2003, which is more than two years ago. I also note that the corresponding English regulations were made in 2004. I presume that the English had some sort of cross-departmental consultation, so, given that they managed to make their regulations at least six months ago or perhaps a year or more ago—I do not know when in 2004 they were made—the question why it took the Executive so much longer to indulge in cross-departmental consultation than it took Westminster still hangs in the air. It is not that such consultation is not welcome, but it seems an awfully lengthy period to have taken before the regulations were brought before us.

The Convener: I remember, for example, that there was a lot of discussion about the Horse Passports (Scotland) Regulations 2005 (SSI 2005/223), which is why the length of the consultation period for those regulations was extended. I do not know the history of these regulations, but there might have been a similar situation. I am not sure.

Mr Maxwell: The Executive response does not give us the background to the regulations; it simply says that there was a need for cross-departmental consultation. That is fair enough, but it would have been helpful if the response had included a bit more explanation.

The Convener: We will pass those points on to the lead committee and Parliament. Is that agreed?

Members indicated agreement.

Cereal Seed (Scotland) Regulations 2005 (SSI 2005/328)

The Convener: The committee asked three questions of the Executive on the regulations. First, we asked for an explanation of why section 17 of the Plant Varieties and Seeds Act 1964 had not been cited as an enabling power. Committee members will see from the response that the Executive feels that that section is not an enabling power. However, members will also have read the comment from our legal advisers, who still consider that the section could be interpreted as having some enabling function, although perhaps not in the strictest sense. Are there any further comments on the regulations?

Christine May: I agree with what you said, convener. It is evident from reading the regulations that section 17 of the 1964 act is effectively being taken as an enabling power. Therefore, we should report the point on the ground of failure to follow proper legislative practice.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: The second question that we asked was whether the reference to regulation 21(5) in paragraph 12 in part VI of schedule 6 to the regulations was correct. The Executive has confirmed that the reference should be to regulation 22(6) and has agreed to change that at the next available legislative opportunity. I am sure that we welcome that.

We also asked the Executive to clarify why paragraph 16 in part VI of schedule 6 imposes both an objective test at subparagraph (a) and a subjective test at subparagraph (b) in relation to the same subject matter. The Executive has agreed that subparagraph (b) is superfluous and to remove it at the earliest legislative opportunity. Are we content with that?

Mr Maxwell: I have one point. The legal advisers are right when they say that this is not the first time that the committee has drawn a similar provision to the attention of the Executive. Does that make the Executive a cereal offender? I could not resist the pun.

Murray Tosh: Can we request another change of committee?

The Convener: At least he keeps us happy.

Christine May: Can we request a failure of the recording equipment for that comment on the ground of good taste?

The Convener: Are we agreed to bring those three points to the attention of the lead committee and Parliament?

Members indicated agreement.

Fodder Plant Seed (Scotland) Regulations 2005 (SSI 2005/329)

The Convener: I challenge Stewart Maxwell to think of something equally funny for these regulations.

Five points arise, three of which are exactly the same as the three points that we dealt with on the cereal seed regulations, although they obviously refer to different paragraphs. Are committee members content that we report those three points to the lead committee and Parliament?

Members indicated agreement.

The Convener: The two other points are first, that we asked the Executive to confirm whether the drafting of paragraph (c)(i) of the definition of "Basic Seed" in regulation 3 is correct. Although the conditions in paragraphs (a) and (b) appear to be cumulative, the definition refers to

"paragraph (a) or (b) and paragraph (c)".

The Executive has confirmed that the conditions are cumulative, has acknowledged that the drafting of paragraph (c)(i) is defective and intends to amend the defect at the next opportunity. I am happy that we picked that point up.

Secondly, we asked the Executive for an explanation of the reference in regulation 9(1)(b)(ii) to articles 6(1)(a) and 6(1)(b) of the fodder plant seed directive, given that no such articles appear to exist. The Executive has explained that the references ought to have been to articles 4a.1(a) and 4a.1(b) of that directive. It has undertaken to rectify the error at the next legislative opportunity. Are we happy to report the regulations, making all those points?

Members indicated agreement.

Local Authorities' Traffic Orders (Procedure) (Scotland) Amendment Regulations 2005 (SSI 2005/338)

The Convener: We asked the Executive a couple of questions about the regulations. The first question was whether there is any limitation on extensions following the six-month period that is allowed for the first extension of the two-year time limit. The intention is that each extension be limited to a maximum of six months. In the regulations, a time limit is imposed only in respect

of the first extension. There is no similar express time limit in respect of further extensions. The matter is not clear. Such a time limit might be implied, but it is not self-evident.

Mr Maxwell: We should not go down the route of last week's discussion on things being implied. It might be the Executive's intention to have a further four extensions, each of which may be of six months. However, if the regulations do not say that, they are poorly drafted at best. They should make it absolutely clear that the periods should be of six months, rather than some other indeterminate period.

The Convener: I have a form of words in front of me. We could report the regulations on the ground of

"defective drafting for failure to spell out the policy intention sufficiently clearly."

Mr Maxwell: That is probably the case.

The Convener: That wording is good.

Members indicated agreement.

The Convener: We also asked the Executive whether an application for an extension must be made before the expiry of the two-year limit, or whether it could be made after that date. As members can see from the Executive's response, it has indicated that, although the regulations do not explicitly state that the application for an extension must be made within the two-year time limit, that is implicit within the regulations. The order cannot be made after two years unless new paragraph (4) of regulation 16 of the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 (SI 1999/614), as incorporated by the regulations before us, applies. The order will fall unless the application for an extension has been made.

Our legal advisers disagree with the Executive that it is implicit that an application for an extension must be made within the two-year time limit, because there is no such stipulation in new regulation 16(4).

Mr Maxwell: I have a sense of déjà vu about this. We are back on things being implicit. My view, with which other members of the committee probably agree, is that we would prefer things to be explicit, rather than implicit. If the regulations do not say that applications for extensions must be made within the two-year time limit, it would be unreasonable to have a situation where somebody went beyond the two-year limit while assuming that they could apply retrospectively and then fell foul of the regulations. We should report the regulations on that basis.

The Convener: There are two courses of action that we can take. We can report the regulations

either on the ground of unduly limited use of the power or on the ground of defective drafting.

Mr Maxwell: I think that it is a case of defective drafting.

The Convener: We said the same thing for a previous set of regulations; this case seems similar.

Members indicated agreement.

Pollution Prevention and Control (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/340)

The Convener: The committee asked the Executive to explain why regulation 5 states that new regulation 12(1) of the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/323) is subject to new paragraphs (4) and (5), as paragraph (5) appears to be a separate condition in its own right. The Executive has explained that it does not consider that the words "Subject to paragraph ... (5)" in any way adversely affect the operation of regulation 5 of the amendment regulations. Our legal advisers do not agree. They consider that there is nothing in new regulation 12(1) that implies that work could be carried on once notification had been given. New regulation 12(5) is a separate condition, rather than a qualification of regulation 12(1). However, the point is a small one, and it will not adversely affect the operation of the regulations. We need to decide whether to report the regulations on the ground of failure to follow proper legislative practice, given the inclusion of superfluous words.

Christine May: I think that we should. I am glad to see that my trifflids—the mobile plants—will be able to be controlled, and that their control will not be adversely affected by superfluous words. However, good legislative practice means not using unnecessary words. Therefore, we should report the regulations on that ground.

The Convener: Are we all agreed on that?

Members indicated agreement.

The Convener: With respect to the matter of the insertion of the words "or mobile plant" after the word "installation", which Christine May has mentioned, the Executive has confirmed that an error was made, and that it will amend the regulations.

Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment Regulations 2005 (SSI 2005/341)

10:45

The Convener: We put three questions to the Executive about the regulations, two of which were

to do with defective drafting. Those are the quickest points to deal with, so I will deal with them first. First, members will recall that we sought an explanation about the definition of “relevant day” in regulation 2(2)(c), as that amendment appears already to have been achieved through regulation 2(2)(b) of the Education (Student Fees and Support) Temporary Protection (Scotland) Amendment Regulations 2005 (SSI 2005/217). The Executive has acknowledged the oversight, and has undertaken to rectify the error at the next legislative opportunity.

Secondly, we asked the Executive why the wording inserted by regulations 4(2) and 4(3) into schedules 1 and 2 to the principal regulations does not—unlike the existing paragraphs of those schedules—make specific reference to “excepted student” and “excepted candidate” respectively. The Executive has acknowledged the mistake. An amendment will be needed to rectify the matter.

Those two points are being dealt with. The third point is perhaps less easy to rectify. It concerns the definition of

“national of a member state of the European Community”

in regulation 2(2)(c). As you will see from the Executive’s explanation, its reason for proceeding as it did is one of consistency. It is argued by our legal advisers that the definition is nevertheless not as clear as it could have been for the purposes of that regulation.

Mr Maxwell: I agree with our legal advice. I appreciate that we should try to be consistent across different regulations. In this case, however, that aim has been inappropriately applied, and it has ended up causing more confusion. The Executive’s approach might have achieved consistency, but the regulations are opaque. It would have been better to have drafted them differently, to avoid the problem of the only definition of European Union excluding the United Kingdom, which seems rather bizarre. Consistency has its place and its merits. In this case, however, the Executive should have thought twice.

The Convener: It is suggested that we pass the Executive’s response on to the lead committee and the Parliament either for information or on the basis of a failure to follow proper drafting practice. It has included the definition on one occasion, and has then clarified it somewhat. We could say that. Is that agreed?

Mr Maxwell: The approach that the Executive has taken is circuitous, but is it wrong?

The Convener: I do not think that it is wrong, but it is not very effective. The appropriate clarity has not been given in the circumstances.

Christine May: If it is not effective, it must be defective.

The Convener: Yes. We can expand on that by saying that the wording does not give the clarity that we would expect, although we can see what the Executive was trying to do for the sake of consistency.

Members indicated agreement.

Fire (Additional Function) (Scotland) Order 2005 (SSI 2005/342)

The Convener: We had noted that article 8 contained a paragraph (1), yet no further paragraphs followed. It has been accepted that the “(1)” should be removed. The printing error will be amended for the annual edition, and the wording will be adjusted on the office of public sector information website. That was a good result. We will pass that on to the lead committee and the Parliament.

Draft Instruments Subject to Approval

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2005 (draft)

Housing Grants (Assessment of Contributions) (Scotland) Amendment Regulations 2005 (draft)

10:48

The Convener: No points arise on the draft regulations.

Instrument Subject to Annulment

Requirements for Teachers (Scotland) Regulations 2005 (SSI 2005/355)

10:49

The Convener: No substantive points arise on the regulations. However, the legal advisers have listed some minor drafting points, which we could raise by informal letter.

Members *indicated agreement.*

Instrument Not Laid Before the Parliament

Serious Organised Crime and Police Act 2005 (Commencement No 1) (Scotland) Order 2005 (SSI 2005/358)

10:49

The Convener: There is one small point. The order gives the appointed day as 1 July, but does not say whether that is in 2005.

Christine May: It would be useful to know the exact date, otherwise it could be any year of any millennium.

The Convener: The year is included in the explanatory note.

Christine May: Even so, it is still a point to be picked up.

Murray Tosh: The Executive always tells us that the explanatory note has no legislative impact, so it could not found on that. It would be legitimate for anyone who is in breach of the order to plead that it had apparently not come into effect.

The Convener: We were just testing that you knew the answer, Murray, and you did. It was perfect.

We will raise that point in an informal letter if that is okay, and hopefully get that changed.

Members *indicated agreement.*

The Convener: The committee will now move into private session.

10:50

Meeting continued in private until 11:18.

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