SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 September 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
25th 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 Kenneth Macintosh (Eastwood) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES
Mr Ted Brocklebank (Mid Scotland and Fife) (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 2

Scottish Parliament

Subordinate Legislation Committee

Tuesday 20 September 2005

[THE CONVENER *opened the meeting at 10:35*]

Executive Response

Tuberculosis (Scotland) Order 2005 (SSI 2005/434)

The Convener (Dr Sylvia Jackson): Welcome to the 25th meeting in 2005 of the Subordinate Legislation Committee. Adam Ingram may not make it to the meeting.

Members will remember that last week we queried the drafting of article 11(3) as well as the reference to subparagraphs rather than paragraphs. Members will have read the Executive's response, which says that both points will be taken on board. However, the Executive argues that, in its interpretation, the drafting of article 11(3) is not such a problem as we have made it out to be, although it has agreed to make the changes at the first legislative opportunity. What are members' views?

Mr Stewart Maxwell (West of Scotland) (SNP): We will have to agree to differ from the Executive's strangled interpretation. It is clear that the order is defectively drafted, and the Executive is wrong to try to put such an interpretation on it. That it has agreed to amend the order shows that it agrees with the committee. It will be up to the Executive to argue its case if a problem comes to court. Our responsibility is to report on the two instances of defective drafting.

The Convener: So we will report to the lead committee and the Parliament on that basis.

Murray Tosh (West of Scotland) (Con): We should report only to the Parliament.

The Convener: I am sorry—we will report only to the Parliament.

Murray Tosh: I just want to show that I have read the briefing paper.

The Convener: You are very good.

It is important that the order is changed at the first opportunity that presents itself, as it is defectively drafted.

Instruments Subject to Annulment

10:38

The Convener: Minor points that can be raised separately have been identified on the Dissolution of Funding Councils (Scotland) Order 2005 (SSI 2005/437), the Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005 (SSI 2005/443), the Mental Health (Form of Documents) (Scotland) Regulations 2005 (SSI 2005/444), the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/445), the Legal Aid in Contempt of Court Proceedings (Scotland) Amendment Regulations 2005 (SSI 2005/451) and the Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452). Are members content for those points to be dealt with together in a letter to the Executive?

Members *indicated agreement*.

Dissolution of Funding Councils (Scotland) Order 2005 (SSI 2005/437)

The Convener: No substantive points arise on the order.

Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Amendment Regulations 2005 (SSI 2005/438)

The Convener: Members may remember that we have previously dealt with fish sellers and buyers. No points arise on the regulations.

Housing (Scotland) Act 2001 (Transfer of Scottish Homes Property and Liabilities) Order 2005 (SSI 2005/439)

The Convener: No points arise on the order.

Mental Health (Period for Appeal) (Scotland) (No 2) Regulations 2005 (SSI 2005/441)

The Convener: Apart from the word "Scotland" now being in the title—as we suggested that it should be—no points arise on the regulations. I am sure that members are happy about that.

Mental Welfare Commission for Scotland (Procedure and Delegation of Functions) (No 2) Regulations 2005 (SSI 2005/442)

The Convener: Members will remember that the regulations came before us and that we

recommended that "may" should be changed to "shall" in paragraph 1(2) of the schedule to the regulations. That has been done.

Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005 (SSI 2005/443)

The Convener: I do not know whether members have read the regulations, but a point has been made about the reference to "page 3" in column 2 of each schedule to the regulations. The schedules refer to "page 3" of the form, which does not appear to exist—I have looked and cannot see that page. What do members think?

Mr Maxwell: I agree that form T2 seems to have no page 3. However, the references in both schedule 1 and schedule 2 do not look like typos. Schedules 1 and 2 list "part 1" and "part 2" and then "page 3". The reference to "page 3" looks deliberate. If so, that page appears to be missing. Although a mistake is unlikely, we need to ascertain whether that is the case.

The Convener: Yes. We will write to the Executive on that point. Are we agreed?

Members *indicated agreement*.

Mental Health (Form of Documents) (Scotland) Regulations 2005 (SSI 2005/444)

Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/445)

Mental Health (Class of Nurse) (Scotland) Regulations 2005 (SSI 2005/446)

Civil Legal Aid (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/448)

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/449)

Criminal Legal Aid (Scotland) Amendment Regulations 2005 (SSI 2005/450)

Legal Aid in Contempt of Court Proceedings (Scotland) Amendment Regulations 2005 (SSI 2005/451)

The Convener: No points arise on any of the instruments. Are we agreed?

Members *indicated agreement*.

Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452)

The Convener: Members will note that three points arise on the order. The first relates to the reference in articles 20(4)(a), 25(2)(a) and 29(4)(a) to

"any period of 12 months",

which I understand should be

"the period of 12 months".

The point is important for interpretation. Does any member have any other point to raise on the instrument?

Gordon Jackson (Glasgow Govan) (Lab): We should ask the question.

The Convener: Thank you, Gordon. Are we agreed?

Members *indicated agreement*.

The Convener: The second point relates to the reference in article 26 to "a care plan". I understand that the reference should be to a "part 9 care plan". We should ask the Executive to clarify that point. Are we agreed?

Members *indicated agreement*.

The Convener: The third point relates to article 34(8)(b), where the word "if" is used when it should read "of". I also understand that other words may be missing. We should ask the Executive to clarify that point. Are we agreed?

Members *indicated agreement*.

Fire and Rescue Services (Framework) (Scotland) Order 2005 (SSI 2005/453)

The Convener: No points arise on the order. Are we agreed?

Members *indicated agreement*.

Instruments Not Laid Before the Parliament

Mental Health (Class of Nurse) (Scotland) Revocation Order 2005 (SSI 2005/447)

Transport (Scotland) Act 2005 (Commencement No 1) Order 2005 (SSI 2005/454)

10:42

The Convener: No points arise on the orders. Are we agreed?

Members *indicated agreement*.

Sewel Convention (Correspondence)

10:43

The Convener: The committee has received correspondence from the Procedures Committee about its inquiry into the Sewel convention. The letter has two sides; I am sorry that only one side was included in the papers that members received by post.

As members will note, the Procedures Committee is moving towards a recommendation that committee scrutiny under the Sewel convention should be based on a memorandum about the relevant United Kingdom Parliament bill. The Procedures Committee is examining the possibility of amending the standing orders to make it a formal requirement for such a memorandum to be referred to this committee. That would happen when a bill includes provisions that confer new powers on Scottish ministers to make subordinate legislation.

Are members happy with the Procedures Committee's recommendation, which is to be found at the foot of the first page of the letter?

Gordon Jackson: The proposal is entirely rational. If subordinate legislation is contained in a bill—even if we are scrutinising it on a secondary basis—it is entirely rational to refer the bill to us. Apart from anything else, we need the work.

The Convener: I am not sure about that.

Gordon Jackson: It is hard to see the rationale against the proposal. The whole thing read entirely sensibly, but I may have missed something, of course.

Mr Kenneth Macintosh (Eastwood) (Lab): I agree. We should be looking at all delegated powers. My only query concerns the phrase "may report". I understand that in some ways we are dealing with the unknown and that we do not want to be swamped with work, particularly if a number of Sewel motions were to come in a rush at the same time as a lot of subordinate legislation.

However, I cannot imagine that the committee would look at subordinate legislation and not make a report to a committee. We report to somebody on virtually every piece of subordinate legislation that comes before us. Therefore it would be strange to pick and choose which Sewel motions to report on. I imagine that we would wish to report on every Sewel motion that came our way.

That said, I agree with what has been recommended.

10:45

Murray Tosh: It is consistent with the attitude that we are taking towards the Executive: we expect a whole lot of boxes to be ticked unless an explanation is given. If we were to apply the principle of our report on regulation to ourselves, we would be saying that we should tick a box.

Even if our reports were to say that any changes are minor or technical and that we have nothing substantive to say, we should give the lead committee some kind of response, should we not?

Mr Maxwell: I understand what both Ken and Murray have said. However, the Procedures Committee's proposed new standing order says that

"the Subordinate Legislation Committee shall consider"

provisions that would confer on Scottish ministers powers to make subordinate legislation. So we certainly will look at them all. That places an obligation on us. It may be that we also end up reporting on all the memorandums, but the phrase "may report" gives us flexibility, particularly since we are likely to end up with them all bunched together at the end of the term. That is part of the problem. That said, we do not report on absolutely everything; we do not report on subordinate legislation dealing with guidance. It is not an absolute rule that we report on everything. The proposed standing order fits in with the rules under which we work at present and is probably okay as drafted.

Gordon Jackson: I think that "may" is okay. Why should we tie our own hands? Stewart Maxwell is probably right: we will almost inevitably report on every bill. However, say that for one reason or another we did not report on a minor matter in a bill. Let us be ridiculous and say that we forgot about a minor matter of no consequence. All of a sudden, somebody will tell us that we have breached standing orders. Why should we make ourselves hostages to fortune? It is unnecessary.

The Convener: Murray, do you wish to make a point?

Murray Tosh: Gordon has covered it.

The Convener: To be fair, what was being considered with "may" was the bunching, as Stewart said, that happens before the recess. We struggle then to cover everything and to get all our reports written, but I cannot imagine a time when we would not report on anything major. If a great deal of subordinate legislation came to us we might have to prioritise, but I cannot see that happening.

However, there may be small technical issues that might have to be left to one side while we looked at more important matters in the detail that they deserved.

Murray Tosh: In such circumstances we could explain that to the relevant committee without formally reporting to it. There would be a response and an explanation for that committee's members.

Mr Maxwell: I agree. A quick letter or an explanation to a committee could be forthcoming without our going to the bother of reporting and publishing. That should cover it.

The Convener: That might get over Kenny's point. We could send a letter to a committee pointing out that the matter in question was a small technical point.

Mr Macintosh: I am relaxed about it; it is not a huge issue. My point is that we should be consistent. The most important thing is that we report on delegated powers under Sewel motions, so I wholeheartedly agree with the Procedures Committee. The question of consistency is one for us or for other parliamentary procedures.

The Convener: I think that we have agreed on a way forward. Are you happy, Ruth, to report that?

Ruth Cooper (Clerk): Yes.

Regulatory Framework Inquiry

10:49

The Convener: We come to item 5, the Executive's response to our phase 1 report, which you have in front of you. There are two ways to proceed. We can go through the response point by point or we can make general comments. We should remember, however, that we will be coming back to some of the issues at phase 2 and that the conclusions will be made by the committee when it completes its inquiry report at the end of this year or the beginning of the new year.

Do members want to make any general comments on the Executive's response?

Mr Maxwell: The Executive's response is a bit of a mixed bag, in that some of the stuff is welcome and some of it is less so.

On regulatory impact assessments, I am slightly concerned by the suggestion on page 2 of the response that the lack of an RIA should be dealt with by

"including a statement within the Executive Note as a matter of standard practice",

rather than by considering each case on its merits. I appreciate that the issue would at least be covered if the standard practice was that the Executive note would include such a statement, but I have some concerns about that.

On the impact of RIAs on the wider community, although the Executive appears to agree to our recommendation, I am slightly confused by the list that is given of those who might be affected

"depending on where they live (in deprived, urban or rural communities) as well as on their ethnicity, gender, age, health and income."

When we originally discussed the matter, we wanted the impact assessments to extend beyond businesses and charities to include local authorities and other such bodies. I am not against widening the impact assessment in the way that the Executive has suggested, but it is rather odd that the Executive has not agreed to extend RIAs to include an assessment of the impact on bodies such as local authorities. It might be worth seeking further clarification on that point.

Gordon Jackson: On a number of our recommendations, the Executive has said, "Yes, we appreciate your point, but we are not sure how best to do that, so we will think about it." We will just need to ensure that that happens. For example, on our recommendation that there should be a statutory requirement to consult, which we felt fairly strongly about, the Executive has said, "Yes, we see what you mean, but we will think about how best we might do that." The next stage—I am sure that the convener will do this—is that we need to ensure that the Executive does not somehow forget the offer that it has made with the result that nothing happens. At this stage, I think that we just need to keep the response and ensure that the Executive delivers on the stuff that it has promised.

The Convener: Parts of the response provide quite a lot of explanation, especially about the accessibility of legislation, how legislation is understood and the extent to which plain English is used. We discussed many of those issues previously, so we can understand the difficulties involved in using plain English in legislation that is technical or that needs to link with older legislation. That part of the response is quite useful, as it agrees with many of our previous discussions.

Another recommendation that we made, in addition to what we said about regulatory impact assessments, was that the improving regulation in Scotland unit—IRIS—should be taken away from the business side of the Executive and relocated in a more central place, such as in the First Minister's office. Do members have views on the Executive's response to that recommendation or will we just hold on to that for the moment?

Murray Tosh: That is the least satisfactory part of the response. We will now need to consider whether we want to press the issue and how we might do that. For almost all our other recommendations, the Executive has either come to a median position—I am not sure whether "median" is the correct word, given the theological discussion about concepts such as median and mean that takes place in the Parliament—or it has accepted them. By and large, the Executive's response is reasonably positive.

For me, the biggest concern is the argument about resource. We will probably just need to accept the commitment that has been given about the consolidation of legislation. We will probably not get what we want, as I suspect that that would be very resource heavy in comparison with the benefits that would be gained

On the resourcing of a website on which subordinate legislation might be shown, I am concerned that the Executive has not taken on board the points that we made. We cannot depart from the principle that we need to show all legislation that is in force. That includes legislation that was in force when the action that the regulation covers was undertaken. People have to be able to appeal if they can show that their action was taken according to the regulation that was in force at the time. People must be able to access the original regulation, the current regulation and all the intermediate stages as well. It is not defensible that people should be charged to find

that out. It is everybody's property; it is the intellectual property of the people. In a democratic country we should all have access to the law.

I know that Gordon has a more emotional if less philosophical attachment to the idea that people pay for the law. What people pay for, however, is interpretation, judgment, advice and good counsel. They should all be able to access the law. That is an area that we might wish to pursue further with the Executive.

Gordon Jackson: I was smiling because I was thinking that we have access to the law—lawyers. However, that was probably entirely unfair.

I suspect that the logistics would be fantastically demanding. Of course I agree in principle with Murray that everyone should have access to the law. It is a legal presumption that people know the law; it is there for them in the public domain. For most people, however, it is very difficult to access. I am not persuaded that it would be easy to do what we want to do.

Can we justify diverting large amounts of resources to cater for what may be a very small number of people who may want access? A business that wants to access very technical regulations that were in force a year ago will get people to do that for it. That is how things are.

The principle is 100 per cent right; I am not sure, however, how practical it will be in the detail.

The Convener: At the bottom of page 5 of the Executive's response it says that the Department for Constitutional Affairs

"has no current plans in relation to revised secondary legislation."

Gordon Jackson: We can explore why that is the case. I suspect, however, that it is a massive resource problem.

The Convener: I agree that the resource implications are quite large. However, at the end of the day access is a goal that we should be pursuing.

Gordon Jackson: I am loth to become boring about the matter, but it is a question of the resource implication against the number of people who will want to access information on regulations. I totally agree with the principle that every citizen should able to access the regulations if they want, but how many people ever come to an MSP's constituency office and complain that they have a problem accessing a regulation? There may be too much regulation, and people probably cannot access the sort of material that we would like them to be able to. I am not sure how big a problem it is, that is all.

Murray Tosh: One of our difficulties is that we do not know the form in which the Executive itself holds all this information. I suspect that, just as you can track changes in a document, the Executive has its own versions of textually consolidated and updated instruments and all the intermediate stages.

I imagine that the reason that the Executive does not want to make that public is that it may not be satisfied with the rigour of what it does; it may not want to expose its documentation and the electronic versions that it is surely working with. Perhaps we could explore that in greater detail, if only to increase our own understanding of the practical issues that Gordon raised or to tease from the Executive what it considers a realistic target for us to aim at.

At the moment, however, we are talking about a principle on the one hand while the Executive is talking about the practicalities on the other. We do not know whether there is an intermediate position, and that is something that we could usefully explore.

Mr Maxwell: I agree with what has been said: the principle is important. My main disappointment, however, was that there was no commitment on the website database and no commitment on rolling consolidation. The Executive will not put legislation on a website and it will not commit to consolidating legislation on a rolling basis. That leaves us going nowhere. I understand and accept Gordon's point about resources but, if there is no commitment at least to aim for the goal, we will never achieve anything.

A problem that we see week in and week out is that amendment after amendment is introduced for legislation. The number of amendments must make the process very complicated for individuals and companies to follow. Not to commit on rolling consolidation or on the website—especially in relation to secondary legislation—is a poor response. We should pursue the issue with some vigour, to try to get some movement.

11:00

Gordon Jackson: Can I come back in, in case I have misunderstood?

The Convener: Kenny Macintosh was first.

Gordon Jackson: I am sorry. I did not see Kenny.

Mr Macintosh: Several explanations are given in the Executive's response for why information will not be available on the database. One explanation is that the Executive will not set up its own database but will rely on the Department for Constitutional Affairs. The implication is that the scale of the task is out of proportion to the use that will be made of it. However, the Executive agrees with the principle of our recommendation.

As parliamentarians, we should be conscious of not wasting what we know to be limited Government resources on a task that is not of practical benefit to many people. There may be other ways round the problem. The Executive has agreed with the principle and we already know its record on open government and so on. It is committed to moving in that direction.

The key point in our recommendation is the "free of charge" point. Even if information is not available on the database right away, there might be other ways of addressing the "free of charge" point at a later stage. Information might not be available electronically but we can quite easily have a debate about the fees when people make inquiries.

On the point about consolidation, I am conscious of the volume of legislation that is coming through the Parliament. I am not saying that that is a reason not to consolidate bills, but we have to be careful about what we ask the Executive to do when we ourselves are constantly complaining about the parliamentary timetable being jammed and about having too much legislation at different stages. I have a lot of sympathy for the Executive; it has its hands full without consolidating every single bill.

Gordon Jackson: I may be crossing my own wires, but I have huge sympathy for the committee's position on consolidation, no matter how difficult consolidation is. The Executive accepts that we should be consolidating more, and it accepts that there should be a rolling programme. However, I think that Murray Tosh was making a slightly different point—about people's ability to tell easily what regulation was in force at the time they did the thing that is being complained of. That is what is incredibly difficult because of the resources that would be involved; and consolidation in itself does not necessarily give that information.

Murray Tosh: That underlies the committee's position; we wanted all the intermediate stages to be accessible as well.

I am not going to argue with Ken Macintosh about the need to be careful with public resources, but the purpose of committee inquiry is to scrutinise and hold to account. I do not think that we should just run at the first sign of Executive gunfire to the effect that something is resource intensive. We should have some sense of what databases, intelligence and memory systems the Executive operates, and of what the practical implications would be of making those systems accessible.

If we look into this and discover that the costs are huge and the potential benefits trivial, then we will have established that after having scrutinised the Executive and come to a rational decision. However, at the moment we need to stick to the position that we have taken. We should ask the Executive for dialogue so that we can understand the issues properly and take a truly informed position.

Gordon Jackson: That is fair.

The Convener: Yes, I think that is fair. I also take on board Stewart Maxwell's point—although I have forgotten what it was.

Murray Tosh: It was memorable.

The Convener: I am sorry—put it down to age.

Mr Maxwell: It will all be in the *Official Report*.

The Convener: My line of thought completely went.

Murray Tosh: It was his finest moment and it passed unnoticed.

The Convener: I want to go back to the points about accessibility—

I remember what Stewart's point was. It was that because there is so much legislation—statutory instruments and amendments—it must be very confusing for people out there to try to access it and to see the changes that have been made. We are trying to work towards better accessibility. I agree with Murray Tosh that we might find that there are huge resource implications, but that that should not stop us at this stage from going along the path to see what might be possible. As Kenny Macintosh said, there might be other ways of getting around the problem.

We have made a good start on the Executive response. Many good points have been made, but we still have to pursue many areas, one of which is accessibility. We could also explore the work on enforcement that the Executive is doing with small businesses. I cannot remember what the other area was, but the Executive said in its response that it was working closely with small businesses on two areas. One of its big concerns was making sure that small businesses knew about consultation ahead of time, as well as the review of statutory instruments.

Mr Macintosh: A well-named group is referred to on page 8 of the Executive response:

"The regulatory sub-group of the Small Business Consultative Group".

Mr Maxwell: Snappy title.

Mr Macintosh: I am delighted to hear that the group is looking at enforcement and we should work closely with it.

The Convener: We should be kept up to date with what is happening in the group because it is also looking at the review, which we were keen

should be addressed. Circumstances change so there is a need to review regulation.

Murray Tosh: On that point about the periodic review, there is a response in the Executive document to sunsetting, which is a bit less responsive than I recall the minister—or someone—being when we took evidence. It seems that sunsetting is to be allowed in "special and exceptional circumstances". It might be worth exploring with the Executive what constitutes special and exceptional circumstances. Sunsetting might be capable of more general application than the tone of that final sentence seems to imply.

The Convener: I agree. We have made a good start. I thank colleagues for coming and hope that you will be here next week for a round-table meeting with the academic and other witnesses who will join us.

Meeting closed at 11:08.

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