

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 15 November 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

31st 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)

*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 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 15 November 2005

[THE CONVENER *opened the meeting at 10:33*]

Item in Private

The Convener (Dr Sylvia Jackson): I welcome members to the 31st meeting in 2005 of the Subordinate Legislation Committee. Today is 15 November, although I have a slightly different date on my briefing.

The first item on the agenda is to ask that item 8 be taken in private. Members will remember that we are going to discuss the main themes arising from phase 2 of the committee's inquiry into the regulatory framework in Scotland, which will assist the drafting of the committee's report. I recommend that that discussion, which will focus on themes for the draft report and future witnesses, be taken in private. Is that agreed?

Members indicated agreement.

Delegated Powers Scrutiny

Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill: Stage 1

10:34

The Convener: We raised a number of points on the bill with the Executive, to which it has now responded. Members should have a copy of the letter that the committee issued last Tuesday.

The first point relates to section 1(6)(g), on the power to specify a person or body as one to which section 1 applies. We sought clarification of the policy intention of the power, which would allow the list to be added to but not amended. The Executive has replied that all the bodies that are currently listed are statutory bodies; therefore, any amendment or alteration of the list could arise only in the context of new primary legislation. The Executive does not envisage any other circumstances in which removal from the list would be necessary. Are we happy with that clarification?

Members indicated agreement.

The Convener: The second issue concerns section 2, on the power to specify a person or body as one to which section 1 applies. The committee noted that section 2 confers a power on ministers to direct any person or body that is not listed in or specified in an order that is made under section 1 to participate in an inspection. The committee was concerned about the width of the power and sought clarification from the Executive. I could go through the Executive's response, but I wonder whether committee members have any views on it.

Mr Stewart Maxwell (West of Scotland) (SNP): I have not changed my opinion on this. The power is still too wide—it is unlimited. However, I assume that the timescale means that we have to send the bill to the lead committee and that there is not much that we can do about it. It may be that we are straying into policy. It is obviously the Executive's intention to take this power, and policy is not our concern. Nevertheless, given the fact that the power is effectively unlimited, I think that we should report to the lead committee that we have concerns about the width of the power.

The Convener: The Executive appears to be saying that it needs that flexibility, but it has not explained why it wants that flexibility. It might be a policy issue, of course.

Mr Maxwell: It probably is. The lead committee can question the minister on that point if we make it clear that we have questions about the width of the power which, as far as we are concerned,

have not yet been fully answered by the Executive.

The Convener: Yes. Is that agreed?

Members indicated agreement.

Murray Tosh (West of Scotland) (Con): For us, the issue is one of process and powers. We have concerns, and the lead committee should satisfy itself that there are policy reasons for what would, effectively, be a departure from normal practice.

The Convener: Absolutely.

The next two points are on section 3(1), on the power to make regulations for the purpose of a joint inspection, and section 5(3), on the power to make regulations for the exercise of functions under section 5(1). We were concerned at the extent to which the substance of the legislation has been left to subordinate legislation and asked the Executive to explain why that is.

In its explanation, the Executive said that there will be an evolving programme, which is why it needs that flexibility. However, the committee was also concerned about the power in section 3(1)(f) that permits regulations to create criminal offences but, unusually, places no limitation on the exercise of that power. We were concerned that that is a departure from the normal procedure. There is also a second issue to do with confidentiality; I do not know what members think about that.

Mr Maxwell: I am particularly concerned about the power to create criminal offences not being limited. It may be perfectly acceptable for the Executive to say that the process is evolving—that may well be; however, it is surely reasonable for the bill to state the limit of any penalty, so that it would be no greater than point 3 on the standard scale, or whatever it happens to be. The detail of the penalties can be left to subordinate legislation, but the bill should place limits on the power. The Executive is incorrect, and this is quite a departure from the normal procedure, as you said, convener. We should report that to the lead committee.

Mr Kenneth Macintosh (Eastwood) (Lab): On the issue of confidentiality, the Executive has published a protocol that describes the protections that currently exist, under both the Data Protection Act 1998 and other legislation. It might be worth while for the Executive to insert a statement or obligation to that effect in the bill. That would reassure members that the duty to respect confidentiality exists.

The Convener: Yes. If I remember correctly, we raised a similar issue with respect to the Human Tissue (Scotland) Bill, but we have not yet received an answer to our question.

Mr Adam Ingram (South of Scotland) (SNP):

We are talking about the guts of the bill in its dealing with the confidentiality versus disclosure argument. The bill's purpose is to overcome the current restrictions that are imposed, particularly on health authorities. We should point out what has been suggested to the lead committee. I am sure that the matter will be gone into in considerable depth during the evidence taking for the bill, but we should flag up the matter from the Subordinate Legislation Committee's perspective.

The Convener: The legal brief states:

"It may be that existing regimes under the Data Protection legislation would provide the necessary protection",

but we do not know whether they will.

Mr Ingram: We do not.

Mr Maxwell: I am interested in what Ken Macintosh said about the protocol. I do not think that having only a reference to a protocol would provide the protection that I seek. A protocol would be pointed to, but that protocol could be changed at any time. Protection might be provided, but that does not mean that protection will be provided in the future, and I am concerned about that. I do not think that that would lead to the level of protection that we seek. We are talking about the confidentiality of sensitive material. Perhaps it would be better if protection were included in the bill rather than the bill pointing to a protocol that could be changed. I accept what Ken Macintosh says about the protocol, but such things can be changed. I wonder how much defence there would be if the bill simply pointed to a protocol.

Mr Macintosh: I wanted to point out that the protocol has been published. There is no reference to it in the bill, but it exists, although I have not seen it.

I did not suggest that all that the Executive should do in the bill was refer to the protocol, although that is one possibility. The Executive could also allude to the fact that there are still duties of confidentiality. Whether there is an allusion to a report or a protocol or the bill spells things out in more detail—although it might be difficult to do that—there should be a statement that the bill will not give inspectors unfettered powers to access information. There are duties.

Mr Maxwell: We have concerns but, as Adam Ingram said, we should point out the matter to the lead committee so that it can go into detail on it.

The Convener: I agree. We are bordering on policy issues, but we are alarmed that things are not explained.

Mr Ingram: The second point was on penalties. Stewart Maxwell is right. A precedent would be set.

The Convener: There would be no limitation.

Mr Ingram: Yes. Given that the Executive has amended previous provisions when we have pointed out problems, the same ought to be done with this bill, for the sake of consistency.

The Convener: Yes. The Executive withdrew a Fire (Scotland) Bill provision.

Murray Tosh: On penalties, the argument about the legislation still evolving is deeply unconvincing. Does not legislation in every field evolve when further regulations are to come forward? Is not all legislation amendable? I agree that a worrying precedent would be set and that it would be helpful to point out that the Executive withdrew a similar provision of the Fire (Scotland) Bill. There may be little time for us to do anything more at this stage, but the fact that the Executive lodged a stage 2 amendment to that bill—and could have lodged a stage 3 amendment if it had come to that—points to the value of having a continuing discussion with the committee about basic principles.

We should ask the Executive to explain further what it is that is evolving unusually in this context that requires a different approach from the normal one. We should also ask the Executive why it withdrew similar provisions in the Fire (Scotland) Bill and suggest that there may be a good argument for it to act at stage 2 or stage 3 to limit the scope of the bill in this respect. We should not just pass the matter to the lead committee as a policy issue; it clearly is a policy issue, but the matter also raises a general point in respect of which the Subordinate Legislation Committee could usefully do further work with the Executive.

10:45

The Convener: I have checked with the clerk and that is perfectly acceptable. I also suggest that in our report to the lead committee we state that we are continuing the dialogue with the Scottish Executive because we are concerned about the issue.

Murray Tosh: That is a courtesy and it also focuses the lead committee to consider the matter in its own scrutiny.

The Convener: Absolutely.

Mr Maxwell: I have a question rather than a point. Is it not the case that the bill will go through a rather truncated process and that stages 2 and 3 may well effectively happen at the same time? It is very important that such information and concerns get to the lead committee and to the Executive

because if there is, as has been suggested, a truncated process and stages 2 and 3 take place at the same time there will not be the usual room for manoeuvre at stage 2. It is important that we deal with the matter.

The Convener: We should flag up that point in our report to the lead committee and when we write back to the Executive to make them aware that we are aware of the issue.

The issue in section 7 is about the definition of social work services functions. The question is whether members are happy with the Executive's response—the Executive states that it thinks that it is entirely okay to leave the definition to subordinate legislation without any limitation—or whether you think that there should be a limitation above and beyond the terms of the long title? We are again straying a little into the policy area, but the exact limits of the definition are not clear.

Mr Macintosh: I want to draw the power to the attention of the lead committee and to emphasise that it is unusual and a source of concern that social work services are to be defined in subordinate legislation, rather than stipulated in the bill. A number of functions, which are currently laid out in different acts, will be captured under any proposed regulations. We are going from one extreme to another—from precise detail to a very general, all-encapsulating bill. It is, however, a question more for the lead committee to consider, as to whether or not this is the best way, or the only way, for the Executive to achieve its objective.

The Convener: I am aware that there could be—and obviously is—a significant policy issue about overlap. Did Murray Tosh mention the overlap with health and other sectors last week?

Murray Tosh: There are not necessarily overlaps within this aspect of social work; those are perhaps more in care services for elderly people and so on.

It is not unusual in legislation, when reference is made to a definition, to be able to cite where something is defined. There are often examples when we argue about something being defined in subordinate legislation and say, "It is already defined—just cite the main act."

If there is no watertight definition of "social work services functions", does that mean that any function that is added by a local authority to its social services comes within the scope of inspections? I think that a better definition is required, but I do not know what to suggest that we do about the matter, other than refer it to the lead committee. The lead committee might have a suggestion to pursue, but the Executive does not appear to be minded to change its position.

The Convener: I gather that the functions could be prescribed on the face of the bill, with a power to amend them. That might be one way round the problem.

Murray Tosh: Do you mean amended by subordinate legislation?

The Convener: I suppose so.

Murray Tosh: So we would suggest to the Executive that it uses a Henry VIII power. There is a nice irony in that, is there not? Let us raise that with the Executive and, again, let us tell the lead committee what we are doing, since the matter is for us rather than for it. Let us add that point to the on-going letter and impress the Executive with the scope, breadth and depth of our probing.

The Convener: Yes. I suppose, in fairness to the Executive, I should say that it said in its response:

"The regulations do not extend the powers of Social Work services in any way and there is no intention to extend the powers beyond those set out in regulations. The power relates to local authority functions and is therefore not unlimited".

However, I think there is a concern that there is no definition.

Murray Tosh: Perhaps there should be a power to amend the definitions, because the scope of social work services has evolved considerably since the parent act in 1968. The flexibility that the clerk's suggestion gives might be appreciated.

The Convener: We could put that suggestion. We have two matters, one of which is the report that we are sending to the lead committee; the other is including our points in the on-going letter to the Executive.

I think that section 8 is okay. We noted that this section makes a number of consequential repeals of other primary legislation that the bill will supersede. However, there is no provision for transitional arrangements or further consequential amendments. The Executive has confirmed that it is satisfied that there is no requirement for transitional provision and that consideration is being given to a possible amendment in respect of further consequential amendments. Our legal advice is that that is acceptable. What do members think?

Mr Maxwell: I agree that that is acceptable.

The Convener: Okay. We will put together all the matters about which we are concerned, send a report to the lead committee and send a letter to the Executive. Is that agreed?

Members indicated agreement.

Executive Responses

Avian Influenza (Preventive Measures) (Scotland) Regulations 2005 (SSI 2005/530)

10:52

The Convener: We noted that provisions concerning powers of entry usually limit the exercise of those powers and we sought clarification as to why they were not limited in the regulations. The Executive's answer is that it did not wish to place any time restrictions on entry to premises because entry might be required at any time to ensure that all required steps are being taken to prevent the transmission of the virus. The Executive said that it would be reasonable as far as was humanly possible. Are we happy with the Executive's explanation?

Mr Macintosh: The explanation is fine, but it reveals a policy issue rather than a fact for subordinate legislation. I think that we should draw the lead committee's attention to that. Certainly, my own view, if I am allowed to speak on the policy, is that if the Executive is going to be reasonable then it should say that in the regulations.

Murray Tosh: The difficulty is in defining "reasonable."

Mr Macintosh: Absolutely. There are many definitions of that. We should draw it to the lead committee's attention that the Executive has referred to a matter of policy in order to ensure that the committee knows that it is a deliberate policy.

The Convener: Yes, we should inform the committee of the Executive's explanation.

Mr Maxwell: I was not going to say anything, but the discussion has opened up the matter. Much as it goes against the grain to support the current Executive, I support it on this matter. It is entirely reasonable for it to take immediate action and to have the flexibility to do so at any time that it deems necessary. This matter is relevant to public health, whether it be human or animal health. There is an overriding factor in these cases that might demand, for example, that taking action at two in the morning is reasonable under certain circumstances.

I am not sure what we would gain from putting that in the regulations. The Executive has been clear that, whenever possible, it would try to ensure that action was taken at a reasonable time and that such action would not be taken unnecessarily. In a matter of public health, it is entirely reasonable for the Executive to have that flexibility.

The Convener: I tend to agree with Stewart Maxwell. What do Murray Tosh and Adam Ingram think?

Mr Ingram: I agree with Stewart Maxwell.

Murray Tosh: The point is well made.

The Convener: We will go with that, but report to the lead committee and the Parliament with the Executive's explanation.

Avian Influenza (Preventive Measures in Zoos) (Scotland) Regulations 2005 (SSI 2005/531)

The Convener: The committee raised two points with the Executive. First, we expressed concern about whether regulation 5(2) meets the requirement that vaccination must be carried out

"under the supervision of an official veterinarian of the competent authorities",

which was imposed by Commission decision 2005/744/EC.

The Executive explains that ministers are required to take advice from the chief veterinary officer and that that is sufficient. Are we okay with that explanation?

Members indicated agreement.

The Convener: Secondly, the committee asked the Executive to explain how the conditions in annex II to the decision are to be enforced. The Executive explains that, where not carried out under the supervision of ministers, vaccination must be carried out in accordance with their instructions, which will necessarily require compliance with annex II to the decision. Are members happy with that explanation?

Members indicated agreement.

The Convener: We will pass those explanations to the lead committee and the Parliament.

Food Labelling Amendment (No 3) (Scotland) Regulations 2005 (SSI 2005/542)

The Convener: The committee asked the Executive for further explanation of why the regulations were not made available free of charge. The Executive has explained that the regulations do not correct a defect in earlier regulations that existed when these regulations were made and that, therefore, it is not required to make the regulations available free of charge.

Do we accept that explanation?

Members indicated agreement.

Draft Instruments Subject to Approval

10:56

The Convener: We move on to agenda item 4. Before we consider the instruments, are members happy for us to gather any minor points that arise and put them in an informal letter to the Executive?

Members indicated agreement.

Fundable Bodies (Scotland) Order 2005 (draft)

The Convener: No points of substance arise on the draft order. There is a point on the explanatory note, but we can raise it in our informal letter to the Executive. I think that the explanatory note could have been better.

Mr Maxwell: The explanatory note does not explain. That is the problem.

The Convener: Do you want to raise that more formally?

Mr Maxwell: Yes, because we have had issues with explanatory notes before. It is entirely reasonable to raise the matter formally.

The Convener: Is that agreed?

Members indicated agreement.

Scotland Act 1998 (Modifications of Schedule 5) (No 3) Order 2005 (draft)

The Convener: No points arise on the draft order.

Contaminated Land (Scotland) Regulations 2005 (draft)

The Convener: No substantive points arise on the draft regulations. However, there is a point about the use of Keeling schedules.

Mr Macintosh: I have to say that I was not familiar with Keeling schedules before now. Apparently, they are a method that was used in the past to allow the latest amendments to subordinate legislation to be made available to the reader. After several amendments to subordinate legislation, they are consolidated into one text to make them readable. When there are complex amendments, as has been the case with the draft regulations, Keeling schedules are useful for everyone to read and understand.

There are broader issues on the matter that we will raise in our on-going inquiry. In this particular case, there is a suggestion that the Executive could have included a Keeling schedule in either

the explanatory note or the Executive note. That would have been a helpful move.

The Convener: The Executive note is perhaps the most appropriate place. In evidence to our inquiry, Colin Reid spoke about the need for such clarity. Of course, it is always better to have such a schedule than to have nothing at all. We would always like to move towards consolidation, obviously, but a Keeling schedule is helpful.

Mr Maxwell: I am curious about a couple of things. I agree that Keeling schedules would be helpful, but if the Executive is working to show schedules in their new form, it would seem better to have rolling consolidation, which is one of the subjects of our inquiry. I imagine that rolling consolidation would be preferable to just having Keeling schedules, which—as I understand it—have no legal effect.

11:00

The Convener: That is right.

Mr Maxwell: That would be my preference. I wonder whether Keeling schedules were included in the Executive note or the explanatory notes. The briefing paper explains that the last time that this was done, which was in relation to part 2 of the Transport (Scotland) Act 2005, it was done in the explanatory notes and not in the Executive note. I am not sure whether that makes any difference.

The Convener: From the looks that I am getting from our legal adviser and clerk, I think that Keeling schedules could be included in either. I take on board what you are saying, Stewart. Should we leave it to one side as being part of the inquiry or send a separate letter on the issue?

Murray Tosh: Given the continuing dialogue with the Executive, it is entirely appropriate that we should flag up complex things as and when we come across them. We should do so with a difficult example such as the Keeling schedules and the clarity that they could have given. If the Executive agrees ultimately to rolling consolidation, that will be well and good. At the moment, it does not. It does, however, do Keeling schedules and it should have done one in this instance. We should pursue the matter.

The Convener: Do members agree to send the letter?

Members indicated agreement.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (No 2) (Scotland) Order 2005 (SSI 2005/548)

11:01

The Convener: No substantive points arise on the order. Is that agreed?

Members indicated agreement.

Instruments Subject to Annulment

Glasgow School of Art (Scotland) Amendment Order of Council 2005 (SSI 2005/525)

11:01

The Convener: The transitional provision in article 1 provides that paragraphs (4), (5) and (7) of article 2 do not apply to

“Governors elected prior to 6th May 2003”.

Two points arise as a result, the first of which is that, although the order refers to elected governors, the principal order provides for the appointment of governors, only some of whom are elected. There is a lack of clarity in the provision. The second point is that it is not clear from the wording whether the exception is a personal exception or an exception that applies only for the duration of the present period of office of a governor.

Are members happy to write formally to the Executive on those two points?

Members indicated agreement.

Teachers' Superannuation (Scotland) Amendment Regulations 2005 (SSI 2005/543)

National Health Service (Superannuation Scheme, Injury Benefits, Additional Voluntary Contributions and Compensation for Premature Retirement) (Civil Partnership) (Scotland) Amendment Regulations 2005 (SSI 2005/544)

The Convener: No points arise on the regulations. Is that agreed?

Members indicated agreement.

Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/545)

The Convener: A number of amendments have been made to the series of regulations that provide for student fees and support and the graduate endowment. Our normal letter would say, "Consolidation, consolidation, consolidation." Following on from the suggestion that Murray Tosh made that we should use all such opportunities, are members happy that we should write to the Executive on the issue?

Members *indicated agreement.*

Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005 (SSI 2005/549)

The Convener: One substantive point arises on the order. It relates to regulation 10(m), which amends the Electricity Act 1989. The point is whether the amendment applies to payments that were accrued prior to 1 October 2001 or prior to the date of the coming into force of the new amendment.

Mr Maxwell: Will we also raise the point on the use of the wording "came into effect", convener? I think that the wording should be "came into force".

The Convener: Yes. Thank you for reminding me of that point, Stewart. Do members agree that we should write to the Executive on those two points?

Members *indicated agreement.*

Common Services Agency (Membership and Procedure) Amendment (Scotland) Regulations 2005 (SSI 2005/550)

Sea Fishing (Enforcement of Community Control Measures) (Scotland) Amendment Order 2005 (SSI 2005/552)

Local Government Pensions Etc (Civil Partnership) (Scotland) Amendment Regulations 2005 (SSI 2005/554)

Plant Health (Fees) (Scotland) Amendment Regulations 2005 (SSI 2005/555)

The Convener: No substantive points arise on the instruments. Some minor points arise, but we can put them in our letter. Is that agreed?

Members *indicated agreement.*

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (Scotland) Revocation Order 2005 (SSI 2005/547)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 10) (Scotland) Partial Revocation Order 2005 (SSI 2005/551)

11:05

The Convener: No points arise on the orders. Is that agreed?

Members *indicated agreement.*

The Convener: As agreed, we move into private session for our consideration of agenda item 8, which is our inquiry into the regulatory framework in Scotland. The reason for so doing is that the committee will discuss themes from evidence heard to date and future sessions with witnesses.

11:05

Meeting continued in private until 12:29.

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