

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 December 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

34th 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

THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 December 2005

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

Delegated Powers Scrutiny

Police, Public Order and Criminal Justice (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): This is the 34th meeting in 2005 of the Subordinate Legislation Committee. Sylvia Jackson and Stewart Maxwell are not here this morning; they are—would you believe—on committee business in London.

Item 1 is delegated powers scrutiny of the Police, Public Order and Criminal Justice (Scotland) Bill. As members will recall, the bill contains a large number of delegated powers; indeed, we asked for the Executive's comments on nine of them.

First, we noted that section 4, on the strategic priorities of the proposed Scottish police services authority, authorises ministers to determine priorities, but that such a determination will not be set out in a statutory instrument. The Executive points out that a similar power is contained elsewhere in analogous legislation. Is the committee content with that response or does it wish to report it to the lead committee and the Parliament? For what it is worth, I am content with the response, but other members might feel that we should do a little more.

Mr Kenneth Macintosh (Eastwood) (Lab): I raised this point at the previous meeting. Although the Executive's explanation makes sense, I think that we should draw it to the lead committee's attention. After all, it is as much a policy matter as it is anything else.

The Deputy Convener: We will draw the issue to the lead committee's attention.

Murray Tosh (West of Scotland) (Con): The issue has raised much controversy. Either today or yesterday, we received correspondence from the local authority body that supervises the police, expressing great concern about a number of aspects of the bill. Of course, it will be up to the lead committee to consider those concerns as policy issues. However, we have made a case for the use of statutory instruments to deal with the matter.

I wonder about the validity of the comparison that has been made with ministerial control of schools. Obviously, ministerial control of schools is a sensitive issue, but in the sensitivity stakes it does not compare with ministerial control of the police service. As a result, I agree that we should ask the lead committee to consider the matter very carefully.

The Deputy Convener: I should mention that we will not be able to send anything back to the Executive again, because Ruth Cooper has to get the report turned round today.

Mr Adam Ingram (South of Scotland) (SNP): Could I ask our legal adviser whether what the Executive proposes would set a precedent? Paragraph 6 of our legal briefing says that a similar situation arose with the Standards in Scotland's Schools etc Act 2000 but that, eventually, the situation was resolved through the introduction of an affirmative resolution procedure. Is what we have a precedent?

The Deputy Convener: Tell us, Margaret.

Margaret Macdonald (Legal Adviser): I suppose so. How you treat the matter is a policy decision for you to make. The situation with the Standards in Scotland's School etc Act 2000 was similar.

Mr Ingram: We should bring that to the attention of the lead committee as well.

The Deputy Convener: All right.

Murray Tosh: Presumably, if any of us wished to take action, the form of redress would be to lodge an amendment. I do not know whether it would be appropriate to look to the convener of the committee to do that on our behalf. I do not sense that there is committee agreement on the matter, but the option of lodging an amendment is open to an individual member to pursue if they wish.

The Deputy Convener: I am conscious that the convener and Stewart Maxwell are not here. Therefore, I would be loth to bind the convener to lodge a committee amendment.

Section 22(1) provides for the power to amend the list of police support services. The committee accepted the need for the power, but considered that there might be a case for the super-affirmative procedure. The Executive considers the affirmative procedure to be appropriate. Although it accepts that the power is significant, it says that it is neither exceptional nor contentious. In fairness, the Executive also pointed to the extensive consultation requirement coupled with the power. Is the affirmative procedure coupled with the requirement to consult sufficient?

Members indicated agreement.

The Deputy Convener: Section 23(1) provides for the power to require the use of police support services. The Executive says that the use of the negative procedure together with—and I emphasise this—the consultation requirements provide enough scrutiny for the power. Are members content?

Members indicated agreement.

The Deputy Convener: Section 32(3) provides for the power to prescribe exceptions from notifying the complainer of the outcome and action to be taken following a complaint-handling review. The committee asked for further explanation of how the power might be exercised. The Executive has detailed the rationale for the provision and the circumstances that might be covered. It says that the provision provides flexibility to modify circumstances and that it is better to have that in regulations than in the bill. Are members content?

Members indicated agreement.

The Deputy Convener: Section 65(2) provides for the power to modify the definition of the enforcing authority. The committee was concerned that the drafting of the power might not achieve the policy intention and asked the Executive for further explanation. The Executive is satisfied that the provisions as drafted would allow Scottish ministers to provide that a different body was to be the enforcing authority but is considering whether it is necessary to lodge an amendment at stage 2. How do we want to report on that?

Mr Macintosh: I think that we have skipped two, deputy convener.

The Deputy Convener: Did I miss one?

Mr Macintosh: Are you going on to section 65(2)?

The Deputy Convener: Yes.

Mr Macintosh: I am still reading about sections 33 and 36(3). That may be my fault.

The Deputy Convener: I am sorry; I will go back to them.

Mr Macintosh: Bring back Sylvia Jackson.

The Deputy Convener: You will get no argument from me on that. Having been rebuked—

Mr Macintosh: Assisted good-naturedly.

The Deputy Convener: I return to my question about the enforcing authority. Do we just have to point out to the lead committee that the Executive is considering lodging an amendment?

Members indicated agreement.

The Deputy Convener: Section 33 provides for the power to make regulations on the

discontinuation of complaint-handling reviews. Again, the committee asked for an explanation of how the power might be used. Are members content with the Executive's explanation?

Members indicated agreement.

The Deputy Convener: I suspect that section 36(3) is much the same. It provides for the power to prescribe exceptions from the requirement to notify the complainer about the outcome, the findings and the action to be taken following the reconsideration of a complaint. Again, the committee has received an explanation from the Executive.

Let us move back to where we left off. Section 86 provides for the power to make procedure in relation to review of sentence and appeal against decisions on review of sentence. The committee agreed that the provisions of orders made under section 86 would largely be matters of administrative and procedural detail, but we asked why the power would be subject to the affirmative procedure rather than the negative procedure. The Executive says that it will change the procedure to the negative procedure. This is possibly the first time in all these years that we have suggested going down the way and reducing the procedure.

Murray Tosh: I dare say that, if we did that more often, we might have more hits with the Executive.

The Deputy Convener: In my memory, this is the first time that we have suggested reducing the procedure.

Paragraph 5 of schedule 3 is on the transfer of property rights and liabilities. The committee asked for the Executive's view on whether the transfer scheme ought to be incorporated into a statutory instrument. The Executive has set out the reasons for its decision, which include the level of detail that would be required. Are members content with that explanation? I suspect that we are.

Members indicated agreement.

Murray Tosh: Before we leave this item, deputy convener, may I jump back—you have established a precedent that we can jump backwards and forwards in these matters—to section 4? I suggest that we might wish to raise the analogy with the Standards in Scotland's Schools etc Act 2000. In that case, the Executive eventually agreed to make a change to include an affirmative statutory instrument. We should raise the same issue in this case and press the Executive a little further on the matter.

The Deputy Convener: We will have to press it through the lead committee.

Murray Tosh: Yes, but this is only stage 1, so the matter will come back. We will observe the formality—you are quite correct to say that it is a matter for the lead committee—but there is no need to rush to judgment. We have time to explore the matter a little further.

The Deputy Convener: All that I meant was that we can get an answer back first.

Murray Tosh: I understand that.

Scottish Schools (Parental Involvement) Bill: Stage 1

The Deputy Convener: We move on to consider the Scottish Schools (Parental Involvement) Bill at stage 1. Through the bill, the Executive seeks to implement its commitment to review and reform the legislation that governs school boards. The bill contains four powers to make subordinate legislation, all of which are detailed in the Executive's memorandum on delegated powers.

Section 19 of the bill confers on ministers the power to issue guidance to various bodies that have functions under the bill. That power is not mentioned in the Executive's memorandum, but it is within the remit of the committee because it is a delegated power, so we will consider it.

Section 8(1) sets out the statutory functions of a parent council that is established under the bill. Section 8(7) confers on ministers a power by order to add to or alter the council's functions. The power is subject to the affirmative procedure. There does not appear to be a problem with the power—it is the sort of thing that is normally done by statutory instrument—but it is not clear what is meant by the power “to alter” the functions of the council. Do members want to ask the Executive to clarify the use of the word “alter” and the policy intention?

Members indicated agreement.

The Deputy Convener: Also, do members agree that we should ask the Executive whether there should be a formal requirement to consult parent councils before an order is made to alter their statutory functions? I think that we should include that in our questions to the Executive.

Members indicated agreement.

10:45

The Deputy Convener: Sections 14(3)(a) and 14(3)(b) deal with procedures for the appointment of a head teacher or deputy and participation in a parent council. Section 14(1) of the bill obliges education authorities to inform Scottish ministers and any parent council of the appointment process established by the authority for filling those posts.

Section 14(3)(a) confers on ministers a power to make regulations to impose requirements that an appointment process must satisfy and section 14(3)(b) confers a power on ministers to give notice to an education authority to make such changes to its appointment process as the notice specifies. That all seems fine. Are we content with the procedures?

Members indicated agreement.

The Deputy Convener: Section 19 provides for a general power to issue guidance. The power is not contained in the delegated powers memorandum as it does not confer power to make subordinate legislation, but it is a wide delegated power and is therefore our business. Section 19(1) confers a power on ministers to issue guidance to education authorities, parent councils and combined parent councils in respect of their functions. Do we have any views about whether the power should be subject to parliamentary procedure?

Mr Ingram: We pursued the subject during our evidence taking in our inquiry. The feedback that we received from the subject committee conveners was that they did not expect to see codes of practice or guidance forming statutory instruments on a regular basis. However, the committee has had occasion in the past to suggest some sort of procedure for codes of practice and guidance. The Gaelic Language (Scotland) Bill is an example of when we tried to ensure that a code was laid before the Parliament for some sort of scrutiny. On the basis of that precedent, we should ask for the same here.

The Deputy Convener: I tend to agree, but it is a question of balance. Some matters are so routine that we do not want to burden the Parliament with them. However, we are talking about guidance not for local authorities but for groups of parents. We should take some action, even if we just ask that the guidance be laid before the Parliament. We should say to the Executive that we would like some parliamentary scrutiny through whichever procedure is thought best. Currently, there is not even an obligation to publish the guidance, but we need some knowledge of what is happening.

Mr Macintosh: The lead committee asked how the Executive intended to draw the guidance to the attention of the Parliament, what role it saw for the Parliament and whether it intended to publish the guidance. We could add our weight to that committee's request for information.

Murray Tosh: It is likely that the people who will be affected by the legislation in practice—individual parents and parents groups—will find it surprising that there has not been any procedure in the event that the guidance ever appears to

them to be challenging. The deputy convener is correct that we are not talking about health boards, local authorities or people who deal routinely with that kind of administration. We are in a more sensitive area when we deal with members of the public.

The Deputy Convener: We will write back to the Executive to say that there should be some form of parliamentary scrutiny, either by statutory instrument or, at the very least, by laying the guidance before the Parliament. We will also ask for the Executive's comments.

Section 21 deals with transitional provisions. Section 24 is on commencement. I suspect that there is nothing unusual to note about those.

Executive Responses

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005 (SSI 2005/584)

10:48

The Deputy Convener: As a member of the Faculty of Advocates, I have a direct financial interest in the regulations, which makes it a little difficult for me to convene this part of the meeting. I will explain the issue and then take no part in what members decide.

The Executive was asked for an explanation of the vires of regulation 2(1), which appeared to give retrospective effect to the instrument in respect of fees recoverable in proceedings before the coming into force of the instrument on 10 December 2005. The Executive has acknowledged that the instrument has retrospective effect, as we thought, and that the parent act does not contain any express enabling power to authorise retrospective. However, the Executive considers that the powers in the parent act do not prevent the approach that has been taken, provided that retrospective application of the regulations does not create any unfairness for those affected by them. That is the issue; I will say no more until members tell the clerks what they want them to do.

Murray Tosh: I think that we should draw the attention of the lead committee and the Parliament to the regulations on the two grounds that you have just covered, which relate to issues of retrospectivity and vires.

The Deputy Convener: Do we agree to follow that suggestion?

Members *indicated agreement.*

Bovine Products (Restriction on Placing on the Market) (Scotland) (No 2) Regulations 2005 (SSI 2005/586)

The Deputy Convener: The committee noted that the Joint Committee on Statutory Instruments criticised equivalent regulation 3 of the English regulations and raised doubts as to the implementation of the European Union decision. We asked the Executive to comment on that.

The Food Standards Agency indicates that it does not agree with the construction placed on the equivalent of regulation 3 by the Joint Committee on Statutory Instruments and considers that the effect of the decision is properly and fully reflected by regulations 3(1) and 3(2) of the instrument.

Do we agree to draw the issue to the attention of the lead committee and outline to it the issue that

has been raised and the positions that have been taken, with an instruction that it may proceed as it wishes?

Members *indicated agreement.*

Draft Instrument Subject to Approval

Scotland Act 1998 (Modifications of Schedule 5) Order 2006 (draft)

10:51

The Deputy Convener: Nothing substantive arises in relation to the order, which replaces the draft order in council that we considered at our meeting of 15 November. Are we content to raise any minor points on this and other instruments by way of informal letter?

Members *indicated agreement.*

Instruments Subject to Annulment

Town and Country Planning (Limit of Annual Value) (Scotland) Order 2005 (SSI 2005/594)

Fishery Products (Official Controls Charges) (Scotland) Regulations 2005 (SSI 2005/597)

10:51

The Deputy Convener: No substantial points arise in relation to these instruments.

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuff) (Scotland) Regulations 2005 (SSI 2005/599)

The Deputy Convener: No substantial points arise in relation to the regulations. However, we should note that they fulfil the undertaking that was given to us that the Executive would bring forth a consolidation of the 2000 regulations. We should applaud that.

Feeding Stuffs (Scotland) Regulations 2005 (SSI 2005/605)

The Deputy Convener: The new European Community legislation for which provision is made in these regulations ought to have been implemented by 18 October 2004, in the case of EC regulation 1831/2003, and by 30 June 2005, in the case of directive 2004/116. There has, therefore, been a considerable delay. Do we agree to question the Executive on that point?

Members indicated agreement.

Contaminants in Food (Scotland) Regulations 2005 (SSI 2005/606)

The Deputy Convener: No points arise in relation to the regulations.

Meat (Official Controls Charges) (Scotland) Regulations 2005 (SSI 2005/607)

The Deputy Convener: Two points have been identified on which the committee might wish to ask for further explanation from the Executive. The regulations provide for the Food Standards Agency to charge for inspections according to the formula set out in the regulations. If the agency incurs increased costs as a result of inefficiency in the operation of a slaughterhouse, paragraph 8 of schedule 2 allows the agency to impose an additional charge.

Paragraph 9 makes provision for circumstances in which the operator of the slaughterhouse does not agree that the additional charge is justified, allowing for the operator to request for a determination by a person nominated for the purpose by the agency. That person must give both parties the opportunity to make representations and must decide within one month whether the charge is justified and notify both parties of the decision.

Paragraphs 9(3)(d) and 9(3)(e) provide that that decision is binding and must be given effect by the agency. That could be considered to be an attempt to exclude the jurisdiction of the courts. I wonder about that. I am just thinking out loud but, presumably, such a decision could be reviewed somehow. I would have thought that that sort of decision might be judicially reviewed.

In any case, I suppose that it is not for me to answer that question—one hat at a time is more than enough. Do we agree to ask the Executive whether the regulations take away the right to have a decision made on such a matter in another forum?

Members indicated agreement.

The Deputy Convener: I have no idea whether that involves big sums of money.

Mr Macintosh: I do not think so. The implication is that the provision would come into play in cases in which a slaughterhouse is inefficient. A slaughterhouse is charged on the basis of the number of animals slaughtered. An extra charge can be imposed on an inefficient slaughterhouse. The question is about the reasonableness of that extra charge.

The Deputy Convener: I have no idea whether vast sums of money could be involved. We will ask whether such a decision will mean that people will have access to the courts. Far be it from me to try to stop such access.

The committee may also wish to ask why the Executive chose to use section 2(2) of the European Communities Act 1972 as the enabling power rather than section 56 of the Finance Act 1973. Let us do that, even though I am sure that none of us understands the point terribly well.

Mr Macintosh: We have raised it before.

The Deputy Convener: That is true.

Feed (Hygiene and Enforcement) (Scotland) Regulations 2005 (SSI 2005/608)

The Deputy Convener: Regulation 14 on page 8 of the instrument makes provision for the payment of fees for certain applications for approval under the regulations. There is a question about whether section 2(2) of the

European Communities Act 1972 is the relevant enabling power or whether section 56 of the Finance Act 1973 should have been used instead. That is the same point as before. Regulation 35 does not include unincorporated associations, which such provisions normally cover, so we should ask whether that omission was deliberate.

**Scottish Homes (Dissolution) Order 2005
(SSI 2005/609)**

**Regulation of Care (Social Services
Workers) (Scotland) Amendment Order
2005 (SSI 2005/611)**

The Deputy Convener: There are no points of substance on the orders.

**Instrument Not Subject to
Parliamentary Procedure**

**Proceeds of Crime Act 2002 (External
Requests and Orders) Order 2005
(SI 2005/3181)**

10:56

The Deputy Convener: The committee may have noted that the order confers powers on the Scottish ministers to make regulations by means of a statutory instrument that is subject to the negative procedure. Members may also have noted that schedule 5 to the order contains references to provisions in the salmon acts that are now repealed. It appears that reference to the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 has not been included in the order. We should seek clarification about that.

Murray Tosh: The other matter that is raised in the legal briefing is that no Executive note was provided, although the legal advisers assume—the briefing says “imagine”; I imagine that that means “assume”—that such a note will be provided for Westminster. It would be interesting to track whether that happens. We might wish to register a mild protest about that at some stage.

The Deputy Convener: That is fair enough.

Instruments Not Laid Before the Parliament

**Registration of Births, Still-births, Deaths
and Marriages (Prescription of Forms)
(Scotland) Amendment Regulations 2005
(SSI 2005/595)**

**Marriage (Prescription of Forms)
(Scotland) Amendment Regulations 2005
(SSI 2005/596)**

**Civil Partnership Act 2004
(Commencement No 2) (Scotland) Order
2005 (SSI 2005/604)**

10:57

The Deputy Convener: No points arise on the instruments.

The next meeting is on Tuesday 13 December and members should note that the committee is scheduled to discuss its draft report on its inquiry into the regulatory framework on 20 December.

Murray Tosh: Mince pies.

The Deputy Convener: Indeed—there will be mince pies. Dr Jackson will attend to that on her return.

Meeting closed at 10:58.

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