

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 13 December 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

35th 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 13 December 2005

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

Delegated Powers Scrutiny

Scottish Schools (Parental Involvement) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 35th meeting in 2005 of the Subordinate Legislation Committee. We have received apologies from Adam Ingram. I remind members to switch off all mobile phones.

Under agenda item 1, we will first consider the Scottish Schools (Parental Involvement) Bill, which is at stage 1. As members will recall from last week's meeting—which, I am afraid, I did not attend—the committee asked for further clarification of the policy intention behind the width of the power in section 8(7), which relates to functions of a parent council. The committee also asked whether the Executive had plans to include on the face of the bill a formal requirement to consult parent councils before making an order that would amend their statutory functions.

The Executive has explained that the power to alter the functions may be exercised in light of the experience of the new parent councils as they are established and develop. It has also confirmed that the power will allow ministers to add to those functions in response to future policy changes and that it would consult stakeholders. However, members will note that no formal consultation requirement will be put on the face of the bill.

I think that we are also a bit unsure about the meaning of “alter”. We do not know whether that would allow any of the functions to be deleted, but we assume from the Executive response that the functions could be added to but not deleted. However, we should remember that any such amendment of the functions of parent councils will be subject to the affirmative procedure.

I open up the discussion to members. Do we think that the Executive's clarification is sufficient?

Mr Kenneth Macintosh (Eastwood) (Lab): As the bill stands, any such order would be subject to the affirmative procedure, so the Parliament would have an opportunity to question any proposed changes. Also, the Executive has clearly stated

that it intends, as a matter of course, to consult all stakeholders. It is always a difficult task to list which stakeholders should be consulted. I am happy with the Executive's response.

The Convener: Are members generally happy that we report to the lead committee the clarification that we sought and the answer that we received? We can always reconsider the matter at stage 2, if we think it necessary to do so.

Members indicated agreement.

The Convener: The second issue to consider is the general power to issue guidance under section 19. I gather that some concern was expressed about the power at last week's meeting, as the guidance could also be addressed to parents on parent councils. There is a need for clarity.

The Executive confirmed in its response that it would be its intention to include “key stakeholders”, including parent councils, in drawing up the guidance. I understand, however, that that will not be specified in the text of the bill. Obviously, the nature of the guidance will become clearer as we proceed to the next stage. What are members' feelings on the matter? It was quite a concern last week. You were here last week, Gordon.

Gordon Jackson (Glasgow Govan) (Lab): Yes. It is okay, I think.

Mr Macintosh: I think that we should refer the matter to the lead committee. I am not sure about the question of what guidance is issued and whether it should be subject to parliamentary scrutiny. It will be, in the sense of subordinate legislation, but at what level? It is a moot point whether the guidance should be referred to in the bill.

The question relates to the form that parent councils will take. That will vary across Scotland. The Executive will want to provide flexibility, but perhaps without too much variation, and the guidance that it draws up will effectively be good practice, I think. It is a question for the lead committee whether or not that should be referred to in the bill. I do not think that that is obligatory, but we should draw the question to the lead committee's attention.

Gordon Jackson: There was an argument that there should be something on the guidance in the bill but, when it comes to such questions, I am never quite sure where our job stops and the lead committee's job starts. This matter appears to be on the borderline. We are entitled to say that our gut feeling is that such measures should properly be referred to in the bill under powers for subordinate legislation. Whether it comes to that or not is almost a policy matter for the lead committee, however.

The Convener: We are still at stage 1, so we can flag the matter up to the lead committee and await its deliberations. We can reconsider the matter at stage 2 if needs be.

Gordon Jackson: It does almost seem to be our job to flag the matter up. Of course, the lead committee might not feel it to be a matter of policy and might conclude that the measures do not need to be included in the text of the bill.

The Convener: Is that agreed?

Members indicated agreement.

Family Law (Scotland) Bill: as amended at Stage 2

The Convener: The Family Law (Scotland) Bill makes amendments to Scots family law, including the law on marriage and divorce. It has been referred to the committee again following a number of substantial changes to the delegated powers at stage 2.

The first of those is under section 13A, which is entitled "Postponement of decree of divorce where religious impediment to remarry exists". Section 13A inserts new section 3A into the Divorce (Scotland) Act 1976. It was inserted by a non-Executive amendment from Ken Macintosh, with a further amendment by Stewart Stevenson. Ken Macintosh is of course a member of the committee, so we have a bit of expertise here.

As I understand it, the issue was discussed at length by the lead committee. As we can see, the regulations will be subject to annulment.

Mr Macintosh: The amendment in my name at stage 2 was subject to quite extensive scrutiny. The matter does not concern religious laws, but the civil law where it applies to religious groups. Rather than naming one specific religious group in the bill, it was decided that it would be better practice to copy the format adopted by the Matrimonial Homes (Family Protection) (Scotland) Act 1981, under which the various bodies concerned are listed in regulations. It was decided to copy that format exactly. That was the reason for the amendments that were agreed by the committee, as a better course of action and as a matter of policy.

The Convener: Are there any views about whether that should be added to in any way? Are we quite happy with the provisions?

Mr Stewart Maxwell (West of Scotland) (SNP): It would be overly burdensome to apply the affirmative procedure. I think that the arrangements should remain as they are.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: We come now to section 14A, which is headed "Financial provision on divorce and dissolution of civil partnership: Pension Protection Fund". It amends section 10 of the Family Law (Scotland) Act 1985 so that, where compensation is payable to persons who have lost their pension as a result of the scheme having been wound up, it will form part of matrimonial property.

Section 14A(3)(d) provides for ministers to make regulations prescribing a method for the verification and apportionment of compensation payable by the board of the pension protection fund, which forms part of the matrimonial property. The regulations will be subject to the negative procedure. Do members have any issues about that, or are we agreed?

Members indicated agreement.

10:45

The Convener: Turning now to section 14A(4), if the board of the pension protection fund assumes responsibility for a pension scheme, section 14A(4)(a) makes provision for ministers to prescribe by regulations subject to the negative procedure any modifications necessary for orders to be implemented by the board. It is argued that the power is needed because there might be cases where an order has not been implemented by the time the board assumes responsibility for a pension scheme.

That is a very unusual provision, which allows ministers to amend an order of the court. There is an issue around proposed new section 12A(7C)(b) of the 1985 act, as introduced by section 14A(4)(a) of the bill, on page 9. It says:

"subject to such other modifications as may be prescribed by regulations by the Scottish Ministers."

That seems very wide, and it is suggested that those provisions should be more restricted than they are. We are at the 11th hour with the bill, and we are going to have to act quite quickly if we want to suggest any changes.

Mr Macintosh: The committee will wish to flag up its concern over that wording. The paragraph in question is in a very specific part of the bill, and it will affect very specific circumstances. The actual effect of the power will be to give ministers the authority to intervene in relation to specific court orders, and that is not something that the committee would wish to happen. The explanation that the Executive has offered in its supplementary memorandum is straightforward, and I do not think that we have a problem with that. The Executive wishes to enable the board of the pension protection fund to implement the orders of the court, and it says that the power would make that

possible. However, the use of the word “modifications” is perhaps overly wide.

We should perhaps draw the minister’s attention to the matter, although we have only two days in which to do so, because we will be debating the bill at stage 3 on Thursday. We could draw the matter to the minister’s attention as a matter of urgency, saying that the committee is expressing its concern at the breadth of the powers that are provided for.

I suggest that we ask the convener to circulate the relevant information to members before stage 3. Perhaps we should delegate to the convener our decision on whether or not we wish to raise the issue during stage 3.

The Convener: Are you suggesting that we use the form of words—almost—that is set out in the Executive’s supplementary memorandum, on why the regulation-making power is necessary, to replace proposed new section 12A(7C)(b)? We want reassurance that paragraph (b) will be subject to any other measures that might be necessary. Are those the lines along which you are thinking?

Mr Macintosh: Yes. I am not keen that the committee should lodge an amendment at stage 3 when we have not had a chance to discuss it properly or to hear the Executive’s response. I am anxious that we and the Parliament should take the opportunity to discuss the matter on Thursday. We have not yet heard from the minister on the matter, but the Executive might look favourably on moving its own amendment, even at this late stage—although it would have to be a manuscript amendment.

I suggest that we write to the Executive as a matter of urgency, highlighting the matter and asking for its response. I think that we should then leave the matter in your hands, convener, when it comes to the question whether we can ask the Executive to lodge a late amendment or whether we could do so ourselves.

Mr Maxwell: I am sure that Murray Tosh could tell us all about manuscript amendments, having become an expert of late. I just wonder whether we should not be a bit firmer with the Executive. The use of the term “modifications” would allow ministers to alter anything that they wanted to. The proposed power is very wide. We should get an explanation very quickly—this afternoon, I hope—about why the Executive thinks that such a wide power is necessary. It may well be that the use of the word “modifications” is entirely legitimate and that the Executive can give a full explanation that answers our concerns. However, there are grounds for us to agree that if we do not get a full explanation, we should consider lodging a manuscript amendment to the bill, even at this late

stage. We have no choice. That would be the only way in which we could get the minister to explain the Executive’s position on Thursday. The minister would have to say whether the Executive agreed or disagreed with the amendment and, if it disagreed with it, it would have to explain to the whole Parliament why that was the case. Any member could move such an amendment.

Gordon Jackson: I am not persuaded that there is a problem. I totally understand that “modifications” is a vague word and that a power that allows ministers to amend an order of the court is highly unusual. Normally, I would be as zealous as anyone else to stop the Executive taking such a power, but I just cannot see what evil it could do with the power. When the Executive takes a power that is too wide, we usually say, “There are wonderful, lovely people in this Executive, so it will not do anything bad with the power, but another Executive could use the power to abolish an organisation or do something else bad.” However, in this case, the explanation of why the Executive wants to take the power is fine and I cannot think what another Executive down the line could do with it that would be bad. Stewart Maxwell, who is looking at me, might have an answer to that, which might make it worth while to lodge a manuscript amendment to the bill, but at the moment I cannot see what damage the power could do, so I am not persuaded that I need to worry about it.

Mr Maxwell: I want to make two points. First, I was looking at Gordon Jackson not because I had thought of what an evil Executive could do with the power, but because I was thinking that we should get an explanation back from the Executive before we make a decision. That said, we probably need to decide now what we will do if the Executive fails to answer our questions.

My second point is more important. Even if the use of the phrase

“such other modifications as may be prescribed”

would not give the Executive the power to do evil things on this occasion, surely there is a principle involved. Once we start to allow provisions that use such phrases, other bills will come along and the Executive will say, “We have used such a provision before and there was no problem.” If we think that the proposed power is so unusual that we object to it in principle, that might be enough to make us want to lodge an amendment to the bill.

Gordon Jackson: That is a reasonable argument.

Murray Tosh (West of Scotland) (Con): I find what Stewart Maxwell said quite persuasive and I would be happy to go along with Ken Macintosh’s suggestion that the convener be delegated to act on our behalf after we have heard back from the

Executive. I am sure that we will get a response, but if the convener is not happy with it, she would have the opportunity to lodge a manuscript amendment.

I cannot in any way prejudge what the Presiding Officer would do with such an amendment, but there might be something to be said for acquainting his office with the fact that a problem has been identified beyond the point at which an amendment might have been lodged under the normal procedure. The convener could explain that although she was trying to clear up the matter with the Executive and thus avoid the need for a manuscript amendment, the issue might be of such significance that she would wish to lodge such an amendment. As Ken Macintosh said, it is possible that once the Executive has received the suggestion that something is wrong with the provision in question, it might want to make its own change. I am just suggesting that it might be better if the Presiding Officer's office knew that a manuscript amendment might be lodged and understood the thinking behind it, rather than being confronted with the task of making a decision on it at 5 o'clock tomorrow, when it would have to decide what effect throwing the amendment into the pot at that stage would have.

The Convener: That is a sensible suggestion.

Are we agreed that we should alert the Presiding Officer's office to what might happen and write to the Executive to outline our concerns about the provision in section 14A(4) and to ask for an explanation of why it has gone down the route of using the phrase

"such other modifications as may be prescribed"?

I will circulate the correspondence that we send and the responses that we receive and, as far as is humanly possible, will try to contact members if I think that we need to lodge a manuscript amendment. Is that agreed?

Members indicated agreement.

The Convener: We move on to consider section 32A, which deals with ancillary provision. It provides for ministers to make, by order, such consequential, transitional or saving provision as they consider to be appropriate in consequence of, or to give full effect to, the Family Law (Scotland) Bill as enacted. Do members agree simply to note that power?

Members indicated agreement.

The Convener: Section 17(3) of the bill as introduced was on parental responsibilities and rights of unmarried fathers. It would have conferred on ministers the power to make regulations affecting unmarried fathers and their parental responsibilities and rights in relation to their children. That power has been removed from

the bill because the Executive was of the view that, for the reasons that are given in paragraph 18 of the supplementary memorandum, it would never be used. Are members content just to note that?

Members indicated agreement.

Executive Responses

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

10:56

The Convener: We move on to consideration of Executive responses. On the regulations, the committee asked the Executive why there had been a delay in implementing regulation 1831/2003/EC of the European Parliament and of the Council on additives for use in animal nutrition, which should have been implemented by 18 October 2004, and European Commission directive 2004/116/EC, on *Candida guilliermondii*, which should have been implemented by 30 June 2005, for which the regulations make provision.

The Food Standards Agency Scotland explained that the delay in implementing regulation 1831/2003/EC was a result of the regulation's resource implications and that directive 2004/116/EC was implemented late because of an oversight. The FSA assures the committee that it will do its best to ensure that that does not happen again, but considers that no detrimental public health consequences resulted from the delay in providing for the enforcement of the European legislation in question.

Are members happy for us to draw the attention of the lead committee to the regulations on the ground of late implementation of Community obligations and to the response that we have received?

Members indicated agreement.

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

The Convener: As members will remember from last week, the committee raised two points on the regulations. Confirmation was sought that paragraphs 9(3)(d) and 9(3)(e) of schedule 2 were not intended to exclude the possibility of judicial review. The FSA has confirmed that the procedure that is outlined in paragraph 9 does not exclude that possibility, so that is fine.

Secondly, we asked for an explanation of why section 2(2) of the European Communities Act 1972 was chosen as the enabling power, rather than section 56 of the Finance Act 1973. The response states that it was not considered appropriate to use the power in the 1973 act in circumstances in which the services for which charges were being levied were being provided by the Food Standards Agency rather than a Government department. The legal briefing provides a longer explanation, if members would like to read it.

Is the committee happy to draw the regulations to the attention of the lead committee, on the ground that further explanation was sought and received?

Members indicated agreement.

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

The Convener: Again, two points were raised on the regulations. The committee noted that regulation 35 did not include a provision on unincorporated associations and wondered whether that was a deliberate omission. The response was that it was not considered necessary to extend the application of the provisions to unincorporated associations with no distinct legal personality in order to provide for the proper enforcement of the regulations.

Secondly, the committee asked for explanation of 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. We have been told that, in the circumstances, it was not considered appropriate to draw down the power in the 1973 act, which relates to fees charged in respect of authorisations by Government departments. The legal advisers agree that use of the power in section 56 of the 1973 act would have been inappropriate.

Are we content to draw the regulations to the attention of the lead committee, on the ground that further information was requested from the Executive and has been supplied?

Members indicated agreement.

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

The Convener: We asked the Executive to clarify why schedule 5 to the order contains references to provisions of the salmon acts that were repealed by the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. There is no reference to that act in the order.

The Executive agrees that schedule 5 to the order should have referred to the 2003 act alongside the other salmon acts. The Executive states that the omission was an oversight and that, in practice, it is unlikely to give rise to difficulties, but it will monitor the situation and seek to amend the order if necessary.

Are we content to draw the lead committee's attention to the instrument on the ground of defective drafting?

Members indicated agreement.

Draft Instruments Subject to Approval

Civic Government (Scotland) Act 1982 (Licensing of Skin Piercing and Tattooing) Order 2006 (draft)

11:00

The Convener: We move on to agenda item 4 and our first draft instrument subject to approval. Both Ken Macintosh and I have an interest in the draft order.

Mr Maxwell: Do explain. [*Laughter.*]

The Convener: We have an interest in bringing the issue to the Parliament.

The draft order makes provision for the licensing of persons who carry out body piercing and tattooing. It applies part I of the Civic Government (Scotland) Act 1982 with the modifications that are set out in the draft order. No points have been identified. Do members have any points to make?

Members indicated disagreement.

Gordon Jackson: A tattoo with no points.

The Convener: That was a Freudian slip.

Members will wish to note that the draft order replaces a draft order that was laid on 7 December. The earlier draft was the subject of a discussion between our legal advisers and the Executive that resulted in the draft being withdrawn and revised. We welcome that.

Gordon Jackson: Indeed.

Primary Medical Services (Scotland) Act 2004 (Modification of the National Health Service (Scotland) Act 1978) Order 2006 (draft)

The Convener: No substantive points arise on the draft order. Again, however, members will note that it replaces a previous draft that was the subject of a discussion between our legal advisers and the Executive that resulted in the draft being withdrawn and relaid.

There are a number of errors in the drafting of the Executive note. Do members wish to draw that informally to the attention of the Executive?

Members indicated agreement.

Mr Maxwell: In this case, there are errors in the note and we will ask the Executive to examine it. However, there is a wider issue about Executive notes. In our inquiry, we are considering the format and design of Executive notes and the amount of information that is supplied in them, but

my specific point is about the Executive note that accompanied the draft Scotland Act 1998 (Modifications of Schedule 5) Order 2006, which we dealt with last week.

For members' information, I was at the Equal Opportunities Committee this morning to question the Minister for Communities about the Executive note that accompanied the original draft order. The minister told me that that note had been withdrawn and that a different one had been issued with the new draft order. The Subordinate Legislation Committee was informed that the original draft order had been withdrawn and that a second draft order had been laid on the basis of a change in the date by which it had to be approved. No information was provided to the committee to indicate that the Executive note had been rewritten. That is a clear omission by the Executive. The original Executive note stated that certain powers could be devolved to the Scottish Parliament but the second version states that they would not be. In other words, the explanation in the second note is the opposite of that in the original note.

We considered the original draft order some weeks ago and the new draft order last week, but no mention was made of the fact that the Executive note had been completely changed. That led to some confusion at the Equal Opportunities Committee this morning. I wonder whether we should raise the issue with the Executive, either as part of our inquiry or in relation to this specific case. When the Executive makes such changes, it should inform us, rather than leave it to chance. I read the first Executive note in detail. However, I did not do so with the second note because the only change that was referred to was a change to the dates, although it turned out that there was a different Executive note, which contained the opposite explanation to that contained in the original note. I would like the committee to raise the issue of changes to Executive notes, using that specific example if possible. We should be informed about specific changes that are made; otherwise, we will be left in the position that I was in this morning, when it turned out that I was working with an out-of-date Executive note.

The Convener: We do not have in front of us the draft order to which Stewart Maxwell refers—we dealt with it last week—but I suggest that we write to the Executive about the general issue of Executive notes using that example. We can also raise the matter as part of our inquiry.

Is that agreed?

Members indicated agreement.

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2006 (draft)

The Convener: The draft order provides for certain functions of a minister of the Crown to be exercisable by the Scottish ministers instead of, or concurrently with, the minister of the Crown concerned. In particular, functions are transferred that will confer on Scottish ministers powers to legislate for non-medicinal animal feed in Scotland and amendments to the firefighters' pension scheme to make provision for civil partners.

No points arise on the draft order.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 18) (Scotland) Order 2005 (SSI 2005/626)

11:06

The Convener: No points arise on the order.

Instruments Subject to Annulment

Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 2005 (SSI 2005/581)

11:06

The Convener: The order closely mirrors the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181), which the committee considered last week. The order before us designates countries in respect of which the Scottish courts can enforce a restraint request or a forfeiture order that is made by a court in the foreign jurisdiction.

There appears to be a typographical error in article 16(6), which obliges the court to

"cancel the registration of the external forfeiture order or an application by the Lord Advocate or any person affected by it"

if certain conditions are met. In that sentence, the first "or" ought to read "on". As drafted, the order could be read as obliging the court to cancel a registration of the forfeiture order or an application by the Lord Advocate or another affected person.

Are members happy to seek clarification on that point?

Members *indicated agreement.*

Adults with Incapacity (Management of Residents' Finances) (Scotland) Regulations 2005 (SSI 2005/610)

The Convener: The regulations restore to section 35(1) of the Adults with Incapacity (Scotland) Act 2000 a reference to "private psychiatric hospitals". That reference was accidentally removed by part 1 of schedule 5 to the Mental Health (Care and Treatment) (Scotland) Act 2003 when schedule 5 was commenced on 5 October 2005 by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No 4) Order 2005 (SSI 2005/161), as amended by the Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No 4) Amendment Order 2005 (SSI 2005/375).

However, the regulations contain an error, in that the citation of the 2000 act in regulation 2 omits the word "Scotland". Fortunately, there is no United Kingdom act with the title "Adults with Incapacity Act 2000", so it is thought that regulation 2 would be interpreted as referring to the Scottish act.

Do members wish to raise the matter formally or informally? I suggest that we raise the matter formally.

Gordon Jackson: I have no doubt that the citation would be interpreted as referring to the Scottish act. Anybody who reads the regulations will know that they refer to the Scottish act because there is no UK act with that name.

However, the regulations represent an unusual use of subordinate legislation. I can see why subordinate legislation has been used—a piece of primary legislation has deleted something, so we are starting from scratch and subordinate legislation allows us to put it back in. The Executive is simply putting back something that was deleted by accident, but what if it was not an accident? Let us imagine that the Parliament deliberately deleted something, saying, “We as a Parliament no longer wish this to be there.” If this is the proper use of the power, the Executive could slip such a provision back in through subordinate legislation. It is very unusual for subordinate legislation to replace something that was removed by primary legislation. In this case, a provision was removed by accident, but I suppose that nothing could prevent such circumstances from arising again.

Mr Macintosh: I think that the reference “or private psychiatric hospital” was removed not by primary legislation but by a piece of subordinate legislation that the committee considered recently.

The Convener: Is Ken Macintosh correct?

Margaret Macdonald (Legal Adviser): The reference was removed by primary legislation that was commenced by a piece of subordinate legislation.

The Convener: So Gordon Jackson is correct.

Gordon Jackson: I took the information from our briefing note. I did not check the details, as I just took Margaret Macdonald’s word for it.

Mr Macintosh: Was the reference deleted through subordinate legislation or primary legislation?

Margaret Macdonald: It was deleted by primary legislation that was commenced by a commencement order.

Gordon Jackson: What matters is not that the reference was removed when the provision was commenced by subordinate legislation but that it was removed by primary legislation. The reinsertion of the reference by the regulations that are before us is a very unusual use of subordinate legislation. However, in theory, the Executive could always do that: whenever there is a power to add things in by subordinate legislation, if a provision is removed by primary legislation, the

Executive could just add it back in. That just shows the power of subordinate legislation, although in this case it does not particularly matter.

The Convener: Should we raise that question with the Executive or should we just consider it at a later date, perhaps as part of our review?

Gordon Jackson: In part, I have just been reading the adviser’s briefing and thinking out loud. There may be no issue to raise. At the end of the day, perhaps it is simply that subordinate legislation can do such things. However, this just shows how powerful subordinate legislation can be.

Mr Maxwell: Surely that is the reason why we are so keen on using the affirmative procedure for Henry VIII powers.

Gordon Jackson: I often say that other members think that members of the Subordinate Legislation Committee are just anoraks. They are probably right, but the regulations before us are a good example of the importance of subordinate legislation and its power as a tool of Government.

Murray Tosh: The question, perhaps, is whether the regulations demonstrate the use of an ancillary or supplemental provision. We should be told.

The Convener: I thank Gordon Jackson for raising the issue.

Gordon Jackson: To be fair, the issue was raised in the legal adviser’s briefing.

The Convener: You can continue to discuss the issue with her later if you wish.

No other points have been raised on the regulations. I think that we have agreed to raise formally with the Executive why, in the citation of the 2000 act in regulation 2, the word “Scotland” has been missed out.

Plant Health (Scotland) Order 2005 (SSI 2005/613)

The Convener: The third instrument that we must consider under item 6 is the Plant Health (Scotland) Order 2005 (SSI 2005/613), which is a consolidation for Scotland of the Plant Health Order 1993 and its amending instruments. Among the other things that it does, the order implements a large number of European Community instruments that establish the Community plant health regime.

When the Joint Committee on Statutory Instruments examined the equivalent English instrument, it reported the instrument on the ground of defective drafting in two respects. The Department for Environment, Food and Rural

Affairs has acknowledged those defects and agreed to correct them. The Scottish order contains similar errors in articles 42(1) and 43(1), which the committee may wish to refer to the Executive for comment. The Scottish order seems to assume that notice will be given orally, whereas it could be given in writing. Therefore, it seems odd to require that a written notice be further confirmed in writing.

The committee may also wish to seek an explanation of the meaning of article 7(3), from which some words may be missing, as the paragraph does not seem to make sense.

Shall we follow up those points?

Members indicated agreement.

Smoke Control Areas (Authorised Fuels) (Scotland) Amendment Regulations 2005 (SSI 2005/614)

The Convener: No points arise on the regulations.

Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2005 (SSI 2005/615)

The Convener: No points arise on the order.

Gordon Jackson: I took the unusual step of reading the order, as I was fascinated to find out what an exempt fireplace is.

Official Feed and Food Controls (Scotland) Regulations 2005 (SSI 2005/616)

The Convener: The regulations make provision for the enforcement in Scotland of regulation 882/2004/EC of the European Parliament and the Council, on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. The regulations also impose prohibitions on the import into Scotland of certain feed and food.

Regulations in virtually identical terms, with modifications to reflect the devolution settlement, have been made for England and Wales.

As members will know from the legal briefing, it is suggested that we raise four issues with the Executive. The first relates to regulation 3 and schedule 1, which define certain Community legislation. We should ask why it has been thought necessary to define regulation 1688/2005/EC when the regulations seem to contain no reference to that piece of legislation. Secondly, regulation 7 authorises the Scottish ministers to issue codes of practice. As those codes of practice appear to have legislative effect, we should ask the Executive to explain the vires of the regulation in light of the prohibition that is contained in paragraph 1(1)(c) of schedule 2 to the European

Communities Act 1972. Thirdly, regulation 18 specifies the enforcement authorities for various provisions in part 2 of the regulations. We should ask the Executive to explain the vires of regulations 18(4) and 18(5), given what section 29(2)(e) of the Scotland Act 1998 states. Fourthly, the word "date" seems to be missing from regulation 43(2)(a), but perhaps we should ask the Executive to confirm that.

Gordon Jackson: We should ask those questions.

The Convener: All four of them.

National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment (No 3) Regulations 2005 (SSI 2005/617)

11:15

The Convener: No substantive points arise, although it is anticipated that another set of amending regulations will be produced in April next year. After that, the Executive might bring out a consolidating instrument.

Are members content to raise minor issues in an informal letter to the Executive?

Members indicated agreement.

National Health Service (Pharmaceutical Services) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/618)

The Convener: No substantive points arise. Are members content to take the same action that we agreed to take on SSI 2005/617?

Members indicated agreement.

Organic Aid (Scotland) Amendment Regulations 2005 (SSI 2005/619)

The Convener: There are no points on the regulations.

Rural Stewardship Scheme (Scotland) Amendment Regulations 2005 (SSI 2005/620)

The Convener: The regulations make a number of changes to the rural stewardship scheme, which is a discretionary scheme under EC legislation that is designed to encourage environmentally friendly farming practices in Scotland. I am sure that members all know that.

We might want to ask the Executive about the purpose and effect of the reference to the regulations in the definition of "post-2003 entrant" in regulation 3(e) and about the meaning of the

words "at least" in the definition that is given in regulation 10(b). There is another point that we can raise in an informal letter. Is that agreed?

Members *indicated agreement.*

**Less Favoured Area Support Scheme
(Scotland) Amendment (No 2) Regulations
2005 (SSI 2005/624)**

The Convener: The regulations correct drafting errors in and omissions from the Less Favoured Area Support Scheme (Scotland) Regulations 2005 (SSI 2005/569), which established the less favoured area support scheme for 2006.

Are members content to ask the Executive whether the regulations will be made available to recipients of the principal regulations free of charge and, if so, why no italic headnote to that effect appears on the front of the regulations?

Gordon Jackson: It is normal to have a headnote to that effect.

The Convener: It is.

Again, there is a minor issue that we can raise in an informal letter.

**Avian Influenza (Preventive Measures)
(Date for Identification of Poultry
Premises) (Scotland) Regulations 2005
(SSI 2005/625)**

The Convener: The Avian Influenza (Preventive Measures) (Scotland) Regulations 2005 (SSI 2005/530) made provision for the enforcement of Commission decisions that were aimed at preventing the introduction and spread of avian influenza. Regulation 6(1) of SSI 2005/530 imposed a requirement on commercial poultry farmers to provide certain information to ministers by a date that was to be specified in further regulations. The regulations before us specify that date.

The committee may wish to note that the Executive has agreed that there are defects in the drafting of the regulations and in the regulations that they amend, which it will address in regulations that will be forthcoming shortly.

Are we content to draw the regulations to the attention of the lead committee on the ground that they contain defective drafting that the Executive has acknowledged and is taking steps to address?

Members *indicated agreement.*

Mr Maxwell: Can the legal advisers confirm that the relevant date error will be corrected by the Executive?

Margaret Macdonald: Yes.

**Instruments Not Subject to
Parliamentary Procedure**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 9) (Scotland) Revocation
Order 2005 (SSI 2005/627)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 10) (Scotland)
Revocation Order 2005 (SSI 2005/628)**

11:19

The Convener: We move on to item 7, which is the final item on the agenda. No points of substance have been identified; there is only a minor point to raise on each of the orders.

At next week's committee meeting, which will be on Tuesday 20 December, we will discuss the draft report of our inquiry into the regulatory framework, so the meeting will be a little longer than normal.

Meeting closed at 11:20.

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