

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 17 January 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting 2006, 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 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 17 January 2006

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

Delegated Powers Scrutiny

Animal Health and Welfare (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the second meeting in 2006 of the Subordinate Legislation Committee. Gordon Jackson will be with us, although he will be a bit late. I remind all members to switch off their mobile phones.

We continue last week's scrutiny of the delegated powers in the Animal Health and Welfare (Scotland) Bill at stage 1. We asked the Executive for further clarification on the use of the emergency affirmative 28-day procedure, and we spelled out our concerns over how that procedure might be used. Members have the Executive's explanation in front of them. It has considered each of the various areas in sections 1, 2, 3 and 8 that we highlighted and has explained why it thinks that it would be appropriate to use that procedure. Since we mentioned the matter, the Executive has also discussed the possibility of using the negative procedure.

The committee has various options as to how to proceed. One option would be to take the procedure used in section 1 as an example: normally, the draft affirmative procedure would be used, but rather than leave things there, we could ask that, if the 28-day emergency procedure was used, we should at least get some clarification in the order as to why that route was taken. I am open to members' ideas.

Mr Stewart Maxwell (West of Scotland) (SNP): That proposal is helpful. It would least be an improvement, in that the Executive would be required to give that explanation. However, that does not answer our original, central point, which was that it would be open to the Executive to instigate the 28-day procedure ad nauseam, without Parliament ever having the opportunity to agree or disagree with that approach. I am not sure that I can see a way around the situation under the present set-up. Perhaps this demonstrates why we are considering the possibility of a specific emergency procedure in

our inquiry into the regulatory framework. This is a classic example of why such a procedure might be useful in resolving such difficulties.

We have a number of options. We could leave things as they are; we could have a beefed-up or enhanced 28-day procedure, as the convener has suggested; we could perhaps use the annulment procedure under certain circumstances; or we could scrutinise draft instruments. We could make a variety of proposals, although I am not sure which would be best or how all those suggestions could be brought together. Perhaps the lead committee could consider the matter in some detail.

The Executive has to give way on the use of the straightforward 28-day procedure. As the convener suggested, it must at the very least provide enhanced information. That would be the absolute minimum.

The Convener: I should clarify that, as I understand it, section 1 suggests the use of the draft affirmative procedure with the possibility of using the 28-day facility. That is already being suggested, but the Executive has not included anything similar to the order-making powers in the Food and Environment Protection Act 1985, under which the Executive would have to clarify why it was laying an order under the 28-day emergency procedure.

Mr Maxwell: I accept that. I do not have the bill in front of me but I remember that, in other sections, the draft affirmative procedure is not used.

The Convener: That is correct—it is not used in all instances.

Mr Maxwell: That is of more concern.

The Convener: Yes. Does Ken Macintosh have any concerns?

Mr Kenneth Macintosh (Eastwood) (Lab): No. I am happy with the powers in the bill. It is a question of balance. We are talking about emergency situations, and we need to get the balance right between expecting the Government to respond to an emergency and ensuring that Parliament has powers to scrutinise the actions that are taken. Given the animal health scares that are around at the moment, the emphasis has to be on responding appropriately to an emergency. I think that the committee's suggestions will be welcomed by the Executive.

Mr Adam Ingram (South of Scotland) (SNP): Paragraph 5 of our legal brief says that the Executive acknowledges that the negative procedure might be appropriate, even though its use might breach the 21-day rule more often than not. However, at least that option would give us

some sort of scrutiny, which is the nub of our concerns over the issue.

What is the nature of the undertaking that the Executive has given? Has it given us any undertaking?

The Convener: I understand from the Executive's response—we have already had this explanation twice from the Executive—that it is trying its utmost to have the best parliamentary scrutiny and, at the same time, the ability to respond quickly to emergencies. Obviously, that is what we want it to do.

Our concern is that under the emergency affirmative 28-day procedure, orders can be laid but the Executive need do nothing further. The 28 days may elapse, and the Executive could, if it wanted to extend the 28-day period, introduce the relevant measure in Parliament. However, the Executive does not have to do that; it could let the 28 days lapse and then lay another order under the 28-day emergency procedure.

The committee accepts that, in its response, the Executive indicates that it considers the emergency affirmative 28-day procedure, with as much scrutiny as possible, to be the best way to proceed, but the committee has concerns about the procedure.

Mr Maxwell: Fundamentally, the procedure is the problem. We all accept that emergencies have to be dealt with quickly in the interests of public health; we have no argument with that. The emergency affirmative 28-day procedure has been used before. However, it has been used extensively in the Animal Health and Welfare (Scotland) Bill—this is the first time that I have seen it used so much. Perhaps that is why we have had so much debate on the bill, although, as I say, the procedure has been used before.

Ultimately, there will be no completely satisfactory outcome to the debate. We do not have a problem with the need to do something about animal health—we have a problem with the procedure. There has to be an emergency procedure, but we do not have one as such. That is the fundamental problem.

The Convener: I agree. If we were to extend the approach that is used in section 1 and recommend the draft affirmative procedure, we would be indicating that we want as much of the matter as possible to be brought before Parliament so that Parliament knows about it. We would still give the Executive the option of using the emergency affirmative 28-day procedure if it had to act very quickly. The committee takes on board that the Executive says that the emergency procedure is the best possible way of dealing with fast spreading diseases. That is where we are at.

If the committee agrees, we could write back to the Executive to say that we agree with that option as long as the maximum safeguards are in place. We could then report to the lead committee on why we did that. In fact, we might simply have to include that in our report on the bill.

Mr Maxwell: We should report that the maximum level of parliamentary scrutiny should always be used, depending on the circumstances.

The Convener: One way of doing that is through the emergency affirmative 28-day procedure, but we should say that we would like there to be clarification in any order of why that procedure was being used. Are we agreed?

Members indicated agreement.

The Convener: Section 18 deals with mutilation. The committee confirmed that it would prefer a statutory requirement to consult to be included in the bill, because mutilation is such a sensitive area. The Executive has noted that, which is fine.

Section 34 deals with animal welfare codes. The committee will remember that the power to revoke will need to be used if a new code replaces an old one. The Executive has acknowledged that it is not clear from the bill as drafted that the power to revoke will attract the same procedure. Therefore, the Executive is considering lodging a suitable amendment. Do members agree with that approach?

Members indicated agreement.

Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill: as amended at Stage 2

10:45

The Convener: We have made quite a bit of progress on the bill—the stage 3 debate will be held on Thursday afternoon.

We had questions about section 3(1), on the power to make regulations for the purposes 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 that the power to create offences for the enforcement of the regulations was delegated to the regulations themselves. The Executive has responded to our concerns by limiting the offences in the bill. Are members content?

Members indicated agreement.

The Convener: Section 7, on interpretation, enables "social work services functions" to be prescribed by regulations. The committee was concerned that that definition, which is critical to the interpretation of the bill, had been left to

regulations. The bill has since been amended to define those functions. Are members content?

Members indicated agreement.

The Convener: Section 7(3) deals with the power to amend the list of enactments in section 7(2). The relevant amendment that has been made to the bill again relates to allowing the definition of “social work services functions” to be included in the bill. It is consequential on the amendment made to section 7(1). Are members content?

Members indicated agreement.

The Convener: New section 8A deals with ancillary provision. We were concerned at stage 1 that the bill did not include provision for consequential or transitional arrangements as a result of repeals under section 8. The Executive is content that it does not need to provide for transitional arrangements; however, it has amended the bill to allow for consequential arrangements. Are members content?

Members indicated agreement.

The Convener: Section 1(5A) deals with codes of practice. The committee’s attention has been drawn to this provision, which provides that persons and bodies who carry out inspections should have regard to guidance that is issued by ministers. That will include matters that relate to access to confidential information. Obviously, many policy issues arise, but I do not know that there are any technical issues. Are members content?

Members indicated agreement.

Executive Responses

Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 (draft)

10:47

The Convener: The committee asked the Executive to clarify why substantive legislative requirements appear in a definition regulation provision and not as substantive legislative provisions. Committee members will see from the Executive’s reply that the Executive was attempting to make schedules 1 and 2 less detailed and complex. It is also stated that the Executive’s approach is not likely to affect the draft regulations’ legal effect adversely.

Do members have any views?

Mr Maxwell: It is helpful to have the Executive’s position—that its approach to the draft regulations will have no adverse legal effect—set out clearly. I accept as probably correct the legal advice that the committee received that there has been a failure to follow proper legislative practice. However, the bottom line is that the Executive’s approach to the draft regulations does not undermine them. Nevertheless, we should probably report on the matter.

The Convener: Are members agreed that we should draw the attention of the lead committee to the matter?

Members indicated agreement.

Road User Charging (Penalty Charges) (Scotland) Regulations 2005 (SSI 2005/652)

The Convener: We raised four points with the Executive, the first of which was about the drafting of regulation 8(1). Although the drafting is unlikely to affect the regulations’ legal effect adversely, it is, nevertheless, defective.

Mr Ingram: We should report that.

Mr Maxwell: It is interesting that the Executive appears to have accepted that there is a fault with the drafting of the regulations and that the drafting is defective. I was amused by the legal briefing, which says that the courts would probably ignore the wording and therefore get it right. That is an interesting solution: the courts will resolve the problem of the Executive’s poor drafting.

The Convener: There was another issue with regulations 10(6) and 13(3) and with the regulations that are referred to in regulation 13. We asked the Executive for further information, which we got back. We should send that

information to the lead committee and Parliament as well as report our first point. Is that agreed?

Members *indicated agreement.*

Road User Charging Schemes (Keeping of Accounts and Relevant Expenses) (Scotland) Regulations 2005 (SSI 2005/654)

The Convener: We raised six points with the Executive. Do members have any major points to highlight?

Mr Maxwell: I particularly wanted to discuss the fifth question that we put to the Executive. Although the regulations are correct in terms of the current accounting standard, it would seem that the Executive's intention was that the regulations would also apply to any future accounting standard. That appears not to be the case; the Executive would have to lay new regulations, which is fine. I am concerned, however, that the Executive intended the regulations to apply to future standards. The effect of that would have been that those who were changing the accounting standard would have been changing the law, rather than the law being changed by Parliament. I am relieved that the policy intention has not been fulfilled in that sense because the regulations rightly deal with the current accounting standard and any future changes to that standard will require new regulations to be brought back to Parliament. That might not have been what the Executive intended, but it seems to be okay.

The Convener: Good.

Additionally, there are points that deal with the failure of regulation 2 to follow proper legislative practice.

Regulations 3 and 4(1) also fail to follow proper legislative practice, which might render the relevant provisions of the regulations technically ultra vires, but should not affect the validity of the instrument. That seems to be an unduly limited use of the power. We should say that, as well as saying that we received quite a bit of explanation from the Executive about that particular point.

It is argued that paragraph 4 of schedule 1 is an unduly limited use of the power. Again we should say that we have had an explanation from the Executive on that as well as on the point that Stewart Maxwell made about proper accounting practices. Are there any other points on the regulations?

Members: No.

M77 (Malletsheugh) (Speed Limit) (Scotland) Regulations 2005 (SSI 2005/655)

The Convener: We asked the Executive three questions. Are we happy to pass on to the lead

committee and the Parliament the points about defective drafting and the fact that the Executive has acknowledged those points? They will not affect the validity of the regulations.

Members *indicated agreement.*

The Convener: I welcome Murray Tosh to the meeting.

Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No 2) Order 2005 (SSI 2005/642)

The Convener: We raised three points with the Executive. First, there was an unusually limited use of the power, in that section 4(4) of the Smoking, Health and Social Care (Scotland) Act 2005 was not commenced by the order. That has been accepted by the Executive, which is moving to correct it with a new commencement order. Secondly, article 2 of the order was defectively drafted, although that should not invalidate the order. Thirdly, there is a failure to follow proper legislative practice, as there is no reference to section 43(4) in the preamble to the order. As I read the Executive's responses, none of those points are detrimental to the validity of the order; they can be rectified.

Mr Maxwell: That is correct. Obviously I have particular concerns about this order as, I am sure, do other members. We need to get it right because of the interest in the order. I am particularly glad to hear that the Executive will move to resolve the problem on sections 4(4) and 4(5) of the act and that, in the same way as the earlier legislation that we discussed, the minor errors do not invalidate the order in any way.

The Convener: I suggest that we draw the three points to the attention of the Parliament? Is that agreed?

Members *indicated agreement.*

Charities and Trustee Investment (Scotland) Act 2005 (Commencement No 1) Order 2005 (SSI 2005/644)

The Convener: We asked the Executive why section 99, which contains an order-making power, was not commenced and whether that was deliberate.

The Executive confirmed that it intended to include section 99 in this commencement order, but that it will now be included in the next one. It also confirmed that there are no plans at present to legislate under the provision.

I suggest that we draw the order to the attention of the Parliament on the grounds of either unduly limited use of the power or defective drafting that has been acknowledged by the Executive.

Mr Maxwell: There is unduly limited use of the power, but I presume that the defective drafting is the main point.

The Convener: Yes.

Mr Maxwell: I suggest that we go with the defective drafting.

The Convener: I agree.

Instruments Subject to Annulment

Public Contracts (Scotland) Regulations 2006 (SSI 2006/1)

10:55

The Convener: The regulations give effect in Scots law to the European directive on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts. A lot of material was sent to members about that.

Regulation 8(5)(a) is about thresholds. The question is whether it was intended that the €137,000 threshold should apply only where offers are sought by schedule 1 entities "and" the Secretary of State for Defence, as opposed to it applying where offers are sought by schedule 1 entities "or" the Secretary of State for Defence.

The second question is to explain the origin of the threshold amounts specified that do not appear to correspond with the figures specified in the directive. This seems to be another common issue; it will come up again in another instrument.

There are also some minor points of form that we could pass on to the Executive.

Mr Maxwell: There is a full page of those minor points in the legal brief.

The Convener: Yes. Is that agreed?

Members *indicated agreement.*

Utilities Contracts (Scotland) Regulations 2006 (SSI 2006/2)

The Convener: The problem seems to be that an explanation is needed for the calculation of the threshold figures contained in regulation 11(2), given that they do not appear to correspond with the figures that are contained in the directive. Is it agreed that we seek an explanation of that and raise some other minor points?

Members *indicated agreement.*

Food Hygiene (Scotland) Regulations 2006 (SSI 2006/3)

The Convener: There is a worry about whether regulation 24 is *intra vires*. We should ask for an explanation of that. Are there any other points?

Members: No.

Older Cattle (Disposal) (Scotland) Regulations 2006 (SSI 2006/4)

The Convener: We have three questions. Why is there a reference to “the standard scale” in regulation 10(a), given that it relates to an offence triable either summarily or on indictment? I am sure that Gordon Jackson could give us an explanation of that if he were here.

The second question is about the effect of the wording of regulation 9(1) in relation to regulations 5(4) and 7(2). Is it the intention that breaches of those provisions should be a criminal offence? Is it the intention that breach of a notice under regulation 7 should be an offence?

Thirdly, why has the term “operator” been used in the schedule to the regulations, given that the definitions and regulation 4 employ the term “occupier”?

Are there any other points?

Mr Macintosh: It would appear that the 21-day rule has been broken. However, when the regulations were introduced at Westminster, there was advance notice. They were certainly published and dealt with within the required period. We have not been able to do that. The reasons are understandable; it happened over the Christmas break. It is interesting that the European directives were implemented in England and Wales in time, but not here. I would be interested to know what it is about the process that means that the Executive is slower than Westminster.

The Convener: We will ask that question; it is not an unfamiliar one. It is also pointed out that, on this occasion, the Executive might have followed the English regulations because they are a lot more straightforward.

11:00

Mr Maxwell: I was going to raise the point that Ken Macintosh has raised about breach of the 21-day rule. Westminster obviously knew about that and was able to publish its regulations in time; however, I presume that, for whatever reason, the information did not get here. I think that we should highlight that.

My second point relates to what you were just saying, convener, about the regulations following the English regulations. Virtually all the points that have been made are about how the Executive's failure to follow the good regulations that have been made for England has led to various problems in the Scottish regulations. Furthermore, the one point where the Scottish regulations follow the English regulations turns out to be the very point at which they should not have followed the English regulations, as they use the word

“operator” rather than “occupier”. I would like an explanation of why the Executive failed to follow all the good points in the English regulations, but followed those regulations at the one point at which they were wrong. It would be worth asking about that—we might get an interesting reply.

The Convener: Absolutely. Is that agreed?

Members indicated agreement.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2006 (SSI 2006/5)

The Convener: The only observation to make in relation to the rules is that there is no formal Executive note.

Mr Maxwell: No, but there was a press release, which I am sure was very helpful. Far be it from me to say, “Government by press release.” I would not say that.

The Convener: Well, we will ask that very question. There are also a few minor points on the rules.

Instrument Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 12) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/6)

11:01

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

Members indicated agreement.

The Convener: We now move into private session.

11:01

Meeting continued in private until 12:24.

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