

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 18 April 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

12th 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)

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*attended

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 18 April 2006

[THE CONVENER *opened the meeting at 09:30*]

Delegated Powers Scrutiny

Legal Profession and Legal Aid (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 12th meeting in 2006 of the Subordinate Legislation Committee. I have received apologies from Gordon Jackson. I remind members to switch off their mobile phones and to insert their cards into their consoles.

Agenda item 1 is delegated powers scrutiny. First, we will deal with the Legal Profession and Legal Aid (Scotland) Bill at stage 1. The bill will establish the Scottish legal complaints commission, the main function of which will be the handling of consumer complaints about the service that legal practitioners provide that cannot be resolved at source. In addition, it will introduce the first stage of a planned programme of measures on the delivery by both lawyers and non-lawyers of all forms of publicly funded legal assistance in Scotland.

The first delegated power that we will consider is contained in section 8, "Commission upholds services complaint". Section 8(7) provides an order-making power to vary the compensation sum that will be subject to the affirmative procedure. Are members content with the power and with the proposal that its exercise will be subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 15 is entitled "Handling by relevant professional organisations of conduct complaints: investigation by Commission". In relation to section 15(4)(b), paragraph 12 of the legal brief states:

"The expiry of a complaint is of course a matter of some importance to every party and normally one might have expected the relevant period to be specified in the bill itself."

There is also an issue to do with section 15(8), which relates to ministers' ability to amend the six-month period that is mentioned in section 15(4)(b). The two issues are closely interwoven. What do members think about the order-making power for

which section 15(4)(b) provides and the related issue to do with section 15(8)?

Mr Kenneth Macintosh (Eastwood) (Lab): In relation to section 15(4)(b), the legal brief suggests that the Executive seeks the power to vary the period because it has not yet made up its mind. That is not really a satisfactory reason because we are talking about an important policy matter. The fact that the Executive specifies a period of six months in section 15(8) sits oddly with that. Perhaps we should wrap the two issues together and write to the Executive to ask it to explain why it has set a period of six months for section 15(8), but has not indicated what time limit it thinks that it will set in relation to section 15(4)(b).

The Convener: I agree. I think that the legal brief might have been suggesting that the detail of both provisions could be dealt with using a single power. We could ask the Executive about that, too.

I welcome Stewart Maxwell to the meeting. Are there any further points?

Mr Stewart Maxwell (West of Scotland) (SNP): I apologise for my slight late-coming. I am not sure that I would put things in the way that the convener has just done. I agree with what Ken Macintosh said about wrapping the two issues together, but I am not sure that dealing with both of them in the same set of regulations is necessarily the right way to proceed.

The drawing of a line in the sand after which people cannot complain is an important matter. Given that it is such a significant policy point, perhaps the relevant time limit should be specified in the bill, rather than being left to regulations. I think that, instead of making a specific recommendation, we should simply ask for an explanation of the difference between the two powers.

The Convener: Okay. Do you have anything to add, Murray?

Murray Tosh (West of Scotland) (Con): Only that it appears that 40 days is not a default to be entered whenever a figure cannot be thought of.

The Convener: Absolutely.

Basically, we agree that we should ask why different approaches have been taken in sections 15(4)(b) and 15(8). What seems to be an important aspect of the bill will be left to subordinate legislation and details have not been given, although a period of six months is included in the bill. We would like clarification on that matter. Another important question is whether the power in section 15(4)(b) should be subject to the negative procedure.

Mr Macintosh: Why do we not wait and see what the Executive says? We have suggested that subordinate legislation may not be required.

The Convener: Okay. We have enough time to wait and see.

Section 16 of the bill is entitled "Investigation under section 15: final report and recommendations". Section 16(8) provides an order-making power for ministers to vary the maximum level of compensation that the commission may recommend that a relevant professional organisation pays to the person making a handling complaint. There is no requirement for consultation and the power is subject to the affirmative procedure. To ensure that we are clear, I refer to paragraph 6 of the delegated powers memorandum, which states that "there is a requirement for consultation",

which is where the difficulty arises. Section 16(8) of the bill does not say anything about consultation. Obviously, we must ask why there is a difference between what is in the delegated powers memorandum and what is in the bill.

Murray Tosh: The delegated powers memorandum suggests that consultation was intended, but the Executive neglected to include it in the bill. Perhaps we should first ask why that has happened.

The Convener: Yes. We could phrase the question in that way and say that the bill may need to be amended.

As members have no other points to make on section 16(8), we will proceed to section 17, "Abolition of Scottish legal services ombudsman". Section 17(1) provides for the office of the Scottish legal services ombudsman to be abolished on a date specified by order. It is proposed that the power be subject to the affirmative procedure. Are members content with the power and that it should be subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 17(3) relates to the transitional period. The power is wide ranging, but it appears to be intended that the new complaints procedure will ultimately remove the need for the ombudsman. Are members content with the power and that the power should be subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 17(4) will allow ministers to make by order subject to the affirmative procedure any incidental provisions that they think necessary in connection with the modification of functions or the abolition of the office of ombudsman. Paragraph 31 of the legal brief states:

"It is not entirely clear exactly what it is intended should be encompassed in an order under this power."

Should we probe that matter further?

Mr Maxwell: Yes. The legal brief seems to cast doubt on whether the power is sufficient. It adds:

"express provision would be needed."

If that is the case, it is clear that we must ask the Executive about the matter.

The Convener: Is that the point that you were going to make, Murray?

Murray Tosh: Pretty much. It is unusual for us to suggest that the Executive needs to take more power for itself, but in this case it might well require more express authority to do what it obviously intends to do.

The Convener: The legal brief highlights such questions as whether issues around the staff and property of the ombudsman will be addressed. More power might be required in relation to that. If it is agreed, we will ask the Executive about those points.

We come now to section 23, "Duty of Commission to make rules as to practice and procedure", together with schedule 3. Section 23 imposes a duty on the new legal complaints commission to make and publish rules as to its practice and procedure, which are not subject to parliamentary procedure. The first question is whether the right balance has been struck between non-statutory rules and statutory provision, and whether any of the rules need to be made as Scottish statutory instruments.

Mr Maxwell: Perhaps we should write to the Executive to ask what is intended to be contained in those rules, so that we can get a clearer idea about them.

Murray Tosh: I do not disagree with the suggestion of asking the Executive about that, but we should perhaps put the point more strongly, as it appears possible to advance some arguments in favour of using statutory instruments. We could do a wee bit of probing on that and establish the Executive's thinking on the matter.

The Convener: Okay. Is that agreed?

Members indicated agreement.

The Convener: The second question about section 23 is to ask the Executive whether it is proposed that the new commission should be listed in schedule 1 to the Tribunals and Inquiries Act 1992. Is that okay?

Members indicated agreement.

The Convener: Section 31 is "Power by regulations to amend duties and powers of Commission". Subsection (1) creates a power for

ministers to modify by regulation provisions to adjust the duties imposed or powers conferred on the commission or to impose new duties and confer new powers on the commission. The power, although significant, is subject to the affirmative procedure and such powers are precedented elsewhere. Are members happy with that?

Members indicated agreement.

The Convener: On section 33, "Giving of notices etc under Part 1", are we content with the power under subsection (2)(a)(v), which is subject to the negative procedure? Are there any points to raise about the power?

Mr Maxwell: There is a point about inconsistency between section 33 and other sections. I have no particular problems with the power, but perhaps the committee would wish to ask about the inconsistency.

The Convener: I take it that you are referring to paragraph 40 of the legal brief.

Mr Maxwell: Yes.

The Convener: It says:

"the Executive's claim that subordinate legislation is more appropriate than primary legislation seems rather inconsistent."

Mr Maxwell: Yes. There is considerable detail elsewhere in the bill, so why not in section 33?

The Convener: Are we agreed that there is no problem with asking that question?

Members indicated agreement.

The Convener: Part 2 is entitled "Conduct complaints: other matters". On section 36, "Unsatisfactory professional conduct: solicitors, firms of solicitor" and so on, are we content with the power introduced under section 36(2) that is subject to the negative procedure?

Members indicated agreement.

The Convener: Are we content with the other power that is introduced under section 36(2), which is subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 36(4) creates a power to modify any enactment that ministers consider appropriate for the purpose of giving the council of the Law Society of Scotland and various other bodies further powers. That power is being taken because the exact nature of the provisions that are required is still under consideration. It is subject to the affirmative procedure.

Murray Tosh: The legal brief makes an argument for the deployment of the super-affirmative procedure. That is a bit like a nuclear

deterrent: it is a weapon that the Executive likes to have in its arsenal, but it is horrified at the idea of ever using it. Genuine examples where it is obvious that it would be appropriate to use it rarely emerge. Given the sensitivity of the provisions, I think that we should suggest that there might be no harm in exercising that rarely flexed muscle, which the Executive has at its disposal.

09:45

The Convener: There are no two ways about it: it is quite a substantial issue. As the legal brief says,

"In approving the power the Parliament would in effect be giving a blank cheque to the Executive."

Mr Maxwell: I agree with Murray Tosh. In fact, I would perhaps go further. If the bill was being published six months from now, the power would be contained in the bill, rather than in regulations, as the detail of it would have been dealt with by then. It is merely the timing that is the problem. The same issue has come up before. The fact that the Executive has not yet reached the point when it is ready to state for definite what its policy is does not seem a sufficient reason for dumping these provisions in regulations. We should be quite firm in our questioning of the Executive on that point. For the Executive to publish a bill and put certain things in regulations just because it is not ready yet does not seem to be—

The Convener: Good legislative practice.

Mr Maxwell: I do not think that it is a good way to legislate at all.

The Convener: How are we going to dovetail that concern with the proposal about the super-affirmative procedure?

Murray Tosh: I do not think that there is any incompatibility between the two. I am quite happy to take the line that Stewart Maxwell is suggesting. The matter can be trailed. I dare say that the Executive might even occasionally read the committee's comments in the *Official Report*. If not, it is the Executive's loss. Let us try the line of asking, "Why are you doing it this way in the first place?" There is time to knock ideas back and forth.

The Convener: And to come back on the question of the super-affirmative procedure. That is agreed.

There is a similar point in relation to section 37(1). I assume that members will want exactly the same points to be raised. Is that agreed?

Members indicated agreement.

The Convener: Section 38 is on the "Power of Tribunal to award compensation for professional misconduct". The power in section 38(1)(b) is

similar to that under section 36(2), which we thought was okay. Are members content with the power and with the fact that it is subject to the affirmative procedure?

Members indicated agreement.

The Convener: Section 38(2) contains a power that is similar to powers elsewhere in the bill. Are members content with this power and with its being subject to the affirmative procedure?

Members indicated agreement.

The Convener: We come now to part 3, "Legal profession: other matters". Section 39 is on the "Constitution of Scottish Solicitors' Discipline Tribunal". The main thing to note about subsection (2) is that it is presently proposed for it to be subject to the negative procedure. The question is whether, having read the comments in the legal brief, we think that the affirmative procedure should apply.

Mr Maxwell: Not particularly. I think that it is fine—although I do not know whether other members have a different view.

Mr Macintosh: It is just about the number of people on the tribunal.

The Convener: So we are happy with the negative procedure as proposed.

Members: Yes.

The Convener: That is fine. I welcome Adam Ingram to the meeting. We are now coming to part 4 of the Legal Profession and Legal Aid (Scotland) Bill. Section 45 is on the "Register of advisers: advice and assistance". We are being asked to approve the conferral of powers under subsection (6), although how they are to be operated is still unknown. Should we ask for more information?

Mr Maxwell: My comments would reflect those that we just made a moment ago. The points are effectively the same.

The Convener: Okay. We could almost have grouped some of these points together.

Mr Maxwell: Yes, I think that we could have done.

The Convener: Are members content with the power in section 45(7) and with its being subject to the negative procedure?

Members: Yes.

The Convener: Section 45(9) inserts new schedule 1A into the Legal Aid (Scotland) Act 1986. The new schedule is headed "Further provision in relation to the Register of Advisers". It contains provision for an adviser code of practice and any subsequent revisions to be laid before the Parliament, although there is no further provision

for parliamentary scrutiny. As paragraph 75 of the legal brief points out—

Murray Tosh: The previous paragraph—paragraph 74—points out that the code will be more than simple guidance. As compliance with the code will be a prerequisite of registration, an adviser could be removed from the register for failure to comply with the code. I agree with the recommendation in paragraph 75 of the legal brief that the Executive should consider some kind of procedure such as that used for the code of good agricultural practice, which is partly subject to parliamentary approval. Although the code will be prepared by the Scottish Legal Aid Board rather than by ministers, it is worth putting to the Executive the argument that has been advanced. There ought to be a procedure for adopting the code, given the penalties and the implications that the code will have for professional people.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: We move on to part 5, which deals with general matters. On section 48, "Ancillary provision", are we content with the power in section 48(1)? Do we agree that any order that amends primary legislation should be subject to the affirmative procedure but otherwise to the negative procedure?

Members indicated agreement.

The Convener: Section 52 provides for the short title and commencement. Section 52(2) provides a standard commencement provision that will not be subject to parliamentary procedure. Are we content with that?

Members indicated agreement.

The Convener: Paragraph 2(7) of schedule 1 deals with the Scottish legal complaints commission. A significant issue is flagged up in paragraphs 81 to 83 of the legal brief. I suggest that we should ask the Executive to explain the policy behind the proposed use of the powers. Do members have any other suggestions?

Mr Maxwell: The use of the affirmative procedure to change the number of commission members is entirely reasonable. Whether such a power should be able to be used to create a commission that is composed entirely of lay members is a policy issue rather than an issue for this committee. I am sure that the Justice 2 Committee will be interested in the matter. If the Executive's intention is to adjust the membership of the commission in that way, that is a policy matter. We may not agree with it, but the matter seems to be one of policy.

The Convener: The other issue is that the bill makes no provision requiring prior consultation

before such an order is laid. That is a concern for this committee. Although the issue is one of policy, the power could have quite a significant effect. I suppose that we need to know the extent of the policy in order to know whether consultation is needed.

Mr Macintosh: We should perhaps write to the Executive. As Stewart Maxwell suggested, the issue is whether the balance on the commission between legally qualified members and lay members is to be changed. As far as I can see, the intention behind the power is to ensure that the commission can cope with the demand that is placed upon it. I think that the power is just to allow the membership of the commission to be increased or decreased. Policy implications would arise only if the Executive used the power to change the balance of the commission from a majority of legal members to a majority of lay members. We should seek assurance from the Executive that the power will be used appropriately.

Murray Tosh: I do not mind seeking assurances from the Executive, but the substantive issue is about consultation. I do not say that the Executive would charge off and change the balance unilaterally, arbitrarily and dictatorially, but the bill currently makes no requirement for consultation. We need more clarity on the Executive's intentions. I agree that the matter is one of policy rather than of subordinate legislation, but I can understand why the legal advisers are so exercised about the provisions. I have no objection to trying to get the Executive to flesh out its thinking.

Mr Adam Ingram (South of Scotland) (SNP): I agree that we should ask those questions.

The Convener: We will ask for clarification on the policy, given that the bill currently makes no requirement for prior consultation. I hope that the Executive will give us the assurances that we seek, but I think that prior consultation is probably still needed on such an important matter.

Mr Maxwell: To give the legal advisers their due, the brief also points out that using the power to remove all the legal members could be outwith the vires or scope of the power. Given the lack of restrictions on the power, it may be legitimate to ask about vires.

The Convener: We will ask those questions.

Paragraph 17(1) of schedule 1 allows ministers to issue directions to the commission on the exercise of its functions. The power is not included in the delegated powers memorandum presumably because it concerns only directions. Is the matter sufficiently important that we need to get further information about it? Should there be more formal scrutiny?

Mr Maxwell: We should perhaps ask the Executive for its comment before we decide. I have no view on the matter because I do not know about it.

The Convener: We will ask for more information. Is that agreed?

Members indicated agreement.

Tourist Boards (Scotland) Bill: Stage 1

The Convener: Agenda item 2 is delegated powers scrutiny of the Tourist Boards (Scotland) Bill. The bill is very short and contains only one delegated power in section 5, which provides for the commencement and short title. Are members content with the commencement powers?

Members indicated agreement.

The Convener: Excellent.

Executive Response

Sewerage Nuisance (Code of Practice) (Scotland) Order 2006 (SSI 2006/155)

09:56

The Convener: Agenda item 3 is consideration of an Executive response. As members may recall, we were not satisfied with the explanation about the breach of the 21-day rule for the order so we asked for further information, which we have now received. The response mentions a combination of complex technical issues and the need for a second consultation. Are members now assured that there were good reasons for breaking the 21-day rule?

Murray Tosh: Convener, so many puns and references could be made about the order that I feel inclined not to bother.

The Convener: We will simply report that we have received the explanation that we sought.

Draft Guidance Subject to Annulment

Environmental Protection Act 1990: Part IIA Contaminated Land Statutory Guidance: Edition 2 (SE 2006/44)

09:57

The Convener: No points arise on the guidance, apart from some minor points that we can raise with the Executive informally.

Instruments Subject to Annulment

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/183)

09:58

The Convener: No points arise on the regulations, which simply replace an earlier instrument in which the committee identified errors. Are members happy with the replacement regulations?

Mr Maxwell: The regulations obviously breach the 21-day rule, but the explanation given is entirely reasonable in the circumstances.

Scottish Charity Register (Transitional) Order 2006 (SSI 2006/188)

The Convener: No substantive points arise on the order. Like the previous instrument, the order breaches the 21-day rule.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 8) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/191)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 16) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/192)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 11) (Scotland) Order 2005 Partial Revocation Order 2006 (SSI 2006/202)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 14) (Scotland) Order 2005 Revocation Order 2006 (SSI 2006/203)

09:59

The Convener: Do members agree that no points arise on the orders?

Members *indicated agreement.*

Instruments Not Laid Before the Parliament

Charities and Trustee Investment (Scotland) Act 2005 (Commencement No 3, Transitional and Savings Provision) Order 2006 (SSI 2006/189)

10:00

The Convener: We will raise a minor point about the order with the Executive.

Avian Influenza (H5N1 in Wild Birds) (Scotland) Order 2006 (SSI 2006/196)

The Convener: We are all obviously very aware of this issue. The order implements a European Commission decision on protection measures in respect of highly pathogenic avian influenza in wild birds. Several points have been raised and it is important to get them on the record.

The first is the absence of an Executive note and a transposition note.

Secondly, we need to know why article 3 of the order does not extend the definition of disease—as well as the definition of poultry—in line with section 88(4) of the Animal Health Act 1981 to include avian influenza as defined in article 2 of the order.

Thirdly, in article 2 of the order, the definition of disinfection states that the term “diseases of poultry” has the meaning that was given to it under the Diseases of Animals (Approved Disinfectants) Order 1978 (SI 1978/32), although that order does not provide such a definition.

Fourthly, there is no definition of the term “wild bird”.

Article 15 of the order contains paragraph 15(1) but no subsequent paragraphs.

Paragraph 1(2)(g)(i) of schedule 1, paragraph 1(2)(c)(i) of schedule 2 and paragraph 1(c) of schedule 3 all refer to the Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2005, but those regulations do not appear to exist. The regulations are not footnoted in schedule 1 and the footnotes in schedules 2 and 3 refer to English regulations. We need to know whether the references in the order should be to regulations 9 and 9A of the Animals and Animal Products (Import and Export) (Scotland) Regulations 2000 (SSI 2000/216).

Finally, what is meant by the term “SFF egg” as in paragraph 4 of schedule 1 to the order?

Murray Tosh: It is actually “SPF egg”.

The Convener: Is it?

Murray Tosh: Yes. I do not know what it means, but we had better be accurate. By the way, it was Stewart Stevenson who noticed that.

The Convener: There are also some minor points that we can raise, so we might as well put them all together. Are there any further points to raise?

Members: No.

The Convener: That is quite amazing.

Mr Maxwell: Although the publication of the order was decided by events that were outwith anyone's control, I would have thought that the order would have been ready and checked. It should have been prepared well in advance. We have known for some time that this was coming but, on the face of it, the order seems to have been a rush job.

The Convener: Yes; there are quite a few errors.

Mr Macintosh: It is more important to say that it was put in place and that it worked.

The Convener: Absolutely, but we also want good legislation.

Murray Tosh: Kenny Macintosh probably knows what an SPF egg is.

Mr Macintosh: No.

Act of Sederunt (Sheriff Court Bankruptcy Rules 1996) Amendment (UNCITRAL Model Law on Cross-Border Insolvency) 2006 (SSI 2006/197)

The Convener: No substantive points arise, but there is an error in the citation provision that has been drawn to the attention of the Lord President's office by our legal advisers.

Act of Sederunt (Sheriff Court Caveat Rules) 2006 (SSI 2006/198)

The Convener: No points have been raised on the act of sederunt.

Act of Sederunt (Rules of the Court of Session Amendment No 2) (UNCITRAL Model Law on Cross-Border Insolvency) 2006 (SSI 2006/199)

The Convener: Several errors in the act of sederunt have already been drawn to the attention of the Lord President's office by the legal team. Are there any further points?

Members: No.

**Act of Sederunt (Sheriff Court Company
Insolvency Rules 1986) Amendment
(UNCITRAL Model Law on Cross-Border
Insolvency) 2006 (SSI 2006/200)**

10:04

Meeting continued in private until 12:31.

The Convener: No points have been raised on the act of sederunt.

I now move the meeting into private session.

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