

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 28 November 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

33rd Meeting 2006, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Mr Kenneth Macintosh (Eastwood) (Lab)

COMMITTEE MEMBERS

*Janis Hughes (Glasgow Rutherglen) (Lab)

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

*Mr Stewart Maxwell (West of Scotland) (SNP)

Euan Robson (Roxburgh and Berwickshire) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

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

Maureen Macmillan (Highlands and Islands) (Lab)

Ms Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Peter Willman (Scottish Executive Education Department)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 November 2006

[THE CONVENER *opened the meeting at 10:30*]

Interests

The Convener (Dr Sylvia Jackson): I welcome members to the 33rd meeting of the Subordinate Legislation Committee in 2006. I have received no apologies.

Gordon Jackson has left us to join the Finance Committee. I thank him for all his work on the Subordinate Legislation Committee; he has been most helpful with our review of the regulatory framework. I am sure that members will wish him well.

Mr Kenneth Macintosh (Eastwood) (Lab): Hear, hear.

The Convener: In Gordon Jackson's place is Janis Hughes, who joins us this morning. Welcome, Janis. Would you like to declare any interests?

Janis Hughes (Glasgow Rutherglen) (Lab): I have no relevant interests to declare.

Deputy Convener

10:31

The Convener: Gordon Jackson was the deputy convener, so a vacancy has come about and we must choose a new one. Under rule 12.1.4 of standing orders, the Parliament has agreed that members of the Labour Party are eligible for nomination as deputy convener.

I seek nominations from among members of that party.

Janis Hughes: I propose Ken Macintosh as deputy convener.

The Convener: Does the committee agree to that nomination?

Mr Stewart Maxwell (West of Scotland) (SNP): Yes.

Mr Kenneth Macintosh was chosen as deputy convener.

The Convener: Congratulations on securing the deputy convenership, Ken.

Delegated Powers Scrutiny

Adoption and Children (Scotland) Bill: as amended at Stage 2

10:32

The Convener: Item 3 is delegated powers scrutiny of the Adoption and Children (Scotland) Bill as amended at stage 2. I welcome to the meeting Peter Willman, who is the bill team leader.

New powers have been introduced into the bill at stage 2 and some powers have been amended. There are also powers that we said we would look at again at this stage.

We start with section 2, "Local authority plans". The bill has been amended to reflect the change to the term "adoption support services". We approved the power at stage 1 and it has not been altered. Are members content with the power and with the fact that it is subject to the negative procedure?

Members indicated agreement.

The Convener: At stage 1 we approved the power in section 5, "Adoption agencies: regulations about carrying out of functions". The section has been amended, but the effect has been to narrow the scope of the power and to remove ambiguity. I am sure that we welcome that. The power is still subject to the negative procedure. Are we agreed?

Members indicated agreement.

Mr Adam Ingram (South of Scotland) (SNP): I have a question for Peter Willman. I do not want to be cheeky here, but was it intended to focus on applications for permanence orders that relate to the possibility of moving on to adoption? Was that a deliberate change? Why did the Executive bring that in?

Peter Willman (Scottish Executive Education Department): Yes, that was a deliberate change. We brought it in at this stage because we thought it appropriate, among the general powers to make regulations on the duties of adoption agencies, to make specific reference back to permanence orders with authority to adopt. That was in order to be clear that, although a permanence order is not an adoption order, those that have a clear link to adoption through the authority to adopt are covered by the scope of the regulation-making power.

The Convener: At stage 1 we approved the power under section 6, "Adoption support services". It has been amended in two respects, but they do not appear to be significant. Are we

content with the changes and with the power being subject to the affirmative procedure?

Members indicated agreement.

The Convener: We had no concerns about section 7, on adoption support services, at stage 1. Although that section has been removed from the bill, its provisions have been merged with those of other sections. Are we content to note that?

Mr Ingram: I have another question. Has the power to add to or modify the list of adoption support services been retained elsewhere in the bill?

Peter Willman: Yes. It is now at section 6(4), which simply reintroduces the provisions of section 7(4) in the bill as introduced.

The Convener: There is a new power in section 7A, "Assessment of needs for adoption support services". It imposes a duty on local authorities to assess certain persons for adoption support services. The supplementary delegated powers memorandum explains that the power

"is a direct replacement for section 48(4) of the Bill which has been deleted".

We approved the power in section 48(4) at stage 1 on the basis that the matters to be delegated would be technical, detailed and administrative. The nature of the power in section 7A is no different. Are members happy with the power and with the fact that it is subject to the negative procedure?

Members indicated agreement.

The Convener: We did not expressly consider at stage 1 the power in section 57, "Guidance", but it has been drawn to our attention at stage 2. Under that section, local authorities must, in discharging their functions,

"have regard to any guidance given by the Scottish Ministers."

Section 57(3) sets out the matters on which guidance may contain provision. Guidance will have a certain level of legal effect, although no parliamentary procedure is provided for such guidance. Are there any questions on section 57?

Mr Macintosh: One of the areas that is covered is the transfer of responsibility between authorities. I raised that issue at stage 1. However, I do not think that the guidance is important enough to be made subject to parliamentary procedure.

The Convener: So you are happy with that.

We welcome Murray Tosh, who joins us for section 58.

Murray Tosh (West of Scotland) (Con): Apologies for my late arrival.

The Convener: That is okay. At stage 1 we were content with the power in section 58, "Regulations about adoption support services". However, it has been amended at stage 2. The section confers a power on ministers to make regulations on various matters relating to adoption support services. The power is subject to the negative procedure. It has been amended in three respects, two of which—as members will see from the legal brief—appear to be okay. It is suggested, however, that we might wish to question the Executive on the third of the changes, which relates to section 58(2). Why is section 58(2) needed, given the terms of sections 109(2) and 109(3)? I do not think that it affects the validity of the provisions, but we wondered why section 58(2) was necessary.

Peter Willman: Section 58(2) is not strictly necessary, in that one could use the powers in section 109 to the same effect. There was a recognition that adoption support services cover a wide spectrum of provision, ranging from simple information and letterbox contact with parents once a year, to much more intensive, therapeutic input. It was acknowledged that it might well be appropriate to make different provisions because of the range of and differences between the types of services that are provided. Therefore, there was some merit in expressing that directly in section 58. That could be said to be desirable, rather than necessary.

The Convener: We are quite happy with that. We understand that the provision is perhaps not entirely necessary, but there is no problem with it.

We undertook to return to section 23 of the bill as introduced—"Scottish Ministers' power to amend period of time in sections 21 and 22". That section conferred on ministers the power to amend the period of five years in both sections 21(1)(b) and 22(1)(b). Although the power was subject to the affirmative procedure, we expressed reservations at stage 1 about the appropriateness in principle of delegating a power to make subordinate legislation to alter what is an integral part of the description of a criminal offence. You will remember that we felt strongly about that.

The Executive undertook to reconsider the provision and has agreed to remove the power. Section 23 has been deleted, which we welcome. Is that agreed?

Members indicated agreement.

The Convener: On section 40, "Disclosure of information kept under relevant enactment", we undertook to return at stage 2 to the power to make provision on disclosure of information, because we were not able to form a definitive view on the appropriateness of the power being subject to the negative procedure.

The power has now been amended in three ways, one of which is that it is now subject to the affirmative procedure, which we welcome. It has also been extended to cover review of decisions of adoption agencies, and the regulations made under the power will apply to any "relevant enactment".

Mr Maxwell: In our original letter to the Executive, we asked why it chose to delegate the power to make provision on disclosure of information, but we have not received a response.

Peter Willman: We saw that as a sensitive issue and, given that setting out the power might take up some space, we thought that it was probably useful to do so in regulations, which will now be subject to the affirmative procedure, rather than going into such detail in the bill.

Mr Maxwell: Do you think that there might be unforeseen changes that would make it necessary to set out the power in regulations? I do not understand why the sensitive nature of the power means that it should be set out in secondary, rather than primary, legislation.

Peter Willman: Perhaps it would be better to describe the power as complex, rather than sensitive. We felt that it might take quite a lot of text to set it out and that it was better to make it clear in regulations rather than setting it out in the bill.

Mr Maxwell: I am struggling with that explanation. You said that it would take a lot of text to set out the power, but I do not see why the fact that extra pages would be needed is a reason for setting it out in regulations rather than in the bill. I am not trying to demean your point; I am just trying to be clear about the reasoning.

Peter Willman: We considered the precedent that the Adoption Agencies (Scotland) Regulations 1996 (SI 1996/3266) make provision on disclosure of information. It seemed to us that the complex and important details would fit better in regulations than in the bill.

Mr Macintosh: I do not know whether this is of interest to Stewart Maxwell and other members, but the Education Committee asked the Minister for Education and Young People about the issue. There are a lot of issues around the disclosure of information between different parties and many of those who submitted evidence to the Education Committee felt strongly about it. It was felt that, although further work needed to be done, the level of detail involved meant that it would be more appropriate to set out the relevant power in secondary legislation.

The Convener: Which enactments, other than previous adoption enactments, are thought to impose duties to keep records as to adoptions?

Why have the enactments that have been identified so far not been specified in the bill in the form of a non-exhaustive list?

10:45

Peter Willman: The two relevant enactments are the Adoption Act 1958 and the Adoption (Scotland) Act 1978. The reason why they have not been specified is a matter of how the drafter chose to express the provision. Although some extant records refer back to the Adoption Act 1958, the requirement to keep them will gradually expire, so it might be better to refer to any "relevant enactment", rather than specifically to the 1958 act.

Murray Tosh: The delegated powers memorandum does not give us much information about what the process for the review of decisions of adoption agencies will involve. What will the procedures and powers be? Who will carry out the review? What right will people have under it? Will you give us more information on that and say whether the Executive intends to flesh that out in any way?

Peter Willman: I am sure that we will flesh it out. If I recall correctly, the Deputy Minister for Education and Young People, Mr Brown, made it clear in the Education Committee that we will consult on the regulations before they are brought before the Parliament.

Murray Tosh: So, the regulations will spell out all the procedures.

Peter Willman: Yes. The 1996 regulations include detailed provisions about complaint procedures. That will be our starting point, but we will adapt the provisions to meet the particular requirements of disclosure of information.

The Convener: Are members content with what they have heard?

Members indicated agreement.

The Convener: Section 47, "Post-adoption services", with which we were content at stage 1, has now been deleted and the substance of the power has been subsumed in section 6. Are members content with that?

Members indicated agreement.

The Convener: Section 48, "Assessment of needs", with which we were content at stage 1, has now been deleted and the power has been subsumed in section 7A. I assume that that is okay.

Members indicated agreement.

The Convener: Section 55, "Reassessment of needs for adoption support services", with which we were content at stage 1, has been amended at

stage 2 to reflect the change in terminology to "adoption support services". Are members happy that the power is subject to the negative procedure?

Members indicated agreement.

The Convener: Section 56A, "Guidance", is a new provision that imposes a duty on local authorities to have regard to any guidance issued by ministers when preparing or reviewing adoption support plans. The guidance relates to administrative processes and is not subject to parliamentary procedure. Are members content with that?

Members indicated agreement.

The Convener: We were content at stage 1 with section 56B, "Regulations about reviews of adoption services". The new provision differs a little and confers on ministers the power to make regulations specifying how reviews of adoption support plans are to be carried out. Are members content with the power and the fact that it is subject to the negative procedure?

Members indicated agreement.

The Convener: Section 66, "Restriction on removal of children for adoption outwith Great Britain", was amended at stage 2. We were content with it at stage 1, but we drew to the attention of the lead committee the fact that there was nothing to prevent subsequent exercises of the power making substantive amendments to the original regulations. The power has been amended, but only in a technical and indirect way. The first exercise of the power is subject to the affirmative procedure, with the negative procedure to be used thereafter. Are members content with that?

Members indicated agreement.

The Convener: We agreed at stage 1 to look again at the power in section 78, "Disclosure of medical information about parents of child". In our report, we expressed concern about the provision being subject to the negative procedure, given the sensitivity of the information that might be disclosed and the potentially controversial nature of the regulations. At the time, the Executive agreed to look again at the provision. Although the power is unchanged, it is now subject to the affirmative procedure. Are members happy with that?

Members indicated agreement.

The Convener: Although we were content at stage 1 with the power in section 97, "Permanence orders: rules of procedure", it has been amended at stage 2 to make it clear that the most onerous notification requirements must apply in such rules where adoption is an issue in the proceedings. It is

suggested that the amendment might be an attempt to ensure that there is balance and that all interests can be heard where adoption is an issue. The power itself is not subject to parliamentary procedure. Are members happy?

Members indicated agreement.

The Convener: Although we were content at stage 1 with the power in section 103, which deals with regulations on fostering allowances, it has been amended at stage 2. In the bill as introduced, the power extended to children placed under section 26(1)(a) of the Children (Scotland) Act 1995. As amended, it also extends to children who are required to reside with a person other than their parent and now provides for the making of a permanence order in favour of the person with whom the child is placed, without disentitling that person to payments under the power. Are members content with that provision, which is subject to the negative procedure?

Members indicated agreement.

The Convener: At stage 1 we drew to the Executive's attention the fact that in section 109, "Orders and regulations", although the intention seemed to be that powers delegated to the registrar general would be exercisable by statutory instrument, the bill did not provide for that. The section has now been amended to ensure that any power conferred on the registrar general is exercisable in that way.

As the powers essentially relate to the form of entries in the register, we were content at stage 1 that they should not be subject to any procedure. However, they are now subject to the negative procedure. Why has that approach been taken?

Peter Willman: As you say, the bill as introduced made a straight omission that has now been rectified.

The Convener: But I take it that you have made the power subject to the negative procedure for a reason.

Peter Willman: Yes. Although the registration of adoptions is an important matter, I do not think that it is terribly controversial and, in such circumstances, the use of the negative procedure does not seem unreasonable. However, we might well look at the matter again.

The Convener: I just wanted to make sure that it was not an error.

Mr Maxwell: We were content with the power at the time, so the introduction of the negative procedure is probably fine. After all, we did not recommend that the Executive make it subject to the affirmative procedure or anything. I do not want Peter Willman to hear our comments and head down the wrong route.

The Convener: I am happy to leave the matter; I was just wondering whether an error had been made. Mr Willman has said that the Executive might explore the matter again, but I think that in any case we are quite happy with the provision.

In schedule 2, "Minor and consequential amendments", there is a new provision that makes a technical amendment to a power in the Social Work (Scotland) Act 1968. Are members content with that provision, which is subject to the negative procedure?

Members indicated agreement.

The Convener: I think that that is everything. I thank Peter Willman for clarifying certain matters, and we will welcome any response you might make about the use of the negative procedure in section 109.

Bankruptcy and Diligence etc (Scotland) Bill: as amended at Stage 2

The Convener: The next item on the agenda is delegated powers scrutiny of the Bankruptcy and Diligence etc (Scotland) Bill as amended at stage 2.

On section 196, "Amendments of the Debt Arrangement and Attachment (Scotland) Act 2002", we asked the Executive to comment on the need for section 196(2A) in the light of section 7(4) of the Debt Arrangement and Attachment (Scotland) Act 2002. The Executive says that it considers that section 196(2A) provides more clarity than any reliance on section 7(4) of the 2002 act and that the provision is consistent with the drafting of the earlier act. Do members find that feedback useful?

Members indicated agreement.

The Convener: On section 198(1), which refers to regulations on information disclosure, we felt that the power should be subject to open procedure and we lodged a number of amendments to that effect. The Executive agrees, although it has slightly changed the wording of our amendments to make the first set of regulations subject to the affirmative procedure. I hope that that means that our approach has been successful.

Mr Maxwell: I welcome the Executive's amendments, which, as you say, mean that the first set of regulations will definitely be subject to the affirmative procedure and that, afterwards, the procedure will be open. That is more or less what we wanted.

The Convener: Are members content to withdraw the amendments that we lodged last week?

Members indicated agreement.

The Convener: A letter from Allan Wilson has also been circulated, advising the committee of amendments that have been lodged for stage 3. We should perhaps note that such information is useful.

Mr Maxwell: The letter also partly addresses some of the concerns that we have expressed over the past few weeks about problems of timescale between stages 2 and 3.

Executive Responses

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 2) Regulations 2006 (draft)

10:56

The Convener: Although we were content with the regulations, we asked the Executive whether it had any plans to consolidate the various regulations. It has replied that it intends to consolidate them at the earliest possible opportunity. Are members content to pass that response to the lead committee and the Parliament?

Members *indicated agreement.*

Rice Products (Restriction on First Placing on the Market) (Scotland) Regulations 2006 (SSI 2006/542)

The Convener: The committee noted that the enforcement procedures set out in the regulations are not the same as those in the equivalent English regulations and asked the Executive two specific questions on that matter. We have now received a response from the Food Standards Agency Scotland. Members will note that the English regulations impose only a general duty on local authorities to execute and enforce the regulations and the European Commission decision, whereas the Scottish regulations impose a comprehensive duty on local authorities to execute and enforce both.

Mr Maxwell: I raised this question, and I welcome the explanation of the difference between the two sets of regulations. I was not pushing for the regulations to be exactly the same; I simply wanted to understand why they had different formats and to ensure that the regulations covered any problems that might emerge under articles 3 and 4 of the Commission decision. The FSA has helpfully addressed the matter.

The Convener: We will draw the Executive's response to the attention of the lead committee and the Parliament.

EC Fertilisers (Scotland) Regulations 2006 (SSI 2006/543)

The Convener: We asked the Executive four questions on the regulations. If members have no comments on the response, I suggest that we draw it to the attention of the lead committee and the Parliament that, given that it is not clear whether regulations 7(c) and 8(c) properly implement obligations under European Community

legislation, the regulations might well raise a devolution issue; that, unlike their English counterparts, the regulations were not accompanied by a transposition note; and that further information was requested from and supplied by the Executive on the due diligence defence. Are members happy with that course of action?

Members *indicated agreement.*

Instruments Subject to Annulment

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuff) (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/548)

10:59

The Convener: No substantive points arise on the regulations. We will deal with various minor points in an informal letter.

Police (Minimum Age for Appointment) (Scotland) Regulations 2006 (SSI 2006/552)

The Convener: No particular points arise on the regulations, which, however, breach the 21-day rule. Do members have any comments?

Mr Macintosh: Policemen really are getting younger.

The Convener: Yes, but are there any comments on the 21-day rule being breached?

11:00

Mr Maxwell: We have received an explanation, but it seems that, yet again, the lines of communication have broken down. It is disappointing when that happens and breaches occur. It does not appear to have been any fault of the Executive department, which seems to have been unaware of the introduction of the English regulations. I do not know whether it would be worth taking that up with the English department to see why the Executive was not properly informed in time. I wonder whether we can write to the English department about that and find out what it is doing.

The Convener: There is nothing wrong in our asking for further explanation. Is that agreed?

Members *indicated agreement.*

Water Environment (Controlled Activities) (Third Party Representations etc) (Scotland) Regulations 2006 (SSI 2006/553)

The Convener: No points arise on the regulations.

Water Environment (Relevant Enactments) Order 2006 (SSI 2006/554)

The Convener: No substantive points arise on the order, but there is a minor point that can be mentioned in an informal letter to the Executive.

**Food for Particular Nutritional Uses
(Addition of Substances for Specific
Nutritional Purposes) (Scotland)
Amendment Regulations 2006
(SSI 2006/556)**

**Non-Domestic Rating
(Telecommunications and Canals)
(Scotland) Amendment Order 2006
(SSI 2006/557)**

The Convener: No points arise on the instruments.

**Instrument Not Subject to
Parliamentary Procedure**

**Regulation of Scallop Dredges (Scotland)
Revocation Order 2006 (SSI 2006/549)**

11:01

The Convener: The order revokes the Regulation of Scallop Dredges (Scotland) Order 2005 (SSI 2005/371), which set out the technical standards with which a scallop dredge must comply if it is to be used in Scotland.

We considered the original instrument on 5 September 2005 and asked the Executive whether it had complied with the requirements of the European Commission's technical standards directive, as failure to have done so would have meant that the relevant legislation was unenforceable. In response, the Executive indicated that it was consulting its English counterparts and would write us again in due course. On that basis, we reported to Parliament that we had questioned whether the regulations were *intra vires* and whether they might raise a devolution issue on the ground of their possible failure to comply with European Community law.

The Executive has now written to us explaining that, after lengthy consultation with the relevant UK departments, it accepts the committee's view that certain parts of the order do, indeed, fall within the scope of the directive and should have been notified to the Commission under article 8 of that directive. The Executive proposes to notify the standards to the Commission in accordance with the directive and has made the current order, which revokes the previous one.

Mr Maxwell: It is nice to be proved right, is it not? I am slightly concerned by the length of time that it has taken for the Executive to come to its decision. It has just been good luck that no enforcement action has been taken during the intervening period; otherwise, a series of other problems could have been raised by the fact that enforcement action had been taken under regulations that were, frankly, not fit for purpose or, at least technically, in breach of EC law. I wonder whether we could get further information about the timescale that has been involved. I do not know the circumstances in which enforcement action might have been taken or what the outcome of that would have been.

The Convener: Okay. We will ask about the time that it has taken for the Executive to respond.

Murray Tosh: Can we also raise with the Executive the technical matters that are mentioned in paragraphs 240 and 241 of the committee's

legal brief? I dare say that those are not matters of massive public interest. Nonetheless, I would have thought that, in drafting an order that replaces an earlier, flawed one, the Executive would want to be scrupulous in getting every detail correct. It might be appropriate to make those observations and see whether the Executive feels that any further explanation might be useful.

The Convener: Are those the paragraphs to do with the explanatory note?

Murray Tosh: Paragraph 240 talks about the failure to accompany the revocation order with an Executive note, and paragraph 241 contains three technical points that may replicate some of what is in paragraph 240. In the round, those paragraphs detail a number of technical imperfections in the order.

The Convener: Okay. We will write to the Executive about those issues formally rather than informally.

Members *indicated agreement.*

Instruments Not Laid Before the Parliament

Glasgow City (Electoral Arrangements) Order 2006 (SSI 2006/546)

West Dunbartonshire (Electoral Arrangements) Order 2006 (SSI 2006/547)

Renfrewshire (Electoral Arrangements) Order 2006 (SSI 2006/551)

Na h-Eileanan an Iar (Electoral Arrangements) Order 2006 (SSI 2006/558)

11:04

The Convener: I cannot begin to say the title of the last of the orders. I did not practice, as I should have done.

Mr Maxwell: I am disappointed. I was waiting for that.

Mr Macintosh: Na h-Eileanan an Iar.

The Convener: Thank you, Ken. No points arise on the orders. Have members anything further to add?

Murray Tosh: Just that we all enjoyed that.

The Convener: The next meeting of the committee will be on Tuesday 5 December.

Meeting closed at 11:05.

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