

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 12 December 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

35th 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

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 12 December 2006

[THE CONVENER *opened the meeting at 10:31*]

The Convener (Dr Sylvia Jackson): I welcome members to the 35th meeting in 2006 of the Subordinate Legislation Committee. I have not received any apologies, so I dare say the rest of the members will be appearing. Before we come to agenda item 1, I should mention that members should have among their papers the response from the Executive to issues that we raised last week about the Legal Profession and Legal Aid (Scotland) Bill, as amended at stage 2.

Executive Responses

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

10:31

The Convener: Members will recall that we asked the Executive five questions about the order, which revokes the Regulation of Scallop Dredges (Scotland) Order 2005 (SSI 2005/371). Members might wish to come in at this point, or I could just go through the five points in turn.

Mr Kenneth Macintosh (Eastwood) (Lab): I welcome the fact that the Executive has agreed to revoke the 2005 order, but there are some issues that are worth commenting on.

The Convener: Do you wish to raise any of them?

Mr Macintosh: Not particularly—I am happy for you to do so.

Mr Stewart Maxwell (West of Scotland) (SNP): The explanation that has been provided is helpful in giving us an understanding of the process, particularly with respect to the fact that there have not been any prosecutions. Although it has been a considerable time since we wrote to the Executive in 2005, the concern about the fact that there could have been prosecutions in the intervening period has been allayed by the fact that the possibility of prosecution was halted upon the Executive's receipt of our 2005 letter. That was a useful bit of information, which helps our understanding of what was going on and lessens our fear that a mistake might have been made.

The Convener: That is right. There has been consultation with colleagues in relevant United Kingdom departments, and the Executive explained the technical nature of the issue and why it took so long to resolve. The reassurance was helpful.

Secondly, we asked for an explanation of why section 20(1) of the Sea Fish (Conservation) Act 1967, which is the enabling power, has not been cited as such. The Executive has explained that that is not an enabling power in its own right and did not require to be cited in the preamble. Nevertheless, it accepts that it should have been referred to in a footnote. Together with the information that we discussed a moment ago, I suggest that we report the point about the 1967 act to the Parliament. The lack of reference in a footnote was a failure to follow proper legislative procedure. Is that okay?

Members indicated agreement.

The Convener: There are a number of other points. Do members wish to raise any of them, or shall I just go through them?

Mr Macintosh: You can do so yourself.

The Convener: Thirdly, we asked the Executive to explain why the revocation order was not accompanied by an Executive note. The Executive takes the view that a note was not required, as the effect of the order is clear from the order itself—we have come across this before—and the reasons for the making of the order were explained to the committee in the Executive's letter dated 21 November. It is a matter of defective drafting, I think, so we should report accordingly. Are we agreed?

Members indicated agreement.

The Convener: Fourthly, we asked the Executive to explain why the explanatory note does not indicate the content of the provisions that have been revoked. The Executive takes the view that the title of the order makes it clear what the content of the revoked provisions is. I suggest that we report that point on the ground of failure to follow proper legislative practice.

Finally, we asked the Executive to explain why a citation for the revoked order is necessary in the explanatory note, as that information is already provided in the body of the order. I think that the Executive did not consider the inclusion of a citation to be misleading or unhelpful. It thought that it was okay. Again, however, we should report that on the ground of failure to follow proper legislative practice.

Mr Maxwell: Convener, I think that you said that the third point was a drafting error, but it is not a drafting error, is it? It is failure to follow proper—

The Convener: Did I say that it was a drafting point?

Mr Maxwell: I think that you did.

The Convener: I am sorry, Stewart. I should have said that it was a failure to follow proper legislative practice. That was my mistake.

Is that everything on the order?

Members: Yes.

The Convener: We welcome Murray Tosh and Adam Ingram to our fold.

National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2006 (SSI 2006/560)

The Convener: The Executive has acknowledged the committee's points on the amendment order in relation to the enabling powers that are cited. The Executive intends to revoke the order and make a new one before the current one comes into force. I think that we should draw the order to the attention of Parliament on the ground of defective drafting. We should perhaps also refer to the fact that the order is to be replaced.

I have been told that we should also mention that the order is of doubtful vires. Is that agreed?

Members *indicated agreement.*

The Convener: I thank Margaret Macdonald for that reminder.

Instruments Subject to Annulment

Home Energy Efficiency Scheme (Scotland) Regulations 2006 (SSI 2006/570)

10:36

The Convener: The regulations are a complete revision of what existed before. We have been looking into the history of the regulations, which first came to the committee in the first session, would you believe. That was when Margo MacDonald was convener. I do not think that there is a present member who was on the committee at that time.

Mr Macintosh: I might have been.

The Convener: Sorry about that, Ken. I forgot that.

Mr Maxwell: On you go then, Ken.

The Convener: Maybe you would like to take us through the issues, Ken.

Mr Macintosh: No thanks.

The Convener: Basically, there were some drafting errors, which have all been sorted. That is not the problem now, but there are some new issues. I will highlight them, and members may chip in.

The first point is that the regulations make provision for grants to be withdrawn in certain circumstances. It is not very clear, as members will see from the legal brief, exactly what "withdrawn" means. We will seek clarification on that. Is that okay?

Members *indicated agreement.*

The Convener: The second point is that the regulations make no provision for any appeal against a decision to award or withdraw a grant. Our advice points to judicial review not being sufficient by itself to fulfil the requirements of article 6 of the European convention on human rights. Again, it is a matter of clarification, but quite a serious one.

Thirdly, a similar point arises in relation to paragraphs 8 and 11 of schedule 1 to the regulations, which allow an agency to appoint and to

"terminate or suspend the appointment of a registered installer for reasonable cause."

Should we perhaps ask for clarification of what "reasonable cause" might mean and of the position that would be taken on appeals?

Members *indicated agreement.*

The Convener: Finally, are members content to ask the Executive to explain the inconsistency in the use of the terms “agency” and “administering agency” in schedule 1 and to explain the provision in regulation 6(3) that appears to restrict the application of the regulations to applications for grants as described in that paragraph?

Members indicated agreement.

Scottish Charity Appeals Panel Rules 2006 (SSI 2006/571)

The Convener: A couple of points arose on the rules. One is to do with the vires for rules 10 and 18(2). The enabling power allows rules to be made as part of the practice and procedure of the Scottish charity appeals panel, but it does not mention the constitution of the panel.

The second and third points are more minor. We would like the Executive to explain whether the power to submit documents electronically under rule 24 is to apply in all cases or to notices other than those sent under rules 3(1), 6(1)(a) and 7(a). The third point is a consistency problem, or rather a problem of inconsistency. We would like the Executive to explain why, in respect of rule 18(5), no provision is made as to the time within which an appeal may be made to the Court of Session and whether it is intended to make appropriate provision in some other way.

There are also some minor points that we can deal with in an informal letter to the Executive.

Is that agreed?

Members indicated agreement.

The Convener: Members should feel that they can come into the discussion at any point.

Murray Tosh (West of Scotland) (Con): No, you are doing wonderfully, convener.

The Convener: I thought that you might say that.

Conservation of Salmon (Collection of Statistics) (Scotland) Regulations 2006 (SSI 2006/572)

The Convener: Two points arise on the regulations. It is recommended that we ask whether any representations were made on them and, if so, what those representations were and what action was taken in respect of them. The committee will recall that Dennis Canavan raised the point that there had not been sufficient consultation on a similar set of regulations, so it is important that we know what representations have been made.

Secondly, it is recommended that we confirm that the requirement of section 38(4)(b) of the

Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 is fulfilled and that, if it is, we ask the Executive to explain why the preamble to the regulations does not refer to that fact.

There is also a minor point that we can deal with in an informal letter.

Marriage (Approval of Places) (Scotland) Amendment Regulations 2006 (SSI 2006/573)

The Convener: No substantive points arise on the regulations, but there is a minor point that we can raise in an informal letter.

Civil Partnership (Attestation) (Scotland) Regulations 2006 (SSI 2006/574)

The Convener: No points arise on the regulations.

Registration Services (Fees, etc) (Scotland) Regulations 2006 (SSI 2006/575)

Plant Protection Products (Scotland) Amendment (No 3) Regulations 2006 (SSI 2006/576)

The Convener: No substantive points arise on the regulations, but there is a minor point on each set that we can raise informally. Is that agreed?

Members indicated agreement.

Sheep and Goats (Identification and Traceability) (Scotland) Amendment Regulations 2006 (SSI 2006/577)

The Convener: A number of defects have been identified in relation to the regulations. They have been withdrawn and replacement regulations were laid yesterday. We will consider the new regulations next week. We look forward to that.

Feeding Stuffs (Scotland) and the Feed (Hygiene and Enforcement) (Scotland) Amendment Regulations 2006 (SSI 2006/578)

The Convener: No substantive points arise on the regulations, but there are some minor points that we can raise informally.

Fishery Products (Official Controls Charges) (Scotland) Regulations 2006 (SSI 2006/579)

The Convener: No substantive points arise on the regulations. Paragraph 88 of the legal brief states that the Joint Committee on Statutory Instruments has not reported on the corresponding English regulations. Members will be pleased to

hear that the JCSI reported today that there are no problems with those regulations. Is that okay?

Members *indicated agreement.*

Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006 (SSI 2006/582)

The Convener: Committee members might be interested to note the use of open procedure. In this case, it is a negative instrument.

A few points arise on the regulations. I will try to link them with the relevant paragraphs in the legal brief. The first point relates to paragraph 95.

Mr Macintosh: And paragraph 101, I think.

The Convener: Yes. As the committee can see from paragraph 95, the regulations revoke the Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Scotland) Regulations 2002 (SSI 2002/6), which did not include projects on restructuring rural land holdings. However, the 2006 regulations include such projects. It is recommended that we ask why the environmental impact assessment directive was not implemented on such projects in the 2002 regulations. It is also recommended that we clarify how the second subparagraph of article 6.3 of the EIA directive has been implemented. That relates to paragraph 101 in the legal brief. Do you want to raise any more points on that, Ken?

Mr Macintosh: We need to ensure that the main reports, and advice on which ministers acted, are made available to the public. That is not in the regulations or the explanatory note, so we should ask for the Executive's comments on that.

The Convener: I am sorry—say that again, Ken.

Mr Macintosh: Ministers are supposed to publish the main reports and advice that they receive, but that is not mentioned in the explanatory note or the regulations, so we should ask them to comment on how they are complying with their duty to publish advice and reports.

10:45

The Convener: It is not clear that reports and advice are included. We will have to double-check that.

It is also recommended that we ask the Executive whether regulation 14(5) should refer to the second set of corresponding English regulations and that we ask it to clarify the meaning of regulation 28(3)(a) given that it does not refer to carrying out reinstatement works. Those points are addressed in paragraphs 103 and 104 of the legal brief.

We can also ask the Executive why the transposition note does not cover the habitats directive. That point is discussed in paragraph 105 of the legal brief. There is also a minor point that can be raised informally, which is the question why the footnote for regulation 5(2)(f) is missing a citation. Is that okay?

Members *indicated agreement.*

The Convener: I remind committee members that Jim Wallace, as a reporter for the European and External Relations Committee, is considering transposition notes at the moment. I wondered—as did Ruth Cooper, our clerk—whether we should put together the issues that have come up in our consideration of transposition notes, and in particular those that came up on the regulations. Do members agree that we should try to get that information together and pass it on to Jim Wallace?

Mr Macintosh: What is he considering?

The Convener: He is considering the transposition of European directives and some of the issues that are connected with that. Ruth Cooper can give us more detail.

Ruth Cooper (Clerk): He has completed his first report on transposing and implementing European directives. He is considering all forms of implementation, so there is a policy side to his inquiry, but there is also a crossover with some of the issues that this committee raises. He will submit the report to this committee, so members will see it and will be able to comment on it early next year.

Mr Macintosh: What spurred the European and External Relations Committee into appointing a reporter? Is there a problem with transposing European legislation?

Ruth Cooper: My understanding is that that committee wanted to examine the matter closely to see—

Mr Macintosh: Just how it is done.

Ruth Cooper: Yes. I understand that Jim Wallace has a lot of background knowledge and experience in that matter and wanted to pursue it.

The Convener: It sounds good. I thought that we should try to get our points together and make an input into that inquiry if we can.

**Instruments Not Laid Before
the Parliament**

10:48

Meeting continued in private until 10:51.

**Housing (Scotland) Act 2006
(Commencement No 4) Order 2006
(SSI 2006/569)**

10:48

The Convener: No points arise on the order.

**Farriers (Registration) Act 1975
(Commencement No 4) (Scotland) Order
2006 (SSI 2006/581)**

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

We now move into private.

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