

SUBORDINATE LEGISLATION COMMITTEE

Wednesday 31 January 2007

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

4th Meeting 2007, 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 ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 1

Scottish Parliament

Subordinate Legislation Committee

Wednesday 31 January 2007

[THE CONVENER opened the meeting at 09:32]

The Convener (Dr Sylvia Jackson): I welcome members to the fourth meeting in 2007 of the Subordinate Legislation Committee. I have received apologies from Adam Ingram and Euan Robson, and I gather that Janis Hughes is stuck in traffic. Murray Tosh is presiding at the Microsoft Government leaders forum between 9 and 10, but he will join us if the meeting goes on beyond 10 o'clock.

Delegated Powers Scrutiny

Transport and Works (Scotland) Bill: as amended at Stage 2

09:32

The Convener: We commented on the bill at stage 1 and the Executive has responded to our concerns and amended the delegated powers. There are no new powers in the Bill. I will go through what has been altered.

Members might recall that at stage 1 we were critical of the delegated powers memorandum. The new DPM addresses the committee's concerns and fills out the detail that was omitted at stage 1.

At stage 1, we noted that the orders in section 1, "Orders as to transport systems and inland waterways", could include provisions that modified or repealed a private act passed by the Parliament and were concerned that such an order would not be subject to any parliamentary procedure. The Executive has amended section 13(6) to provide that an order that contains such a provision will be subject to affirmative resolution. Are members content with that amendment?

Members indicated agreement.

The Convener: At stage 1, we felt that there should be an obligation to publish any guidance that was prepared under section 7, "Model provisions", and that a power to revoke or amend such guidance was also required. Those issues have now been addressed. Are members happy with that?

Members indicated agreement.

The Convener: The rule-making power in section 8, "Objections", has been extended so that it now includes the power to make rules regarding representations that do not amount to an objection in front of ministers. The legal briefing makes a minor point about the need to amend the section's heading, which we could make in a letter. Are members content with that?

Members indicated agreement.

The Convener: An amendment has been made to subsection (14) of section 12, "Publicity for making or refusal of order", to reflect a drafting comment that we made at stage 1. The problem that we identified in relation to a duplication of procedure has been corrected. Are we happy with that amendment?

Members indicated agreement.

The Convener: The drafting of the amendments in section 23, "Amendment of Roads (Scotland) Act 1984", has been refined at stage 2 and some of the drafting points that we made at stage 1 have been taken on board. Are members happy with that?

Members indicated agreement.

The Convener: As with section 23, the amendments to section 24, "Amendment of Harbours Act 1964", in part reflect our comments at stage 1. Are we content with them?

Members indicated agreement.

The Convener: Subsection (3) of section 27, "Further provision as regards rules, regulations and orders", has been amended to provide that when specified instruments under the bill amend the text of an act, they are to be subject to the affirmative procedure. That change reflects our comments at stage 1, so I take it that we are happy with it.

Members indicated agreement.

The Convener: A second change is that, as drafted, the amendment to section 27(6)(aa) would allow the delegation of legislative as well as other functions. The question arises whether it is appropriate to confer powers to make subordinate legislation on persons other than the Scottish ministers. Do we want to ask about that?

Mr Stewart Maxwell (West of Scotland) (SNP): I looked at the delegated powers memorandum, but I do not have the bill with me. On what kind of persons is it envisaged that such powers could be conferred?

The Convener: It does not say, so we could ask.

Mr Maxwell: It would be helpful to get some examples, because the proposal is slightly

concerning. I am sure that it is not the case that anyone could be such a person, but we should seek clarification.

The Convener: Is that agreed?

Members *indicated agreement.*

The Convener: Do you have another point, Ken?

Mr Kenneth Macintosh (Eastwood) (Lab): No. Stewart Maxwell said that he was worried about persons other than the Scottish ministers having powers to make subordinate legislation, but I imagine that that happens in other circumstances.

Margaret Macdonald (Legal Adviser): Very rarely.

Mr Maxwell: I have never come across such an example.

Mr Macintosh: I cannot think of one.

Margaret Macdonald: The Registrar General for Scotland has those powers.

Mr Maxwell: One could understand the registrar general having powers to make subordinate legislation—that is fair enough.

Mr Macintosh: Behind the principle of devolution lies the idea that power should be devolved to the most appropriate person. That is not a bad idea; it is only an issue when we are talking about legislative power.

The Convener: Let us ask for examples of the people who will be given legislative power.

Members will wish to note that in response to the objections that we made at stage 1, the specific power to modify the bill once it has become an act—which was contained in section 27(8)—has been removed. However, the question remains whether the reference to “any enactment” in section 27(6)(b) would include the bill as enacted. We should write to obtain clarification on that point.

Mr Maxwell: That would be helpful. Our legal briefing says that opinion on the matter is pretty evenly divided, so it would be useful to get the Executive’s opinion on the record.

The Convener: Members may recall that we made a drafting comment on subsection (2) of section 29, “Short title and commencement”, and the date of commencement. Although, strictly speaking, it was not within the committee’s remit to do that, our point has been taken on board by the Executive—that was a success. Are members happy with that?

Members *indicated agreement.*

Executive Response

Drugs Assessor (Qualifications and Experience) (Scotland) Regulations 2007 (SSI 2007/8)

09:38

The Convener: We move on to agenda item 2. We asked the Executive to confirm that the enabling power for the regulations would be brought fully into force on or before the coming into force of the regulations on Monday 26 February 2007. The Executive has confirmed that the enabling power will be fully commenced before the regulations come into force.

Are members content to draw the attention of the lead committee and the Parliament to our request for clarification and the response that we got back from the Executive?

Members *indicated agreement.*

Draft Instruments Subject to Approval

Budget (Scotland) Act 2006 Amendment Order 2007 (draft)

Regulation of Care (Scotland) Act 2001 (Minimum Frequency of Inspections) Order 2007 (draft)

09:38

The Convener: No substantive points arise on the draft orders under agenda item 3, although there are some minor points that we can raise informally.

Draft Guidance Subject to Approval

Licensing (Scotland) Act 2005: Draft Guidance for Licensing Boards and Local Authorities (SE/2007/9)

The Convener: Yes, especially as it is the second version.

Mr Maxwell: Our adviser had little time to look through it. We are left with some concern that there might be more serious errors.

The Convener: Okay.

09:39

The Convener: We move on to agenda item 4, which is consideration of the second version of the draft guidance for licensing boards and local authorities. The first version was laid before the Parliament on 23 January but was withdrawn by the Executive because it contained a number of errors. Although no substantive points arise, there are still a few errors in the text, which we can raise informally—thank goodness.

Mr Maxwell: I agree. The new version is an improvement on the first version. However, the legal brief states:

“It is also observed that there are numerous grammatical and punctuation errors which, though not individually listed here, do suggest that the editorial checking of the draft was not particularly robust.”

Given that our legal adviser found some more errors and that there are a number of grammatical and punctuation errors, we are left with the suspicion that the draft guidance might still be full of mistakes. That is concerning, given that it is the Executive's second attempt. Rather than raising the matter informally, can we point out to the lead committee that there are still errors in the second version? In particular, there is an amusing one about

“Sending children to obtain alcohol or young persons”.

The Convener: Yes. We are not clear about what that would entail.

Mr Maxwell: I think I know what it means, but it does not say that.

The Convener: We think that it means “sending a child or young person to obtain alcohol.”

Mr Maxwell: Yes.

The Convener: Can we send the letter, then? Sorry—we are just reporting, are we? That is all we have got time for.

Ruth Cooper (Clerk): For clarification, do you want us to draw the matter to the attention of the lead committee?

Mr Maxwell: Yes—we should do that.

The Convener: We will also write to the Executive.

Mr Maxwell: We should mention the errors and our concern that, given that it is a thick document, it might contain other, more substantive errors.

Instruments Subject to Annulment

Food Hygiene (Scotland) Amendment Regulations 2007 (SSI 2007/11)

09:41

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

Members indicated agreement.

Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2007 (SSI 2007/13)

The Convener: Members will note that this order replaces the Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2006 (SSI 2006/602), which we considered at a previous meeting. The Executive agreed that that order was defectively drafted. The order generally prohibits fishing with more than one trawl, but it allows the use of two trawls in certain specified circumstances. A few points arise, which members will see in the legal brief.

First, are members content to ask the Executive to confirm that the order will be made available free of charge, in the normal way, to recipients of the defective order? We should also ask why the order does not bear an italic headnote to that effect.

Members indicated agreement.

The Convener: Secondly, we should ask why the explanatory note does not make it clear that the order replaces an order that was defectively drafted. That is important.

Thirdly, we should ask the Executive to explain the purpose of article 3(a), given that the Prohibition of Fishing with Multiple Trawls (No 2) (Scotland) Amendment Order 2003 (SSI 2003/166) was revoked by SSI 2006/602. Also, SSI 2006/602 will come into force at the same time as SSI 2007/13. The point is not in the legal brief, but our adviser says that it would be better for SSI 2007/13 to come into force the day before.

Mr Maxwell: So SSI 2007/13 would come into force the day before SSI 2006/602. Is that right?

The Convener: Yes. That would be the best way to do it. We could ask about that.

Margaret Macdonald: Strictly speaking, they should not come into force at the same time. If they do, what effect will that have on the revocation?

The Convener: We will ask why SSI 2007/13 will not come into force the day before SSI 2006/602.

Members indicated agreement.

The Convener: The final point is that we should ask the Executive to explain the drafting of new article 3(2) and, in particular, whether “or” rather than “and” should have been used at the end of article 3(2)(c)(iii).

Do members have any other points?

Mr Macintosh: As with several of the instruments on the agenda, there are queries about accuracy and errors have crept in. However, I am glad that the Executive is listening to the committee and amending instruments in line with our suggestions. It has done so in relation to all the instruments that we are considering today.

The Convener: Absolutely.

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2007 (SSI 2007/14)

09:45

The Convener: The regulations provide that they may be applied retrospectively, but that does not appear to be authorised under the parent act—the Legal Aid (Scotland) Act 1986. We have raised the issue of retrospection with the Executive on a number of occasions. Do members wish to raise it again or should we let the matter rest? I think that we should raise it again.

Mr Maxwell: I agree. The point is still valid. Even if it feels as though we are hitting our heads against a brick wall, it is still worth raising the issue.

I have another point on the regulations. The legal brief, which I am sure is correct, states:

“We observe that it is very unlikely that these Regulations which increase the fees payable to solicitors will be subject to legal challenge.”

They are unlikely to be subject to legal challenge by solicitors, but might they be challenged by other people who have a particular view of the legal profession? The legal profession is crawled over by a number of groups that are interested in it and have suspicions about it, so any mistakes in the regulations are worthy of correction. We should not just hope that nobody will ever challenge them. The regulations do something that we all expected to happen anyway.

The Convener: Shall we ask about that point as well?

Mr Macintosh: What Stewart Maxwell is saying is that, although it is unlikely that lawyers

themselves will question the fact that their fees will be retrospectively raised, that makes it more important for us to exercise our public duty.

The Convener: Okay.

The final point on the regulations is that they have now been amended a number of times. Are members happy to note that and raise it with the consolidation working group when it is established?

Members *indicated agreement.*

Antisocial Behaviour (Fixed Penalty Offence) (Prescribed Area) (Scotland) Regulations 2007 (SSI 2007/15)

The Convener: No substantive points arise on the regulations. There is a minor point that can be raised informally.

Tenements (Scotland) Act 2004 (Prescribed Risks) Order 2007 (SSI 2007/16)

The Convener: No points arise on the order.

Tweed Regulation Order 2007 (SSI2007/19)

The Convener: There are two questions about the order. We could ask the Executive to explain why it chose to use a combination of powers, not all of which are subject to procedure, and why it chose to disregard the requirement in article 36(1) of the enabling order—the Scotland Act 1998 (River Tweed) Order 2006 (SI 2006/2913)—regarding the citation of instruments that are made under that provision.

There is also a small point that can be made informally in a letter.

Mr Maxwell: In general, I do not think that the combination of powers that are subject to parliamentary procedure and powers that are not will create practical difficulties. It could do, but I doubt it. However, the point remains valid that it is not good practice to use in a single instrument a combination of powers that are not all subject to the same procedure. The exercise of the powers under articles 36, 53 and 68 of the enabling order is not subject to parliamentary procedure so we can do nothing about them. That seems odd, given that we could challenge other powers. There might not be practical difficulties, but the approach is odd and we should raise it with the Executive. It is not good practice.

The Convener: It is not.

Instruments Not Laid Before the Parliament

Tenements (Scotland) Act 2004 (Commencement No 2) Order 2007 (SSI 2007/17)

09:48

The Convener: No points arise on the order. Do members have any other points?

Mr Maxwell: I have a general point, which I should probably have raised under agenda item 1. I apologise for forgetting to raise it then.

In the case of the delegated powers memorandum that we discussed under item 1, the Executive changed the original rather than introducing a replacement. I can see the merit of taking that approach in that case because the original DPM was below standard, but I wonder whether there is a third way. The Executive could take the original and highlight in some way the new bits and the changes that have been made. If the Executive redoes the original, it should at least point out where the changes are, if it does not provide a new, second, supplementary memorandum.

It is not entirely helpful to be given simply a replacement DPM because, unless you read both documents side by side, you cannot tell what changes have been made.

The Convener: I think that we can raise that point in a general letter. Do you agree, Ken?

Mr Macintosh: Yes, and it is fantastic to hear Stewart Maxwell talking about a third way.

Mr Maxwell: As soon as the words were out of my mouth, I regretted it.

The Convener: I welcome Adam Ingram to the meeting. I am sorry, Adam: I have already given your apologies, because we thought that you were not coming.

Mr Adam Ingram (South of Scotland) (SNP): That is all right.

The Convener: The committee will next meet on Tuesday 6 February. Members will be pleased to learn that we will discuss what I hope will be the full draft—or nearly the full draft—of our inquiry report.

Meeting closed at 09:50.

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