

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 September 2007

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

3rd Meeting 2007, Session 3

CONVENER

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

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)

Helen Eadie (Dunfermline East) (Lab)

*Ian McKee (Lothians) (SNP)

*John Park (Mid Scotland and Fife) (Lab)

*Dr Richard Simpson (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)

Richard Baker (North East Scotland) (Lab)

Christopher Harvie (Mid Scotland and Fife) (SNP)

Margaret Smith (Edinburgh West) (LD)

*attended

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament Subordinate Legislation Committee

Tuesday 4 September 2007

[THE CONVENER *opened the meeting at 14:15*]

Interests

The Convener (Jamie Stone): I welcome you all to the third meeting of the Subordinate Legislation Committee this session. In particular, I welcome our two new members, John Park and Dr Richard Simpson. I also welcome our legal team, including those who are sitting at the side of the committee room—they are watching what happens as there will sometimes be substitutions of personnel at the committee table. We have received apologies from Helen Eadie. I ask everyone to turn off their mobile phones and pagers.

We will be considering a number of Scottish statutory instruments subject to the negative procedure that have breached the 21-day rule, as you can see from your papers. By that I mean that they have come into force within 21 days of being laid. However, that is not unusual for the end of a recess.

Gil Paterson (West of Scotland) (SNP): Convener, we should hear the declarations of interests from the new members of the committee.

The Convener: Indeed. Thank you for reminding me of that. Do the new members wish to declare anything before the committee?

John Park (Mid Scotland and Fife) (Lab): I have nothing to declare other than what is already listed on the Parliament's website.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): I have no interests additional to those that are presently given on the website.

Draft Instruments Subject to Approval

Provision of School Lunches (Disapplication of the Requirement to Charge) (Scotland) Order 2007 (draft)

14:17

The Convener: I refer members to the legal brief, and I propose that we agree to put to the Executive the questions that are listed in the summary of recommendations.

Dr Simpson: We do not want to get into the situation where the pupils pay the charge, which is then paid back. I realise that that administrative solution might make the measures more competent—or at least let them sit more easily with the committee. However, if we can possibly avoid creating such administration and bureaucracy, we should. I am referring to paragraphs 19 and 20 of the legal brief which suggests payment and repayment as a way around the difficulty. That seems problematic, and we should avoid it if possible.

Ian McKee (Lothians) (SNP): I back what Richard Simpson said. Levying a charge and then reimbursing it is not the same as giving free school meals. Apart from anything else, there could well be delays before the reimbursement of the charge that is levied. That would be a hindrance to pupils in families who are in poverty and who find it difficult to raise cash. Secondly, a “purely nominal charge” is still a charge. Even having read the legal brief, I think that there is no way other than through the draft order to allow for free school meals.

The Convener: We will await the answers to our questions next week. That will be interesting.

Both Dr Simpson and Ian McKee are straying into the subject committee's remit. I appreciate the points that you are making, but I imagine that your colleagues on the appropriate committees can raise them there.

Ian McKee: I would say—without straying into the remit of the subject committee—that the question that we must ask is whether free school meals could be given by the local authority without the order. I would argue that they could not. If a charge is made, the meal is not free.

Jackson Carlaw (West of Scotland) (Con): I am unclear about whether the legal advice implies that, given that there is an alternative route, there is an obligation to follow it. Is that the implication, or is the Executive perfectly able to pose another solution—notwithstanding that alternative route, which might be competent under the parent act?

The Convener: All those points will become much clearer when we see the Executive's responses next week. The work on that lies before us next week, rather than today.

Ian McKee: I am concerned that we are seeking a response to a question that I do not think needs to be put—although I might be in the minority on that. I do not think that there are any ways of allowing local authorities to give free school meals other than through the order. I do not think that charging pupils and then reimbursing them means free meals.

The Convener: We have our legal advice before us.

Gillian Baxendine (Clerk): The question is whether alternative methods were considered—we are not flagging up the particular methods. The Executive might come back to us and say, "This is the only way of doing it," which would be a valid response.

The Convener: There is some likelihood that the Executive will say that.

Do we agree to put the questions that are listed in the summary of recommendations?

Members indicated agreement.

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2007 (draft)

The committee agreed to raise minor points on the instrument.

The Convener: The minor points on the order will be raised with the Executive by the clerks, if I am right. They will not necessarily receive a response. It is more like giving the Executive a prod.

Housing Grants (Assessment of Contributions) (Scotland) Amendment Regulations 2007 (draft)

Licensing (Mandatory Conditions) (Scotland) Regulations 2007 (draft)

The committee agreed that no points arose on the instruments.

Instruments Subject to Annulment

Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007 (SSI 2007/336)

14:22

The Convener: Are members content to ask the Executive to explain why the conditions that are specified in paragraphs 2 and 6 of the schedule to the regulations appear to confer a power on licensing boards to amend, in part, the scope of those conditions? Do you wish to comment on the view that those provisions therefore contain an unauthorised sub-delegation of a power? The matter is referred to in paragraph 52 of the legal brief, where the relevant wording is shown in bold type. The picture is hazy to say the least.

Dr Simpson: There are two points, one of which is within our remit, and one of which strays from it, strictly speaking. However, they are related. The main point in the legal brief concerns the sub-delegation of a power that should properly remain with the minister. The question is whether the minister has the power to sub-delegate in this instance.

The second point is that the suggestion for how to proceed is a recipe for chaos. Through what is perhaps an inappropriately sub-delegated power, licensing boards are to be allowed to decide when the personal licence holder must be on the premises. That could vary, so enforcement will be extremely difficult for the police. There is a practical issue there. I appreciate that the matter is more properly for the lead committee. Nevertheless, if the sub-delegation is inappropriate, we could, through asking the Executive to think again about the regulations, prevent the chaos to which I referred.

The Convener: The sub-delegation seems to be inappropriate with respect to the parent act. I suspect that it was inadvertent—I would be surprised if ministers were seeking to sub-delegate the power. However, we will await the Executive's response. It is an important point. I take it that members are content to raise the matter.

Members indicated agreement.

Bovine Products (Restriction on Placing on the Market) (Scotland) (No 2) Amendment Regulations 2007 (SSI 2007/338)

The Convener: This is the first instrument that we will consider today that breaches the 21-day rule.

The European Commission decision that the amending regulations seek to implement was issued by the European Commission and published on 14 June 2007. It relates to a ban on the use of certain products for public health reasons and the Executive introduced the Scottish statutory instrument as soon as possible. Members may contradict me, but the breach seems to be perfectly reasonable.

Members indicated agreement.

The Convener: Thank you. Members are content with the explanation for the breach of the 21-day rule. Are you also content that our officials should raise a couple of minor points with the Executive?

Members indicated agreement.

Transmissible Spongiform Encephalopathies (Scotland) Amendment Regulations 2007 (SSI 2007/357)

The Convener: The regulations also breach the 21-day rule. In this case, the amending instrument gives effect to a European regulation that came into force on 1 July 2007. Are members content with the Executive's explanation for the breach of the 21-day rule and that we should raise the minor points with the Executive?

Members indicated agreement.

European Communities (Lawyer's Practice) (Scotland) Amendment Regulations 2007 (SSI 2007/358)

The Convener: If members are content, we will ask the Executive to explain why the regulations, which are due to come into force on 25 September 2007, were not laid earlier, given that they implement European Council directive 2006/100/EC, which member states were to implement by 1 January 2007. We will also ask for a reason for the long delay between the regulations being made on 16 July 2007 and being laid before the Parliament on 1 August 2007. So there are two delays to ask about. Are there any comments?

Dr Simpson: I understand from our pre-meeting briefing that this situation is not particularly unusual in respect of EC regulations and consequent changes required to our subordinate legislation. When we ask the Executive for an explanation, can we also ask whether the problem is perennial and, if it is, why, so that we can avoid it in future?

The Convener: We cannot predict the Executive's answer, but as we heard in the pre-meeting briefing, it could have something to do with co-ordination among Scotland, England and

Wales. We will wait and see what comes back from the Executive.

Are members also content to raise a minor point with the Executive?

Members indicated agreement.

European Communities (Services of Lawyers) Amendment (Scotland) Order 2007 (SSI 2007/359)

The Convener: If members are content, we will ask the Executive to explain why the order was not made earlier. The same point arises as for SSI 2007/358, as this order also implements directive 2006/100/EC, which member states should have implemented by 1 January 2007, which was the date of accession of Bulgaria and Romania. The order is due to come into force on 25 September 2007.

Are members also content to raise the two minor points informally with the Executive?

Members indicated agreement.

Food (Suspension of the Use of E 128 Red 2G as Food Colour) (Scotland) Regulations 2007 (SSI 2007/363)

The Convener: The regulations are a nice example of the extraordinary diversity of the matters that come before the committee.

The regulations relate to emergency measures suspending the use of E128 Red 2G as food colour. Are members satisfied with the explanation offered by the Executive for the breach of the 21-day rule, and content therefore with the regulations? Are you also content to raise two minor points with the Executive?

Dr Simpson: What are the consequences of regulations that have come in as rapidly as these have done for producers and retailers in relation to goods that were produced prior to the date on which the new regulations come into force? Do the products have to be withdrawn from the shelves? I am sorry; I should have asked those questions at the pre-meeting briefing.

The Convener: The order contains transitional provisions that will cater for that. I would have thought that the subject committee would address that.

Gillian Baxendine: It could do.

The Convener: That is a good point well made, Richard.

Dr Simpson: There was a previous case where an additive was banned and there were problems with it still being found because it was being imported. It was being produced overseas, but a

United Kingdom wholesaler and retailer were using materials from elsewhere.

Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2007 (SSI 2007/375)

14:30

The Convener: Our summary of recommendations lists the detailed questions that we want to ask the Executive. Members have that document before them. It is a public document so there is no need to read out the questions; that will just take a long time. Are we content to ask the Executive to explain the four points that have arisen?

Members indicated agreement.

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) Regulations 2007 (SSI 2007/376)

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No 2) Regulations 2007 (SSI 2007/377)

The Convener: Are members content with the reason for both sets of regulations breaching the 21-day rule? Are you also content that we should ask the Executive to explain the two points listed in the summary of recommendations?

Members indicated agreement.

Foot-and-Mouth Disease (Export Restrictions) (Scotland) Regulations 2007 (SSI 2007/386)

The Convener: I am sure that members are content with the reasons for the breach of the 21-day rule. Are you also content to ask the Executive the three questions listed in our summary of recommendations?

Members indicated agreement.

Scottish Local Government Elections Amendment Order 2007 (SSI 2007/379)

The Convener: The order allows the Electoral Commission to access the electronic ballot information. The 21-day rule has been breached to allow prompt completion of the report on the May 2007 local government election. The Electoral Commission would otherwise have had to wait until 21 days after the end of the parliamentary recess. The breach seems to be perfectly reasonable. Members might disagree, but there was always an assumption that there would be an inquiry and that the issue had to be looked at urgently given the possible democratic

consequences. Are members content with the explanation for why the order is being processed as fast as it is?

Members indicated agreement.

The Convener: Can we raise the minor points with the Executive?

Members indicated agreement.

Reciprocal Enforcement of Maintenance Orders (United States of America) (Scotland) Order 2007 (SSI 2007/354)

Recovery of Maintenance (United States of America) (Scotland) Order 2007 (SSI 2007/355)

The committee agreed to raise minor points on the instruments.

Nutrition and Health Claims (Scotland) Regulations 2007 (SSI 2007/383)

Scotland Act 1998 (Cross-Border Public Authorities) (Traffic Commissioner for the Scottish Traffic Area) Order 2007 (SI 2007/2139)

The committee agreed that no points arose on the instruments.

Instruments Not Laid Before the Parliament

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Recognition and Enforcement of Judgments in Civil and Commercial Matters) 2007 (SSI 2007/350)

14:33

The Convener: I point out for the record that sederunt is to do with civil matters, which is something that I learned today. Are members content to ask the Lord President's office to explain why, in relation to articles 2(2) and 2(3), paragraph 1A of schedule 2 to the European Communities Act 1972 has not been cited as an enabling power?

Members indicated agreement.

Dr Simpson: I thought that we had already asked that and that the Executive had batted the question away. Are we going to ask again?

The Convener: That is the implication.

Dr Simpson: Fair enough.

The Convener: Belt and braces, Richard, belt and braces.

Again, can we raise the minor points with the Executive?

Members indicated agreement.

Act of Sederunt (Sheriff Court European Enforcement Order Rules) Amendment (Extension to Denmark) 2007 (SSI 2007/351)

The Convener: Are members content to ask the Lord President's office why, in relation to article 2(2), paragraph 1A of schedule 2 to the European Communities Act 1972 has not been cited as an enabling power? Are members also content to raise minor points on the instrument?

Members indicated agreement.

Act of Sederunt (Rules of the Court of Session Amendment No 7) (Devolution Issues) 2007 (SSI 2007/360)

The Convener: Are members content to ask the Lord President's office, first, which paragraph (c) is being referred to in article 2(2)(b), given that the phrase "paragraph (c)" occurs twice in rule 25A.1 of the rules of the Court of Session, and why that was not made clearer, and, secondly, why the direction in article 2(11)(b) is that the new form title "becomes" the new wording, rather than being

substituted for the old title? Are members also content to raise minor points informally on the instrument?

Members indicated agreement.

Act of Adjournal (Criminal Procedure Rules Amendment No 4) (Devolution Issues) 2007 (SSI 2007/361)

The Convener: Are members content to ask the Lord President's office, first, which paragraph (c) is being referred to in article 2(2)(b), given that the phrase "paragraph (c)" occurs twice in rule 40.1, and why that was not made clearer, and, secondly, why the direction in article 2(12)(h) is that the new form title "becomes" the new wording, rather than being substituted for the old title?

Members indicated agreement.

The Convener: I am sorry to sound so formal.

Act of Sederunt (Proceedings for Determination of Devolution Issues Rules) Amendment 2007 (SSI 2007/362)

The Convener: Are members content to raise with the Lord President's office the matters that are listed in the summary of recommendations, as well as minor points on the instrument?

Members indicated agreement.

Disease Control (Interim Measures) (Scotland) Amendment Order 2007 (SSI 2007/387)

The Convener: This is quite important. During our informal discussion before the meeting started we said that it seems strange that two procedures are being combined in the way that is described in our summary of recommendations.

Dr Simpson: Given that the Parliament determined the procedure to which the enabling power should be subject, it is unacceptable that an approach that involves no parliamentary procedure should take precedence over the negative procedure. That is an extremely dangerous precedent. If an order must be made by exercising enabling powers that are subject to two procedures—the approach does not seem sensible but I gather that it has been taken in the past—the superior procedure and not the inferior procedure should take precedence. We should ask the Executive to establish and adhere to that principle.

The Convener: Yes. The summary of recommendations asks us to consider why the Executive purports to

"make the instrument without any Parliamentary scrutiny".

It would be unfortunate if that were the case—I

hope it is not. Do members agree to make those points to the Executive? We will have to do our reading carefully before our next meeting.

Members *indicated agreement.*

**Protection of Vulnerable Groups
(Scotland) Act 2007 (Commencement No
1) Order 2007 (SSI 2007/385)**

The committee agreed to raise minor points on the instrument.

**Adult Support and Protection (Scotland)
Act 2007 (Commencement No 1,
Transitional Provision and Savings) Order
2007 (SSI 2007/334)**

**Legal Profession and Legal Aid (Scotland)
Act 2007 (Commencement No 3) Order
2007 (SSI 2007/335)**

**Act of Sederunt (Ordinary Cause,
Summary Application, Summary Cause
and Small Claim Rules) Amendment
(Equality Act (Sexual Orientation)
Regulations 2007) 2007 (SSI 2007/339)**

**Schools (Health Promotion and Nutrition)
(Scotland) Act 2007 (Commencement No
1) Order 2007 (SSI 2007/372)**

**Prostitution (Public Places) (Scotland) Act
2007 (Commencement) Order 2007
(SSI 2007/382)**

The committee agreed that no points arose on the instruments.

The Convener: Thank you for your contributions. I look forward to seeing you at our next meeting, which will take place next Tuesday at 2.15 pm. We will all study our legal brief doubly hard before then.

Meeting closed at 14:39.

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