

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 22 April 2008

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

13th Meeting 2008, Session 3

CONVENER

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

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)

Jackson Carlaw (West of Scotland) (Con)

*Helen Eadie (Dunfermline East) (Lab)

Ian McKee (Lothians) (SNP)

John Park (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)

Christopher Harvie (Mid Scotland and Fife) (SNP)

Elaine Smith (Coatbridge and Chryston) (Lab)

Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Nick Brown (Scottish Government Public Health and Wellbeing Directorate)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 22 April 2008

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

Delegated Powers Scrutiny

Creative Scotland Bill: Stage 1

The Deputy Convener (Gil Paterson): I welcome everyone to the meeting. I ask members to turn off their mobile phones. I have received apologies from Jamie Stone, Ian McKee, John Park and Jackson Carlaw.

Agenda item 1 is delegated powers scrutiny of the Creative Scotland Bill at stage 1. The committee considered the bill at its meeting on 25 March and agreed to raise several issues with the Scottish Government. Members have a copy of the response. Today will be our final consideration of the bill before we report to the lead committee.

In light of the Government's response, are members content with the powers to issue directions and guidance that are contained in section 5, "Directions and guidance"?

Members indicated agreement.

The Deputy Convener: Are members content to draw to the attention of the lead committee the following matters: first, that there may be scope for doubt as to the edges of the expression "artistic or cultural judgement" in section 5(2) and, consequently, as to what is excluded from the direction-making power; and, secondly, that there is no provision in section 5 to require the Scottish ministers to consult with creative Scotland before issuing directions to it?

Members indicated agreement.

The Deputy Convener: Are members content to recommend that the ancillary powers in section 9, "Ancillary provision", are acceptable in principle?

Members indicated agreement.

The Deputy Convener: Are members content to recommend that the draft affirmative procedure should apply in circumstances in which the ancillary provisions modify any enactment, as well as when there is textual amendment of any act?

Members indicated agreement.

The Deputy Convener: Are members content to reject the suggestion in the final paragraph of the Government's response in relation to section 9, that the negative procedure could apply to all exercises of the ancillary power in section 9(1)?

Members indicated agreement.

The Deputy Convener: Are members content to accept the commencement powers in section 10, "Short title, commencement and interpretation"?

Members indicated agreement.

The Deputy Convener: We turn to paragraph 2 of schedule 1, "Membership of Creative Scotland". In relation to the powers in paragraphs 2(2) and 2(3) and in light of the Government's response, are members content that the delegated powers are acceptable in principle and, in the circumstances, that the approach of permitting the limited textual amendment of paragraph 2(1)(b) of schedule 1 is acceptable; and that, in the circumstances, it is appropriate for the delegated powers to be subject to the negative procedure?

Members indicated agreement.

The Deputy Convener: Are members content to draw to the attention of the lead committee the delegated powers in paragraphs 2(2) and 2(3) of schedule 1?

Members indicated agreement.

The Deputy Convener: Are members content to indicate to the lead committee that, although in principle the committee considers those delegated powers to be acceptable, the powers as drafted permit the substitution of any minimum or maximum number of members of the authority, and that the committee considers that, to ensure that the power is drawn only so far as is warranted, consideration be given to its amendment so as to impose maxima and minima of membership?

Members indicated agreement.

The Deputy Convener: That concludes the committee's consideration of the bill.

Glasgow Commonwealth Games Bill: as amended at Stage 2

The Deputy Convener: Agenda item 2 is the committee's first consideration of the delegated powers in the Glasgow Commonwealth Games Bill as amended at stage 2. I welcome the Government officials who are here to respond to the committee's questions. We have Nick Brown, the bill team leader; David Thompson, from the bill team; and Beth Elliot from the Scottish Government legal directorate.

Section 1(2) is on games locations. I welcome the amendments that the Government has made to the section. Are members content with the delegated power, which is now restricted to specifying additional locations that are to be used in connection with the games, and that the power is subject to the negative procedure?

Members *indicated agreement.*

The Deputy Convener: Members have several questions for the officials on section 2, "Ban on outdoor trading in the vicinity of Games locations". I ask Richard Baker to kick off.

Richard Baker (North East Scotland) (Lab): What is the Government's view of the committee's proposal that the powers in section 2(3) should be subject to affirmative procedure unless urgent circumstances exist, in which case the negative procedure should apply?

Nick Brown (Scottish Government Public Health and Wellbeing Directorate): When the bill was first put before the Parliament, the thinking was that all the regulations should be made by negative resolution. The Subordinate Legislation Committee felt that that was inappropriate and the Government agreed. The regulations are important, so the Government considered how best to bring the recommendation into effect. We saw two principal reasons why changes might be required to the regulations. The first is that there could be material changes to the programme near the date of the games—one of the venues or the route of the marathon might need to be changed. A minor change of the regulations would be required to incorporate such late changes. The second possibility is that an unexpected loophole could be exploited by traders and advertisers. We would then need to introduce a change to the regulations quickly.

The open procedure that the committee suggested, in which we would apply a kind of urgency test to decide whether regulations would be subject to affirmative or negative resolution, would introduce an element of uncertainty. The suggestion would introduce an extra hurdle to be overcome at a time when we might need to act quickly. It could also leave open to challenge regulations that were made under the urgent procedures. Such uncertainty would not be helpful in introducing criminal offences. We would want people to know exactly where they stood. The purpose of the regulations is to deter wrongdoing, rather than to prosecute for wrongdoing. To that end, we want people to know exactly where they stand.

Richard Baker: The committee proposed what it perceived to be a workable alternative. Why is it considered appropriate that any subsequent exercise of the power should be subject to

negative rather than affirmative procedure, without any restriction on its use, given that the circumstances in which the Government may consider it necessary to make subsequent use of the power to make further substantive provision after the first trading regulations have been made are readily foreseeable? For example, additional circumstances may arise in which there is no accompanying urgency to bring the measures into force, or there may be drafting errors.

Nick Brown: The Government's clear intention is that the first operation of the power to make the regulations would be the substantive power. The minister put that on record at stage 2 and during the stage 1 debate. We do not envisage that a second substantive set of regulations would be needed, but if it were, it would be likely to be needed quickly in a situation where making the case for the regulations to be made urgently by negative resolution would distract from actually achieving them rapidly. As I said, it would also be open to someone whose behaviour was caught by the regulations to challenge the legitimacy of the decision to make them urgently under the affirmative procedure because "urgent" is a subjective term.

Helen Eadie (Dunfermline East) (Lab): What justification does the Government give for restricting the application of the provision for consultation in section 44 and public notice in section 46 to the first trading and advertising regulations, when substantive provision can be made by subsequent exercise of the power?

Nick Brown: I mentioned that we do not envisage having to make a second substantive set of regulations. Sections 44 and 46 of the bill require an outline of the intention to be made public two years in advance of the regulations coming into effect and the detailed proposals to be published six months beforehand. If that requirement was to be applied to subsequent regulations, it would effectively mean that new regulations could not be considered any later than two years before the games. It is simply about practicalities. We cannot give two years' or six months' notice if we do not have two years or six months in which to give it. It is not the intention to not take into consideration the views of the public. There would have been consultation during the first, substantive iteration of the regulations and, presumably, those views would still stand. If it was practical to seek further views, that would be the intention, but to commit to and engage in a formal consultation process within a fixed period of, for example, 12 weeks, would not be practical given the nature of the changes that we might have to make.

Helen Eadie: That answers my final question.

The Deputy Convener: Does the committee wish to press the Government for a commitment to lodge an amendment at stage 3 to the effect that the parliamentary procedure to apply to the trading regulations, the advertising regulations and the regulations to be made under section 19 relating to use of the internet will be subject to the affirmative procedure unless there are urgent circumstances, in which case the regulations may be made subject to negative procedure?

Richard Baker: I am minded to do that, convener. The point of the debate seems to be about how we can define practically what is urgent and what is not and what process would be needed to arrive at a simple definition that would be clearly understood. By lodging that amendment, we could at least have that debate.

Helen Eadie: I agree. It would encourage the Government to reflect on the point and, if it does not lodge the amendment, we might decide to lodge one.

The Deputy Convener: Yes. I think that we have been asked to sacrifice scrutiny. Do the officials have any further comments to make before the committee comes to a conclusion?

Nick Brown: If that was the committee's conclusion, we would have to go back and consider it.

14:30

Helen Eadie: Is this the appropriate time to press the point or will we return to the discussion later in the meeting?

The Deputy Convener: We should discuss it now. I am really in members' hands.

Helen Eadie: We should ask the clerks to assist us in preparing an appropriate amendment. Although we have heard what the officials have said, committee members have some residual concerns. If circumstances change, we can always withdraw the amendment.

The Deputy Convener: The committee might wish to delegate to the convener the power to lodge amendments and take it from there. That would be the way forward.

Helen Eadie: I move that we do so, convener.

The Deputy Convener: Okay.

The committee has the same concerns and questions about section 10, "Ban on advertising in the vicinity of Games locations", but they relate to the procedure to be applied to the delegated power to make the advertising regulations and the application of the requirements for consultation and public notice. Could the officials respond to that?

Nick Brown: The response is the same as that which I gave earlier. Any amendments that we envisage being made would either be minor, such as on the vicinity of games areas, or in response to unforeseen and urgent circumstances.

The Deputy Convener: Thank you. We are in the same position as we were in earlier, so I recommend that the committee might wish to delegate the drafting and lodging of amendments to the convener. Do members agree to that?

Members indicated agreement.

The Deputy Convener: The committee has the same concerns and questions about section 19, "Use of internet etc", as we did about the earlier sections. Our concerns relate to the procedure to be applied to the delegated power to make internet ticket touting regulations. I invite the officials to comment on those concerns.

Nick Brown: The internet is developing very fast. I am not sure that we could have envisaged six years ago that the internet would look as it does today. It is therefore sensible to make internet regulations as close to the time of the event as possible.

The Deputy Convener: Thank you. We are in the selfsame position as previously. I am sure that regulations could be laid under the affirmative procedure in June 2014. We are at an impasse again, although I thank you for your contributions so far. Again, my recommendation is that the committee might wish to delegate to the convener the drafting and lodging of committee amendments. Are members content with that?

Members indicated agreement.

The Deputy Convener: Are members content with the power in section 22(2), "Enforcement officers", which was subject to a technical amendment at stage 2?

Members indicated agreement.

The Deputy Convener: Are members content with the power in section 31, "Compensation and recovery of costs", which was subject to a technical amendment at stage 2?

Members indicated agreement.

The Deputy Convener: On section 33A, "Action under sections 23 to 30: procedure", I welcome the replacement of the power that was referred to in section 21 with the new power in section 33A, which is restricted to specifying further procedure. Are members content with the amended power and that it is subject to negative procedure?

Members indicated agreement.

The Deputy Convener: On section 38, "Games traffic regulation orders", are members content

with new section 38(4), which is a further modification of the power conferred upon local authorities under section 14 of the Road Traffic Regulation Act 1984 to make games traffic regulation orders?

Members *indicated agreement.*

The Deputy Convener: On the interpretation of “games ticket” under section 48, are members content with the delegation of the power to specify additional events connected with the games as games events for the purpose of the ticket touting offence and that the power is subject to negative procedure?

Members *indicated agreement.*

The Deputy Convener: That concludes the committee’s consideration of the bill today. We will consider it again next week when we consider the Government’s response to the points that have been raised.

I thank the officials for coming along to give us the Government’s point of view. We will remain in dialogue with you, so perhaps, even at a late stage, we might come to some understanding that enables us to work together a bit better on the bill.

Scottish Government Responses

14:36

The Deputy Convener: After our meeting on 15 April, we wrote to the Government about two SSIs. Members have seen the responses.

Plastic Materials and Articles in Contact with Food (Scotland) Regulations 2008 (SSI 2008/127)

The Deputy Convener: Are members content to draw the regulations to the attention of the lead committee and Parliament on the grounds that are set out in the summary of recommendations?

Members *indicated agreement.*

The Deputy Convener: I invite members to note that the Government has undertaken to correct the defects in the regulations by way of amending regulations.

Forestry Challenge Funds (Scotland) Regulations 2008 (SSI 2008/135)

The Deputy Convener: Are members content to draw the regulations to the attention of the lead committee and Parliament on the grounds that are set out in the summary of recommendations?

Members *indicated agreement.*

Draft Instruments Subject to Approval

**Transport and Works (Scotland) Act 2007
(Access to Land by the Scottish Ministers)
Order 2008 (Draft)**

**Transport and Works (Scotland) Act 2007
(Access to Land on Application) Order
2008 (Draft)**

14:38

The committee agreed that no points arose on the instruments.

Instruments Subject to Annulment

**Specified Products from China
(Restriction on First Placing on the
Market) (Scotland) Regulations 2008 (SSI
2008/148)**

14:38

The Deputy Convener: Are members content with the explanation that the Scottish Government has given for breaching the 21-day rule and content to ask it the two questions that are set out in the summary of recommendations?

Members *indicated agreement.*

**Sea Fishing (Enforcement of Community
Quota and Third Country Fishing
Measures and Restriction on Days at Sea)
(Scotland) Order 2008 (SSI 2008/151)**

The Deputy Convener: Are members content with the explanation that the Scottish Government has given for breaching the 21-day rule and content to ask it the two questions that are set out in the summary of recommendations?

Members *indicated agreement.*

**Plant Health Fees (Scotland) Regulations
2008 (SSI 2008/153)**

The Deputy Convener: Are members content to ask the Scottish Government the question in the summary of recommendations?

Members *indicated agreement.*

**Smoke Control Areas (Authorised Fuels)
(Scotland) Regulations 2008 (SSI 2008/154)**

The Deputy Convener: Are members content to ask the Scottish Government the question in the summary of recommendations?

Members *indicated agreement.*

**Animals and Animal Products (Import and
Export) (Scotland) Amendment
Regulations 2008 (SSI 2008/155)**

The Deputy Convener: Are members content to ask the Scottish Government the question in the summary of recommendations?

Members *indicated agreement.*

**Smoke Control Areas (Exempt Fireplaces)
(Scotland) Order 2008 (SSI 2008/157)**

The Deputy Convener: Are members content to ask the Scottish Government the question in the summary of recommendations?

Members *indicated agreement.*

**National Health Service (Travelling
Expenses and Remission of Charges)
(Scotland) Amendment Regulations 2008
(SSI 2008/147)**

**Sea Fishing (Control Procedures for
Herring, Mackerel and Horse Mackerel)
(Scotland) Amendment Order 2008
(SSI 2008/156)**

**Scotland Act 1998 (Agency Arrangements)
(Specification) Order 2008 (SI 2008/1035)**

The committee agreed that no points arose on the instruments.

**Instruments Not Laid Before
the Parliament**

**Tribunals, Courts and Enforcement Act
2007 (Commencement) (Scotland) Order
2008 (SSI 2008/150)**

14:42

The Deputy Convener: Are members content to ask the Scottish Government the questions that are set out in the summary of recommendations?

Members *indicated agreement.*

**Management of Offenders etc (Scotland)
Act 2005 (Commencement No 5) Order
2008 (SSI 2008/149)**

**Serious Crime Act 2007 (Commencement
No 1) (Scotland) Order 2008 (SSI 2008/152)**

The committee agreed that no points arose on the instruments.

The Deputy Convener: Members will note from the annex to the summary of recommendations that minor points that arise in relation to SSI 2008/127, SSI 2008/147, SSI 2008/148, SSI 2008/149, SSI 2008/151, SSI 2008/154, SSI 2008/155 and SSI 2008/156 will be raised with the Scottish Government informally. Are members content for us to proceed in that way?

Members *indicated agreement.*

Mainstreaming Equal Opportunities

14:43

The Deputy Convener: Members have a paper from the clerk for this agenda item. The convener of the Standards, Procedures and Public Appointments Committee has written to all committee conveners about mainstreaming equal opportunities in the work of parliamentary committees. The paper sets out our involvement in equalities issues, such as those that can arise under the European convention on human rights and Community law. We also scrutinise and report on drafting practice—for example, failure to use gender-neutral language in instruments.

The paper suggests that, because of the technical and constrained nature of our remit and the limited amount of public engagement that is appropriate to it, we have only limited scope for action in relation to equalities issues. I ask members whether a report on mainstreaming equalities once a session would be sufficient; whether it should be required under standing orders or should be voluntary; and whether they agree that it is unnecessary for the Subordinate Legislation Committee to report on mainstreaming equalities in this year's annual report.

14:45

Helen Eadie: I was content when I read that officials constantly monitor reports to ensure that all the language is gender neutral and takes into account all the other requirements that would come under the umbrella of equal opportunities. We do not need to do anything unusual. We should have an annual reporting mechanism rather than an on-going one, because it seems to be officials' practice anyway.

Richard Baker: Why would we not include anything in this year's annual report? Can we not say in the annual report that, as its response to the letter on mainstreaming equality, the committee has agreed to report in future?

The Deputy Convener: So we should make a reference to it.

Richard Baker: Yes, we should just say that we are going to do it. Otherwise, it might be that every other committee mentions it and we do not.

Helen Eadie: It seems to be part of the officials' culture anyway.

The Deputy Convener: Should the report be required under standing orders or should it be voluntary?

Richard Baker: Has the Equal Opportunities Committee said that it should be required under standing orders?

Gillian Baxendine (Clerk): It has made that suggestion; the Standards, Procedures and Public Appointments Committee favours a voluntary approach initially but would like other committees' views.

Richard Baker: A voluntary approach would be sensible.

Helen Eadie: That is what other committees have said.

The Deputy Convener: To summarise, once a session would be sufficient; the report would be contained in our annual report; and reporting would be voluntary.

Helen Eadie: We always have the option of reviewing that and, if it does not work, ensuring that reporting on equal opportunities becomes part of standing orders in due course.

The Deputy Convener: The intention is for the convener to write to the convener of the Standards, Procedures and Public Appointments Committee with this committee's views.

I thank everybody for attending.

Meeting closed at 14:47.

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