

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 12 May 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

16th Meeting 2009, Session 3

CONVENER

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

DEPUTY CONVENER

*Ilan McKee (Lothians) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)
*Malcolm Chisholm (Edinburgh North and Leith) (Lab)
*Bob Doris (Glasgow) (SNP)
*Helen Eadie (Dunfermline East) (Lab)
*Tom McCabe (Hamilton South) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Ross Finnie (West of Scotland) (LD)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Laurence Sullivan (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 12 May 2009

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

Schools (Consultation) (Scotland) Bill: Stage 1

The Deputy Convener (Ian McKee): I welcome members to the 16th meeting in 2009 of the Subordinate Legislation Committee. We have received apologies from Jamie Stone, which is why I am convening the meeting. I ask members and others present to turn off any mobile phones, BlackBerrys, et cetera.

Under agenda item 1, we are considering the delegated powers memorandum for the Schools (Consultation) (Scotland) Bill. I extend the committee's welcome to James Newman of the Government's bill team and to Laurence Sullivan, the senior principal legal officer. Thank you very much for coming, gentlemen.

The committee agreed to hold an evidence session to examine the delegated power, a commencement power, as set out in section 22(4) of the bill. In particular, the committee wished to explore whether the power could be used to amend other enactments and, if so, whether it is appropriate that the instrument is not subject to any procedure.

I invite members to put their questions.

Tom McCabe (Hamilton South) (Lab): We have received your response regarding section 22(4), but there is perhaps a need for some further clarification. You seem to think that the power will not be used to amend enactments, but the committee must consider how it could be used. Are you of the view that the power could be used to amend other enactments?

Laurence Sullivan (Scottish Government Legal Directorate): Yes, in theory, a commencement power of this nature could be used to amend other enactments. That is well precedented for commencement powers. However, we have no intention of using the power for that purpose—there is nothing in contemplation. It is a commencement power, so any transitional and saving provisions made in connection with it would be solely for the purpose of commencement of the bill. As the committee will have noticed—and quite unusually—we have

included substantial transitional and saving provisions in schedule 3 to the bill. Such provision is frequently made under an order-making power but, because the policy was well advanced, it has appeared in the bill itself, so Parliament will be able to engage fully with the transitional provisions.

None of the transitional or saving provisions in schedule 3 amends any enactments. If we had had any intention or need to amend any enactments under a commencement power, we would have put that in schedule 3.

Tom McCabe: Is there a case for clarifying that in the bill to give people the reassurance that they might need?

Laurence Sullivan: That is not something that we would put in the bill, because that would be saying that we are not going to do something, whereas a bill usually sets out the rights and duties that are to be adhered to. We would be happy to put it in a policy statement that we have no intention of using—and see no need to use—the commencement power for the purpose of amending any enactments.

The reason for still including such a transitional and saving power, even though we think that we have already scoped out all the transitionals that are required, is just in case anything crops up when the bill, if passed, is commenced. For example, one of the current proposals under the Education (Publication and Consultation etc) (Scotland) Regulations 1981 (SI 1981/1558) as amended, which the bill builds on and replaces, is on school commencement dates. As of now, councils have the power to change school commencement, if they so wish, from August to another time in the year. No council has ever done that or consulted on it, but the transitional power exists to cover a situation in which a council decides to do or consult on that.

The provisions in the bill will cover us just in case we need some transitional power if, say, the eventual act comes into force in December and a council has decided by that point to change its school commencement dates with effect from next January. It is a future-proofing power. All the transitional powers that we think we need to move from the old system to the new system are in schedule 3.

Tom McCabe: At face value, it sounds as if that provides reassurance. However, the committee receives its own legal advice, and I am sure that Government representatives would be quite happy to discuss the form of any reassurance with our legal representatives to ensure that it fits with the bill. You have spoken about a policy statement, but we would need to know that it could be founded on should someone decide, at some

future date, to take a different course of action with the power.

Laurence Sullivan: Although we have no intention of doing this, the power could be used to amend primary legislation. As regards saving and transitional provisions, it is usually not necessary directly to amend primary legislation. If anything, the effect of it might just be modified. Transitional or saving provisions are inherently temporary, so they would not be needed—it would not be usual or common directly to amend primary legislation under a transitional or saving power. The direct amendment of legislation suggests permanence; a saving or transitional provision moves from the old law to the new law and is inherently temporary in nature.

Regarding the generality of commencement powers, the power in section 22(4) could, in theory, be used to amend primary legislation—that is well preceded in normal commencement provisions—but in the context of the bill we see no need at all to do that.

Tom McCabe: If that is the case, should we not have some process around that to ensure that, if the power were used in that way at some point, there was a facility for parliamentary scrutiny?

Laurence Sullivan: I think that you are suggesting an amendment to limit the power of section 22(4). Any amendments to the bill are a matter for stage 2 consideration and for ministers. I cannot comment further on that.

The Deputy Convener: The power is not subject to any procedure, yet you have stated the possibility that it could be used to amend enactments. Do you not think that there might be some sort of procedure, negative or affirmative, to allow Parliament to be involved if an enactment was to be amended at some later date—even though you do not foresee it at the moment?

Laurence Sullivan: It is normal for commencement orders not to have any parliamentary procedure attached to them. Section 22 reflects the normal commencement power that appears in most bills. I am not sure whether the committee has a wider issue about the nature of commencement powers.

The Deputy Convener: Normally, a commencement power is just what it says it is: something fairly simply and straightforward. If it is possible to amend primary legislation through a provision, do you not think that that calls for a certain degree of parliamentary scrutiny?

Laurence Sullivan: It does not amend primary legislation in the same way as, for example, the power in section 20. The power in section 22 would amend or, more likely, modify the effect of primary legislation. If that was necessary, it would

be purely in the context of commencement and would not be for any wider purpose. Section 22(4) could not be used to amend any other bit of education legislation; any amendment, even if it was just in contemplation, would have to be sharply focused on the commencement of this bill and on the provision that is necessary for its commencement. The power goes no wider than that: it is not a wider ancillary power. As is normal, commencement orders frequently require saving, transitional or incidental provision. Even when they have that provision attached to them, it is normal and preceded for no parliamentary procedure to apply to such orders.

The Deputy Convener: I thank Mr Sullivan and Mr Newman for giving evidence. I can inform the witnesses and members that we will have one final consideration of the issue at a future meeting, and we will report prior to the lead committee's evidence session with the Cabinet Secretary for Education and Lifelong Learning on 3 June.

Instruments subject to Annulment

Adoption Support Services and Allowances (Scotland) Regulations 2009 (SSI 2009/152)

14:24

The Deputy Convener: Are we content to report that, although on initial consideration regulation 11 might appear to be an unusual or unexpected use of the powers conferred by section 71 of the Adoption and Children (Scotland) Act 2007, the position is satisfactorily explained and justified in the Government's response, such that, on this occasion, we are content to note the response as satisfactory and to report accordingly to the lead committee and Parliament?

Members indicated agreement.

Plant Health (Scotland) Amendment Order 2009 (SSI 2009/153)

The Deputy Convener: Are we content to report to the Parliament that the committee notes the explanation given by the Scottish Government for the failure to refer to wood and bark of the plants mentioned in item 1a, added by article 6(1)(a) of the order? Are we also content to note that the transposition of the European Union requirements appears to have been effected by a United Kingdom statutory instrument—the Plant Health (Forestry) (Amendment) Order 2009 (SI 2009/594)?

Members indicated agreement.

The Deputy Convener: In relation to item 7a, inserted by article 6(2)(a) of the order, are we content to report that the Government has admitted that the order is defectively drafted and has undertaken to correct it at the first appropriate opportunity?

Members indicated agreement.

Adoption Agencies (Scotland) Regulations 2009 (SSI 2009/154)

The Deputy Convener: Are we content to report the regulations to the lead committee and to the Parliament on the ground that we consider that due account should be had to the scheduling of related instruments to which reference is made, so as to avoid reference to provisions contained in a still-to-be-made instrument, when it is possible to do so, as a matter of good drafting practice?

Members indicated agreement.

The Deputy Convener: In view of what seems to be quite an important potential problem, whereby two bits of legislation could be so far removed from each other that we could consider an instrument under the negative procedure without our knowing quite what its effect will be, should we draw this matter to the attention of the Minister for Parliamentary Business for further consideration? It seems a bit strange that we have responsibility for considering the procedures that are being adopted without knowing exactly how they will be carried out before the end of the 40-day period that applies under the negative procedure. Does my suggestion sound reasonable?

Members indicated agreement.

Rural Development Contracts (Land Managers Options) (Scotland) Amendment Regulations 2009 (SSI 2009/155)

The Deputy Convener: Are we content to report the regulations to the lead committee and to the Parliament on the grounds set out in the summary of recommendations?

Members indicated agreement.

Act of Sederunt (Fees of Members of the Association of Commercial Attorneys in the Sheriff Court) 2009 (SSI 2009/162)

National Health Service (Appointment of Consultants) (Scotland) Regulations 2009 (SSI 2009/166)

Adoption and Children (Scotland) Act 2007 (Supervision Requirement Reports in Applications for Permanence Orders) Regulations 2009 (SSI 2009/169)

Applications to the Court of Session to Annul Convention Adoptions or Overseas Adoptions (Scotland) Regulations 2009 (SSI 2009/170)

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

**Act of Sederunt (Sections 25 to 29 of the
Law Reform (Miscellaneous Provisions)
(Scotland) Act 1990) (Association of
Commercial Attorneys) 2009
(SSI 2009/163)**

The Deputy Convener: The next meeting of the committee will be held on Tuesday 19 May at 2.15.

Meeting closed at 14:29.

14:27

The Deputy Convener: Are we content to draw the instrument to the attention of the Parliament on the ground that, in the citation of enabling powers in the preamble, there has been a drafting error, but not such as is considered to affect the validity or operation of the instrument?

Members *indicated agreement.*

**Fees in the Registers of Scotland
Amendment Order 2009 (SSI 2009/171)**

**Damages (Asbestos-related Conditions)
(Scotland) Act 2009 (Commencement)
Order 2009 (SSI 2009/172)**

The committee agreed that no points arose on the instruments.

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