

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 9 December 2003
(Morning)

Session 2

£5.00

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SUBORDINATE LEGISLATION COMMITTEE

16th Meeting 2003, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

Mr Stewart Maxwell (West of Scotland) (SNP)

*Christine May (Central Fife) (Lab)

*Alasdair Morgan (South of Scotland) (SNP)

*Mike Pringle (Edinburgh South) (LD)

Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Joanne Clinton

Catherine Fergusson

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 9 December 2003

(Morning)

[THE CONVENER *opened the meeting at 10:32*]

Delegated Powers Scrutiny

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 16th meeting this session of the Subordinate Legislation Committee. I have received apologies from Stewart Maxwell and Murray Tosh.

The first item is delegated powers scrutiny, and we return to our stage 1 consideration of the Education (Additional Support for Learning) (Scotland) Bill. Members will recall that we sought further information from the Executive on the bill.

Section 12(5) contains the power to make further provision by regulations in connection with the additional support needs tribunals and the president of the additional support needs tribunals for Scotland. The reply from the Executive is perhaps less than helpful in certain respects. We are still faced with the issue of the flexibility with which fine tuning of the tribunals might be undertaken. The bill does not seem to indicate that such changes will necessarily be relatively trivial, incidental or consequential. We must decide whether the general power to make regulations that has been suggested by the Executive is the appropriate one. I seek members' ideas on the matter.

Alasdair Morgan (South of Scotland) (SNP): In its response on section 12(5), the Executive says that it does not wish to burden the Scottish Parliament with primary legislation. Call me an old cynic if you like, but I suspect that that was the least of the Executive's considerations when it drew up the bill. The Executive goes on to mention further legislation on what might be minor, additional provisions. That leaves the door open, in that such future provisions might not be minor or additional; they might be of some substance. Nevertheless, the Executive proposes to give itself the power to go ahead in that way. I do not think that that is satisfactory.

Christine May (Central Fife) (Lab): The Executive does not know what provisions might be covered through the power to make regulations—it effectively says in its letter, “We don't know. If we did, we would have told you.” In that case, the bill should be amended to make it perfectly clear that the power will be used only for minor matters—and subordinate or consequential matters, I think, although I cannot remember which two other terms were used. Any changes that are made ought to be open to scrutiny by the Parliament in the most appropriate form. If that is to be done by an open procedure, that is what we should do, but we should use the appropriate terminology to say so.

The committee needs to put down a marker—again—and to say that drafting needs to be as tight as possible. The drafting in the Education (Additional Support for Learning) (Scotland) Bill is so open that it leaves the floor free for ministers or the civil servants who advise them to do anything that they want.

The Convener: Shall we recommend to the lead committee that we would like there to be something in the bill that provided some safety in this regard and which would indicate that changes made through regulations would have to be minor.

Christine May: “Trivial, incidental or consequential” are the words that are used.

The Convener: Are we agreed? Mike?

Mike Pringle (Edinburgh South) (LD): Yes.

The Convener: Is that all that we need to do? Do we need also to add a proviso along the lines of “subject to open affirmative or negative procedures”?

Christine May: I think that we should do both those things.

The Convener: Alasdair Morgan is looking quizzical.

Alasdair Morgan: If the Executive gave way on the first matter—if it restricted what it intended to do through regulations to trivial matters—then the second point would not necessarily apply. I do not think that we would need to get into any other elaborate procedure.

The Convener: I am just worried about interpretation and what would be considered “minor”.

Christine May: The Executive says that it does not wish to burden us with legislation, but our primary function as a Parliament is to legislate. I want to say to the Executive, “Burden us, please. That is what we are supposed to do.” I do not like to disagree with Alasdair Morgan, but I think that we probably should pursue both matters. Perhaps I am even more cynical than Alasdair, but I have

seen the havoc that can be caused by changes to legislation that have not been properly scrutinised.

The Convener: If negative procedure is to be used, the scrutiny of that is not as great as it might be. Are we agreed that we will send those two suggestions to the lead committee?

Members *indicated agreement.*

The Convener: Section 17(1) contains the power to make provision by regulations for dispute resolution. We asked for examples of matters that might be included in such regulations. We have a wee bit of a problem in that we have not really been given any examples. One option would be for us to suggest that the first exercise of the power be subject to affirmative procedure, so that we can set the scene, so to speak. Subsequent exercises could be subject to negative procedure. How does the committee feel about that?

Alasdair Morgan: How practical is that? Has such an approach been adopted before?

The Convener: Yes.

Alasdair Morgan: What is to stop the first exercise of the power being on a relatively trivial matter? The second exercise might be more substantial, yet it would be subject only to negative procedure.

The Convener: It is considered difficult to have a trivial matter as the first regulation. However, I take Alasdair Morgan's point. There does not appear to be another procedure. It would not be any better to go for a more open procedure. All we could do is say that all the regulations should be made under the affirmative procedure. However, if they were trivial regulations, that would seem a bit—

Christine May: I have a technical question. How difficult would it be to change from affirmative procedure to negative procedure at a later date? That would be a relatively minor amendment to a piece of legislation, I would have thought. Surely, if Parliament—or the Executive—was able to demonstrate that any regulations made were trivial, we could come back and amend the procedure to make it negative rather than affirmative. I see shaking heads. Would that be very difficult?

Alasdair Morgan: It would require primary legislation.

Christine May: So we cannot do it that way.

Alasdair Morgan: No.

Christine May: For me, the same concerns apply to section 17(1) as apply to section 12(5), which we discussed earlier. The Executive is saying that it has written two lines into the bill and now it can go away and do what it wants. We will

come on to the precedent that has been set in respect of people ignoring the regulations. I am afraid that regulations are ignored if the door is left open for that to happen.

Alasdair Morgan: The Executive is effectively saying that it does not know what it wants to do. It has no definitive model in mind and it wishes to develop its thinking. However, it cannot develop its thinking if it legislates using the negative procedure first, rather than thinking first and then legislating. That is the point of all the consultation procedures that precede primary legislation in the Parliament. We do our consultation first, and then we legislate. The Executive seems to want to do it the other way round.

Mike Pringle: That is a very strange way of going about things. Paragraph 8 of the legal brief says that the Executive

“has yet to clarify its policy thinking on the matter.”

That is what Alasdair Morgan is referring to. I find it strange that it has not sorted out the matter beforehand.

The Convener: The only alternative is to express our strong reservations to the lead committee.

Mike Pringle: We should do that.

The Convener: I cannot think of any other measures that we could take. We have been through all the options that we could use and none of them seems satisfactory.

Mike Pringle: Can we ask the lead committee to consider our reservations and then tell us what it is thinking? Can the lead committee come back to us like that?

Christine May: No.

Mike Pringle: We should therefore say that the policy thinking should have been done beforehand and not after the bill was drafted.

The Convener: Yes.

Our legal advice is that we do not have another option. We will write to the lead committee and express our grave reservations about section 17(1).

Christine May: We should recommend that the first regulations should be subject to the affirmative procedure. I share Alasdair Morgan's concern that the first operation might not give a broad enough flavour of the type of regulations that might be necessary. We cannot set a time limit because we do not know when the regulations will come up.

The Convener: I am trying to avoid appearing as if we are settling for the use of the affirmative procedure on the first occasion. I do not think that

that is sufficient, as Christine May seems to be saying. It is therefore important that we stress that we have grave reservations about section 17(1). However, it might help if at least the first exercise of the power is subject to the affirmative procedure.

Mike Pringle: Yes.

The Convener: We should include the words “at least”.

Christine May: Can we say that the committee would have preferred that more than one exercise of that power was subject to the affirmative procedure?

The Convener: We can put “at least”, apparently.

Mike Pringle: That sounds better.

The Convener: It does not seem as if the consultation has highlighted examples of the type of regulation that might be needed.

Christine May: That is probably partly down to when the consultation took place. If I recall correctly, it took place during the summer.

10:45

The Convener: It could be argued that the section is dealing with a new area and that it is therefore difficult to know what regulations might be required. Equally, I would have thought that consultation would have raised those issues.

Christine May: It is going to be a difficult area for education authorities and other providers to deal with financially, if nothing else. Therefore, we should ensure that the bill is drafted as well as it possibly can be. Other members have pointed out that the thinking should have been done first. There is plenty expertise in the field and advice could and should have been sought.

The Convener: We could suggest that procedure should be affirmative apart from where the regulations could be seen as trivial. We would like the emphasis to be on affirmative procedures. Affirmative procedures should be the norm. Shall we use those words?

Members indicated agreement.

The Convener: We are going to say to the lead committee that we have grave concerns about section 17(1) because we wonder whether the right consultation has taken place if the Executive cannot come up with examples of the regulations that might be needed. As a result of that, we think that affirmative procedures should be the norm when dealing with those regulations. Are we agreed?

Members indicated agreement.

The Convener: Section 19(4) of the bill deals with the power to set time limits by regulations for the meeting of requests by appropriate agencies, subject to exceptions. We have a response from the Executive, in light of which it is suggested that the negative procedure might be appropriate. Is that agreed?

Members indicated agreement.

The Convener: Section 20(1), which deals with the power to prescribe standards and requirements relating to the conduct of special schools, is more problematic. The issue is to do with the use of non-statutory guidance where the Parliament has no power to scrutinise. Members will recall that, last week, we talked about the case law, which shows that there should be concern about how the section has been drafted.

Alasdair Morgan: The legal advice is quite clear about cases in which guidance, rather than statutory provision, is used. If that approach is written into the bill and there is a legal challenge, those schools will be found to have been acting unlawfully. In light of that, the fact that the Executive has found that the current system operates satisfactorily seems to indicate that there has never been a legal challenge. The Executive has ignored what the committee said and is effectively saying that it has got away with it so far and it is just going to carry on. I suspect that that is not good enough.

Christine May: I think we should draw the lead committee's attention to the House of Lords decision on the use of non-statutory guidance and indicate that the committee was mindful of that when considering the section.

We should also refer to the Executive's reply that regulations might be required in due course. We should use that to make the point that the committee recommends that the use of non-statutory guidance should not feature because of the lack of scrutiny. As I said, we are here to legislate and to consider proposals for legislation; therefore, we should be burdened with that consideration.

The Convener: We are recommending that the lead committee discontinues the use of non-statutory guidance. Is that okay? Mike?

Mike Pringle: Yes, I am happy with that.

The Convener: Section 23 is on codes of practice and directions. We are fairly agreed that codes of practice are good. However, where—as here—they are a substitute for legislation, we have the same problem as we had with section 20(1). We gave the Executive various options, which have not been taken up. How would members like us to proceed?

Alasdair Morgan: The Executive has argued that the method of proceeding that it suggests gives the advantages of speed and flexibility. If we take that to its logical conclusion, totally ignoring Parliament in all circumstances would give the Executive total speed and flexibility, but that would not make it a good thing. We deal regularly with health-related statutory instruments—for example, in respect of amnesic shellfish poisoning—on which the need for speed and flexibility is far greater than it is on this kind of code of practice. We manage to deal with the health-related legislation satisfactorily, so it beggars belief that the Executive thought that we could not do that in this case.

Christine May: Our previous comments on the need for effective scrutiny of ministerial actions by Parliament apply in this case also.

The Convener: We will point out to the lead committee that, although codes of practice are normally good, in this case, as they are a substitute for legislation, they are not. We have suggested options to the Executive that have not been taken up, and we expect the lead committee to consider those. We also think that we do not have the necessary safeguards for parliamentary scrutiny using the approach that the Executive has suggested. That, again, is a grave concern. Is that an adequate summary?

Members indicated agreement.

Primary Medical Services (Scotland) Bill: as amended at Stage 2

The Convener: Item 2 is delegated powers scrutiny of the Primary Medical Services (Scotland) Bill as amended at stage 2. A couple of wee points were picked up in the Executive's memorandum, which will be dealt with. Apart from that, our legal advice is that there do not seem to be any particular issues with the amendments. Are we all agreed?

Members indicated agreement.

The Convener: We will state in our report to the Parliament that the committee is content with the provisions of the bill as they stand.

Executive Responses

Race Relations Act 1976 (Statutory Duties) (Scotland) Amendment Order 2003 (SSI 2003/566)

10:53

The Convener: Item 3 is Executive responses. Members will recall that we raised the issue of the definition of the 2002 order in this order. The Executive has agreed that it was not necessary to provide a definition of the order and that it was not necessary to refer to the 2002 order in article 5(2) and article 6 of this order. On that basis, I suggest that we inform the lead committee and the Parliament that we raised that issue and received that answer. Is that agreed?

Members indicated agreement.

Honey (Scotland) Regulations 2003 (SSI 2003/569)

The Convener: We raised with the Executive the lack of a definition of the term "country of origin" in the regulations. Do members want to make any comments on the response?

Alasdair Morgan: Yes. The original complaint that I made was that anyone who picked up and read the regulations would not know the meaning of the phrase "country of origin" in this context. The Executive has said that, in the absence of a definition, the most persuasive interpretation is that it means a member state. That is fine and well, but we are still in a situation in which somebody who is bottling—or jarring, whatever the word is—honey and labelling it does not have the advantage of having that advice in front of them. We should be providing statutory instruments that are clear to the people who have to obey them. The situation is still not satisfactory.

It may be that the fault lies with the original directive or the European procedure that backs the regulations up; however, that does not make it any easier for the poor sod at the end of the chain who has to interpret the legislation and who will probably fall foul of it. I do not think that the situation is satisfactory, although I do not think that there is much that we can do about it.

The second point that I want to make is more a point of policy, and is probably not for this committee. The fact that, if someone makes honey in Scotland, they have to state not only that it is made in Scotland but that it is made in Scotland in the United Kingdom seems a bizarre requirement. If I were a Eurosceptic—which I am not—that would be something else that I could use to

hammer the European Union with. It is unfortunate that this kind of regulation is going through.

The Convener: It is a good job that Murray Tosh is not with us this morning.

I agree with you, to an extent. We can perhaps draw those issues to the attention of the European and External Relations Committee. That might be a way forward. I agree that there is not much more that we can do, but we might at least raise the issue, as clarity is important. Is that agreed?

Members *indicated agreement.*

The Convener: It is also suggested that we inform the lead committee and the Parliament that we asked the question; that we did not think that the answer was particularly clear; and that we have brought the matter to the attention of the European and External Relations Committee.

Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003 (SSI 2003/576)

The Convener: There was great debate on the regulations at last week's meeting. We were concerned about how the regulations had been drafted. From the answers that we have received from the Executive, and the committee's legal advice, it seems that we are hardly any further forward. Many of our questions have not been answered, and pages and pages of difficulties remain to be addressed.

We can go through those difficulties step by step if members wish. However, because so many issues have been raised, I suggest that we send them all to the lead committee and the Parliament, identifying our concerns. Members will recall that, last week, our legal adviser was concerned that we might not even have picked up all the points—the drafting was so disastrous. Do members think that there is anything else that we can do?

Alasdair Morgan: As the committee's legal advice is not in the public domain we should perhaps say for the *Official Report* that one point of doubt is whether the regulations are *intra vires*, while another is whether they raise a devolution issue. There are also six cases of defective drafting and six cases of unusual or unexpected use of the powers in the regulations. That is pretty good for starters.

The Convener: It is.

Christine May: Alasdair Morgan made the point that somebody could fall foul of the Honey (Scotland) Regulations 2003 (SSI 2003/569). I think that everybody is going to fall foul of these regulations.

Mike Pringle: Was that meant to be a pun?

Christine May: Of course it was meant to be a pun. Gee—well spotted!

Last week we talked about the person who had originally made the application for registration having to apply to amend it. We asked—very sensibly—what would happen if that person was dead. The Executive has accepted that we had a point. If the person is dead, they cannot make that application; their representative can make it for them.

Nonetheless, the regulations are late, defective in the ways that Alasdair Morgan pointed out and potentially defective in other ways that might be picked up if we spent an awful lot of time on them. If the regulations have to go back to the Executive to be redrafted properly, they are going to be even later. Would that be preferable to having an omelette like this implemented?

11:00

The Convener: The regulations certainly are bad. One of the issues that I thought Gordon Jackson might have brought up, had he been here, related to our 10th question, which was on fines. The information that we have received from the Executive does not clarify the issue at all. As Alasdair Morgan said, however, the matter is covered under recommendation (c) in our brief, on defective drafting. We have covered most of the substantive points on the regulations, but it is worrying that there are so many of them. I think that we ought to express concern about the regulations to the lead committee and the Parliament, because they are so bad.

Christine May: I would be concerned that the regulations are unenforceable in their current form, in which case there is little point in their going on to the statute book—or whatever it is called.

The Convener: I agree that those are the type of words that we should use. We should say that the regulations as we see them, judging from our legal advice, are unenforceable, and that they raise a devolution issue. Is that agreed?

Christine May: We should say that the regulations are unenforceable as currently drafted.

The Convener: Yes.

Christine May: I presume that, ideally, we want somebody to go back and do them again.

The Convener: Exactly. When we hold our informal meeting with the Executive, we might wish to raise some specific examples. We have had one or two.

Local Government Pension Reserve Fund (Scotland) Regulations 2003 (SSI 2003/580)

The Convener: The Executive has acknowledged that there was a failure to follow proper drafting practice in the regulations. We asked the Executive why it thought it necessary to include a definition of "local authority", given that the term is defined in both enabling powers in the same terms as in the regulations. Are there any further points?

Members: No.

Pupils' Educational Records (Scotland) Regulations 2003 (SSI 2003/581)

The Convener: There are quite a few issues that we need to draw to the attention of the lead committee and the Parliament. There was some defective drafting, which was acknowledged in response to the first point that we raised, which related to regulations 5(1) and 5(2). Our second and fifth points raised doubt as to whether the regulations are *intra vires*. Our third and fourth points raised further matters of defective drafting. Our third point was also on a matter of unusual or unexpected use of powers. Our sixth and seventh points highlighted a failure to follow proper legislative practice and our sixth point also raised what may be an unusual or unexpected use of a power. In other words, we had quite a few points to raise.

Our legal advice raises quite a bit of case law, including the case of *McCarthy & Stone (Developments) Ltd v Richmond-upon-Thames Borough Council*. That really ought to have been taken on board. Is it agreed that we raise the issues that I have outlined? Do members wish to add any further points?

Christine May: I do not have any additional points to raise, but can we ensure that the case law on which our decisions have at least partly been based is brought to the attention of the lead committee?

The Convener: Yes. Is that okay?

Members *indicated agreement.*

Instruments Subject to Annulment

Regulation of Care (Scotland) Act 2001 (Transitional Provisions and Revocation) Order 2003 (SSI 2003/587)

11:03

The Convener: No points have been noted by the legal advisers.

End-of-Life Vehicles (Storage and Treatment) (Scotland) Regulations 2003 (SSI 2003/593)

The Convener: The memorandum accompanying the equivalent English regulations was very useful. However, we have a number of recommendations concerning the regulations. First, there is the matter of late implementation.

Secondly, we think that there is an issue about the number of vehicles that have been mentioned. Regulation 7(4)(e)(i)(bb) omits the 400 vehicles that are mentioned in paragraph 45 in table 4B of schedule 3 to the Waste Management Licensing Regulations 1994 (SI 1994/1056). In the version of table 4B that is available to the committee, there is no reference to 400 vehicles, but there are references to 100 vehicles and 1000 vehicles. Is it agreed that we check with the Executive what has happened there?

Members *indicated agreement.*

The Convener: Is there anything else to raise on the regulations?

Christine May: The memorandum from the Department for Environment, Food and Rural Affairs states that the fees are payable to the Environment Agency. Has anyone read the regulations closely enough to say whether that has been changed so that fees are payable to the Scottish Environment Protection Agency?

The Convener: Yes they are.

Christine May: That is fine.

Instruments Not Subject to Parliamentary Procedure

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (East
Coast) (Scotland) Revocation Order 2003
(SSI 2003/589)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (East
Coast) (No 3) (Scotland) Revocation Order
2003 (SSI 2003/590)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (Orkney)
(No 4) (Scotland) Revocation Order 2003
(SSI 2003/591)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (East
Coast) (No 4) (Scotland) Partial Revocation
Order 2003 (SSI 2003/592)**

11:05

The Convener: No points arise on the orders.

Instruments Not Laid Before the Parliament

**African Swine Fever (Scotland) Order 2003
(SSI 2003/586)**

11:06

The Convener: Late implementation of the order is an issue, but there are no other substantive points to raise.

The Executive explained that because of the aftermath of the foot-and-mouth epidemic, it was not possible to implement the order by the implementation date. Does anyone have any points to make?

Christine May: That might be an acceptable reason, but the precedent is that the committee reports such lateness. Do you not think that we should?

The Convener: Not unless you want to.

Christine May: No. We would be being horrid.

The Convener: No substantive points arise on the order.

**Transport (Scotland) Act 2001
(Commencement No 4) Order 2003
(SSI 2003/588)**

The Convener: A minor point has been noted in the explanatory note, but apart from that no substantive points arise.

I thank the committee for its patience and for doing a lot of reading in connection with some of the instruments.

Meeting closed at 11:07.

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