

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 7 June 2005

Session 2

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## SUBORDINATE LEGISLATION COMMITTEE

19<sup>th</sup> Meeting 2005, Session 2

### CONVENER

\*Dr Sylvia Jackson (Stirling) (Lab)

### DEPUTY CONVENER

\*Gordon Jackson (Glasgow Govan) (Lab)

### COMMITTEE MEMBERS

Mr Adam Ingram (South of Scotland) (SNP)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

\*Christine May (Central Fife) (Lab)

\*Mike Pringle (Edinburgh South) (LD)

\*Murray Tosh (West of Scotland) (Con)

### COMMITTEE SUBSTITUTES

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Stewart Stevenson (Banff and Buchan) (SNP)

\*attended

### CLERK TO THE COMMITTEE

Ruth Cooper

### SENIOR ASSISTANT CLERK

David McLaren

### LOCATION

Committee Room 3



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 7 June 2005*

[THE CONVENER *opened the meeting at 10:30*]

**The Convener (Dr Sylvia Jackson):** I welcome members to the 19<sup>th</sup> meeting in 2005 of the Subordinate Legislation Committee. I have received apologies from Adam Ingram. I welcome David McLaren, who is our new senior assistant clerk. Members will remember that Bruce Adamson left us the other week. We wish you well, David—I am sure that you will serve us well.

### Item in Private

10:30

**The Convener:** Agenda item 1 is to consider whether to take agenda item 5, which is the consideration of a draft report, in private. Do members agree to take that item in private?

**Members** *indicated agreement.*

## Delegated Powers Scrutiny

### Charities and Trustee Investment (Scotland) Bill: Stage 2

10:31

**The Convener:** Agenda item 2 is delegated powers scrutiny of the Charities and Trustee Investment (Scotland) Bill, as amended at stage 2. As members will know, the stage 3 debate takes place this Thursday and we need to report to Parliament in advance of that. I will go through the various sections on which we commented previously. We have received feedback from the Executive on the amendments that have been made.

Section 2 is on the Office of the Scottish Charity Regulator's annual reports. Section 2(4) would have obliged OSCR to comply with any directions of the Scottish ministers about the form, content and means of publication of the general report that the office will have to prepare annually under section 2. That ministerial power has now been removed, on the recommendation of the lead committee, which did not feel that it was necessary. There is not much more to say about the matter, so we will simply note the amendment.

Section 6 is entitled "Applications: further procedure". At stage 1, the committee sought clarification on the drafting of the section, as provisions appeared to overlap. The Executive accepted that the section might require adjustment and undertook to introduce an appropriate amendment at stage 2. Accordingly, the Executive has removed the references to sections 4 and 54(2) from section 6(2), as the committee recommended. Section 6(1) has also been amended to include references to sections 56(1) and 58(1), which will allow ministers to make regulations in relation to applications from charitable companies or registered friendly societies to convert to a Scottish charitable incorporated organisation, or in relation to applications from SCIOs to amalgamate. Are members happy to report to Parliament that the amendments address our concerns?

**Members** *indicated agreement.*

**The Convener:** Section 7, which is on the charity test, sets out the criteria that a body will have to meet to be treated as a charity. Section 7(3) has been amended to refer specifically to the Scottish ministers or a minister of the Crown and section 7(4) has been removed. At stage 1, the Executive informed the committee that it intended to adjust the bill in relation to the non-departmental public bodies that relate to the five national collections, which is an issue about which we were

concerned. Therefore, new section 7(4A), has been inserted; it contains a new order-making power that will allow ministers to disapply either or both of paragraphs (a) and (b) of section 7(3) in relation to any body or type of body. The exercise of the power will be subject to the affirmative procedure. During stage 2, the Communities Committee welcomed the amendment as meeting concerns that it had raised. Are members content with the amendment?

**Members indicated agreement.**

**The Convener:** Section 9 will oblige OSCR to issue guidance on how it determines whether a body meets the charity test. Originally, the bill would have obliged OSCR to consult

“such persons as it thinks fit”,

but an amendment has been made that will oblige OSCR specifically to consult representatives of the charitable sector, as well as other persons. Are members content with the amendment?

**Members indicated agreement.**

**The Convener:** Section 15 will confer power on ministers to make regulations that require charities to include certain information on documents that they issue or sign. The regulations may also set out the information that is to be included on such documents. The regulation-making power was refined at stage 2 to include a power to exempt charities, or particular types of charities, from any of the requirements of the regulations. The Executive has explained that the change is needed to allow a period of grace for charities to use up stationery that does not comply with the regulations. Orders that are made under section 15 will be subject to the negative procedure. Are members content with the amendment?

**Members indicated agreement.**

**The Convener:** Section 19 makes provision in relation to the property of charities that are removed from the register. Originally, the order-making power in section 19(8) would have applied only to assets that ministers considered to be of national importance, but the power has been amended so that it will now apply to any property that is specified in the order. In recognition of the width of the power, orders that are made under it will be subject to the affirmative procedure. Are members content with the power as amended?

**Members indicated agreement.**

**The Convener:** Section 63 will confer on ministers the power to make detailed provision about applications for the constitution of the bodies that are to be known as Scottish charitable incorporated organisations and other related matters. The power, which will be subject to the negative procedure except in the case of

regulations that are made under section 63(d), has been extended—by the inclusion of section 63(da)—to allow ministers to make provision by regulation for the maintenance of registers of information about SCIOs. Are members content with the amendment?

**Members indicated agreement.**

**The Convener:** Section 82 relates to regulations about fundraising. The committee raised concerns about section 82(2), in particular the powers in sections 82(2)(h) and 82(3), which the committee considered should be subject to the affirmative rather than the negative procedure. The committee also raised concerns about the power in section 82(5) to create offences. The committee’s general view was that the sanctions for breaches of subordinate legislation should, as far as possible, be set out in the primary legislation rather than delegated to subordinate legislation.

As we recommended, the Executive amended the bill so that regulations made under the power will be subject to the affirmative procedure. The Executive also clarified section 82(2)(c) so that the regulations will be able to determine the identification and information that professional fundraisers are to provide, rather than simply the information that they are to provide. However, the Executive does not seem to have addressed the committee’s other recommendations on the drafting of section 82, particularly those on the power to create criminal offences in regulations rather than the inclusion of offences in the bill.

I would like to know what members feel about that.

**Christine May (Central Fife) (Lab):** I accept that it might be difficult to specify the nature of the offences and that the Executive might circumscribe itself by doing so. However, I am concerned that not specifying the offences in the bill is not good legislative practice. Therefore, I would like the committee to seek clarification on the matter, perhaps during the stage 3 debate on Thursday afternoon.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I do not see why it is particularly difficult to specify the offences in the bill. It is normal for offences to be in primary legislation rather than created through subordinate legislation. I do not understand why the Executive has chosen that method—we have not had a full explanation. However, given the timescale and the fact that the stage 3 debate is on Thursday, the best approach is, as Christine May rightly suggests, to question the minister in the debate to see whether we can get an explanation of the Executive’s approach.

**The Convener:** We will inform the lead committee of the issue and raise the matter as quickly as possible with the Scottish Executive.

We will then raise it in the stage 3 debate. Are there any other mechanisms that we should use?

**Christine May:** We might want to alert the Presiding Officer to the fact that we want to make a comment.

**The Convener:** Yes, although that has never been a problem in the past.

Section 94 is on consequential amendments. As introduced, the section allowed the Scottish ministers to amend by order any local, personal or private act of Parliament, as well as any other act of Parliament or of the Scottish Parliament, in relation to sections 92 and 93 of the bill. Section 94 has been removed by the Executive, which now takes the view that it is unnecessary, given the customary general powers to modify enactments, as provided for in section 100. Is that agreed?

**Members indicated agreement.**

**The Convener:** Section 97 is on the population of the register. A number of concerns were expressed at stage 1 regarding the bodies to be covered by the section. The committee was particularly concerned that the power was open ended and that no time limits had been included in the power such that, in theory, ministers could exempt any charity from the provisions of the bill without limit of time. Although ministers indicated at the time that they considered it impractical to include any time limits in the bill, it appears that, after further consideration and consultation with OSCR, they have revisited the section in the light of the comments that the committee and others made. As a result, the order-making powers have been revised substantially. In particular, the Executive has now included time limits for the exercise of the power. Are we content to report to Parliament that the Executive's changes have addressed our concerns?

**Members indicated agreement.**

**The Convener:** Section 100 is on ancillary provision. The section makes the customary provision that allows amendments to primary and other legislation, in consequence of the bill, to be made by order. As a result of the removal of the power to make transitional, transitory or savings provisions from section 97, section 100(b) has been amended to include those provisions. Are we content with that amendment?

**Members indicated agreement.**

**The Convener:** Section 101 is on orders, regulations and rules. The section contains the usual procedural provisions relating to subordinate legislation under the bill. Amendments have been made to change the procedure for instruments under sections 19(8) and 81(1) from negative to affirmative and to provide that orders under new

section 7(4A) are also subject to the affirmative procedure. Are we content to note those amendments?

**Members indicated agreement.**

**The Convener:** Section 104 is the short title and commencement. At stage 1, the committee questioned the drafting of the section, which provided for section 97 to be commenced on royal assent, although the terms that are referred to in that section were defined in section 103, which was to be commenced by order. As was promised by the Executive, the reference to section 97 has now been removed from section 104. Are members content with that amendment, which addresses our concerns?

**Members:** Yes.

**The Convener:** That brings us to the end of our consideration of the Charities and Trustee Investment (Scotland) Bill. To be fair, apart from issues around section 82, most of our concerns have been addressed.

## Executive Responses

### Dentists Act 1984 (Amendment) Order 2005 (draft)

10:42

**The Convener:** The committee asked the Executive to clarify why the order-making power that was conferred on the Privy Council by article 50(2) of the order is not subject to any procedure in the Scottish Parliament. The Executive has explained that, where transitional provisions regarding new professions complementary to dentistry are necessary, they will be included in regulations made by the General Dental Council under new section 36A of the Dentists Act 1984, and that, by virtue of new section 51(4) of the 1984 act, any such regulations, where they affect devolved areas, will be subject to annulment in pursuance of a resolution of the Scottish Parliament. Are we content with the Executive's response on that? I see Murray Tosh nodding.

**Mr Maxwell:** The Executive's response partly explains the situation but, as our legal brief points out:

"the UK Government does not intend to use the power at article 50(2) to make provision for devolved areas ... The fact remains, however, that the power at article 50(2) of the Order is capable of being exercised in a way which would affect a devolved area."

I accept that the brief goes on to say that

"this would appear to be unlikely in practice."

However, the fact remains that the Government could use the power in a devolved area. I do not find it acceptable that the UK Government has decided to create powers that could be used in a devolved area. That is unacceptable. It should be this Parliament that deals with areas of devolved competence. It should be pointed out to the lead committee and the Parliament that, under the draft order, the UK Government could exercise power over a devolved area of competence.

**The Convener:** Are we agreed on that?

**Murray Tosh (West of Scotland) (Con):** Yes, because that is a statement of fact. The entire devolution settlement is subject to the competence of the Westminster Parliament, and I would have no difficulty in our underlining that again for the lead committee's interest.

**Members indicated agreement.**

### Right to Purchase (Prescribed Persons) (Scotland) Amendment Order 2005 (SSI 2005/275)

10:45

**The Convener:** We have noted the example about janitors' property. We asked for clarification on why an Executive note was not provided. The Executive confirmed that it considered producing an Executive note, but decided that the explanatory note provided information in sufficient detail, and that no additional information would be provided through an Executive note.

**Christine May:** The question whether janitors might have been disadvantaged by the provisions when they moved house is interesting to speculate on. Perhaps there are a number of them out there. Speculation is great fun, but it is not very good when it comes to being clear about what the law is intended to do and who is intended to be covered by it. Some clarity might have been useful to both the committee and those who must implement and use the legislation. Can we report that to the lead committee and the Parliament?

**The Convener:** We can indeed. I was going to suggest that we mention failure to follow proper legislative practice and that we highlight the fact that we really did feel in need of greater clarification in this instance. Is that agreed?

**Members indicated agreement.**



## Instruments Subject to Annulment

### Contaminants in Food (Scotland) Amendment Regulations 2005 (SSI 2005/277)

10:46

**The Convener:** The regulations raise the on-going issue of failing to cite in the preamble the consultation requirement under article 9 of regulation (EC) 178/2002 of the European Parliament and of the Council. We have raised that matter on several occasions. I suggest that we bring the regulations to the attention of the lead committee on the ground of defective drafting.

**Christine May:** I happily support that.

*Members indicated agreement.*

**The Convener:** We need also to deal with some minor drafting points by informal letter. Quite a few of those arise later on our agenda.

*Members indicated agreement.*

### Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2005 (SSI 2005/278)

### Seed Potatoes (Fees) (Scotland) Regulations 2005 (SSI 2005/279)

**The Convener:** No substantive points arise on the regulations. Minor drafting points will be dealt with by informal letter.

*Members indicated agreement.*

### Seed Potatoes (Scotland) Amendment Regulations 2005 (SSI 2005/280)

**The Convener:** The regulations before us amend the Seed Potatoes (Scotland) Regulations 2000 (SSI 2000/201), which regulate the production, classification and marketing of seed potatoes in accordance with European Union law. The present regulations make a number of technical amendments to the classification and marketing process.

The aim of regulation 15(e) is to amend paragraph 3(b) of schedule 1 to the principal regulations to update the reference there to the Seeds (National Lists of Varieties) Regulations 1982 (SI 1982/844). However, it appears that that amendment has already been made, by regulation 25(6)(b) of the Great Britain-wide Seeds (National Lists of Varieties) Regulations 2001 (SI

2001/3510). We should ask the Executive for an explanation of the purpose of regulation 15(e).

*Members indicated agreement.*

**Christine May:** Perhaps it is the braces to go with the belt.

**The Convener:** Possibly. We might also ask the Executive to explain why the explanatory and Executive notes state that the principal regulations "have not previously been amended",

when in fact they have been. There are also some minor drafting points, which we could raise by informal letter.

*Members indicated agreement.*

### Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/281)

**The Convener:** The regulations implement European Commission directive 2004/115/EC to substitute new residue definitions for metalaxyl and metalaxyl-M, and new maximum residue levels for a number of pesticides. There are 39 footnotes listed.

**Mr Maxwell:** It was rather cowardly of you not to read out the names of all those interesting pesticides, convener. I would have been most interested to hear how they are all pronounced.

**Mike Pringle (Edinburgh South) (LD):** I cannot believe that there are so many. Blimey! We should have them all on the record.

**Mr Maxwell:** There is a serious comment to make about the footnotes. Schedule 1 refers only to footnotes 1 to 6 and 17, although there appear to be 39 footnotes. There is also a reference made to footnotes 46 to 49, which do not appear to be there. There is obviously some sort of problem with the footnotes, so we should seek clarification about what has happened to the references to those that are there and what has happened with the references to those that are not there.

**The Convener:** Is that agreed?

*Members indicated agreement.*

**The Convener:** Members will also note the Executive's plans for consolidation of the principal regulations, which is good news.

**Christine May:** Yes; that is very welcome.

### Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Regulations 2005 (SSI 2005/286)

**The Convener:** The regulations provide for the implementation and enforcement of article 9 of

European Council regulation (EEC) 2847/93 and article 22 of European Council regulation (EC) 2371/2002 in relation to the marketing of fisheries products. There is some discrepancy in the regulations.

Regulation 4(2) makes it a criminal offence for a master, owner or charterer of a fishing vessel to sell first-sale fish to a buyer who is not a registered fish buyer. No defence is provided for that offence in the regulations.

However, a different approach is taken at regulation 11(1), which makes it an offence for a person to buy first-sale fish from a fishing vessel unless that fish has been landed by a licensed fishing vessel. Regulation 11(2) provides that it should be a defence for a person to show that they did not know, and that it was reasonable for them not to suspect, that the fish had not been landed by a licensed fishing vessel.

There is a discrepancy between those two regulations, so I suggest that we ask the Executive to clarify why a defence has been provided for offences under regulation 11(1) but not under regulation 4(2). Is that agreed?

*Members indicated agreement.*

**Mike Pringle:** It is bizarre. Did someone not realise that when they were drafting the regulations? It is silly.

**The Convener:** We will ask.

**Mike Pringle:** It will be interesting to see the response.

**The Convener:** Regulation 8(2) provides that any person who would be guilty of an offence under regulation 8(1) and who buys more than 50kg of fish in a day commits an offence.

The final sub-paragraph of article 22.2 of Council regulation (EC) 2371/2002 provides that

“A buyer acquiring products which are not thereafter placed on the market but used only for private consumption shall be exempt from the requirements of this paragraph.”

The effect of regulation 8(2) would appear to be that that exemption applies only to persons who buy less than 50kg of fish in a day. The exemption is not limited in that way in the Council regulation. There might therefore be a vires issue. We should ask about that one too.

**Christine May:** We should ask.

*Members indicated agreement.*

### **Local Government Pension Scheme (Scotland) Amendment Regulations 2005 (SSI 2005/293)**

**The Convener:** Does anyone have anything to say about the amendments that have been made so far? They are the eighth amendments to the principal regulations.

**Christine May:** It is worth noting that the regulations have not been consolidated because further amendments are expected quite soon. I suggest that we keep an eye on the regulations. They should be flagged for the committee's attention whenever amendments come up so that we can see what is happening.

*Members indicated agreement.*

**The Convener:** There are also minor drafting points that we can deal with through an informal letter.

### **Food (Chilli, Chilli Products, Curcuma and Palm Oil) (Emergency Control) (Scotland) Regulations 2005 (SSI 2005/294)**

**The Convener:** For those of us who have been on the committee for a while, these regulations are very familiar.

These regulations implement European Commission decision 2005/402/EC, which is an emergency decision containing prohibitive measures in relation to chilli, chilli products, curcuma and palm oil. The regulations breach the 21-day rule but there seems to be a very good reason for that. Are we content with the Executive's explanation?

*Members indicated agreement.*

### **Road Traffic (Temporary Restrictions) Procedure Amendment (Scotland) Regulations 2005 (SSI 2005/299)**

**The Convener:** No points have been raised on the regulations.

**Christine May:** I am delighted that the regulations take a number of things that have to be done, all of which have a cost, and put them all together. That seems very sensible.

10:54

*Meeting continued in private until 12:14.*

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