

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 7 December 1999  
*(Morning)*

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## SUBORDINATE LEGISLATION COMMITTEE

### 13<sup>th</sup> Meeting

#### CONVENER :

\*Mr Kenny MacAskill (Lothians) (SNP)

#### COMMITTEE MEMBERS :

\*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

\*Trish Godman (West Renfrewshire) (Lab)

\*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

\*Bristow Muldoon (Livingston) (Lab)

\*David Mundell (South of Scotland) (Con)

\*Ian Welsh (Ayr) (Lab)

\*attended

#### COMMITTEE CLERK:

Alasdair Rankin

#### ASSISTANT CLERKS:

Claire Menzies

Anne Peat



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 7 December 1999*

*(Morning)*

[THE CONVENER *opened the meeting at 11:16*]

#### Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) (No 2) Order 1999

**The Convener (Mr Kenny MacAskill):** At our previous meeting we raised questions about Westminster straying into the Parliament's areas of competence. Does anyone wish to comment on the response? It appears rather disingenuous of the Executive to say that it had nothing to do with it, since its fingerprints were all over the draft document.

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** A dusty answer.

**The Convener:** Yes, a dusty answer. However I can understand why that occurred.

**Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP):** It is only fair to the Executive to point out why we think it is disingenuous—the implication of the note was that the Government really had nothing to do with the private member's bill, but the committee has been informed that that is not quite the case, and that drafting assistance was given by the Scottish Executive development department.

**Ian Jenkins:** We were merely trying to institute a procedure that would help to streamline things. I think we should reply by saying that we were trying to be helpful and that we are not being critical.

**The Convener:** I agree—we will reply that we wrote with the best of intentions and that the Executive would have been better to admit its culpability because we were not reproaching it in any way.

**Fergus Ewing:** I should express what is perhaps a minority view, but I would not want to see Westminster legislating on devolved issues any more.

**The Convener:** I will echo that.

**Bristow Muldoon (Livingston) (Lab):** All of us would prefer that the vast majority of devolved legislation goes through this Parliament. As we are

all aware, there may be instances when it is more sensible for legislation to be progressed through Westminster. That would happen only after discussion and agreement with the Scottish Parliament.

**David Mundell (South of Scotland) (Con):** I agree with Bristow.

**The Convener:** On the facts and circumstances of this matter, I can understand how this came about. I do not own a dog, never mind breed dogs, but doubtless regulations are required on that. It might have been easier to bring the regulations in through Westminster, given the stage that the process had reached. However, the Government should have admitted that and confirmed that it was straying into our field of competency, for perhaps understandable reasons.

**Trish Godman (West Renfrewshire) (Lab):** This issue is coming to the Local Government Committee tomorrow afternoon. Perhaps we can make some comments on it there.

#### Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 1999 (SSI 1999/149)

**The Convener:** The fact that this matter appears to be being dealt with under legislation that might or might not be appropriate has been mentioned. It gives the laying power as section 2(4) of the Courts of Law Fees (Scotland) Act 1895. There is some doubt as to the relevance of that section, as opposed to section 40 of the Sheriff Courts (Scotland) Act 1907. Does the committee agree that we should seek clarification on that from the Executive?

**Members:** Yes.

**Fergus Ewing:** Definitely. I agree with Bristow Muldoon and Trish Godman.

#### Act of Sederunt (Fees of Sheriff Officers) 1999 (SSI 1999/150)

**The Convener:** Again, there is a question as to why this was dealt with under section 2(4) of the Courts of Law Fees (Scotland) Act 1895, as opposed to section 40 of the Sheriff Courts (Scotland) Act 1907. Will we pose the same question to the Executive?

**Members:** Yes.

### **Non-Domestic Rating Contributions (Scotland) Amendment Regulations 1999 (SSI 1999/153)**

**The Convener:** There is nothing to note on this, apart from the typographical error that our eagle-eyed adviser pointed out.

### **Local Statutory Provisions (Postponement from Repeal) (Scotland) Order 1999 (SSI 1999/156)**

**The Convener:** No matters arise from this.

### **Local Statutory Provisions (Exemption from Repeal) (Scotland) Order 1999 (SSI 1999/157)**

**The Convener:** No matters arise from this.

### **Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (No 3) (Scotland) Revocation Order 1999 (SSI 1999/159)**

**The Convener:** We noted that in previous matters we had not raised why section 24(1) is now being mentioned as opposed to section 24(3). Perhaps it was our failure that that was not noted in the first place. Should we seek clarification as to the use of 24(3) vis-à-vis 24(1)?

**Members:** Yes.

### **Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (No 2) (Scotland) Partial Revocation Order 1999 (SSI 1999/160)**

**The Convener:** The same point arises from this as from the earlier matter, regarding sections 24(1) and 24(3).

### **Minister for Parliament (Letter)**

**The Convener:** The final matter on the agenda is the letter from the Minister for Parliament, which we held over from the previous matter regarding consolidations. We had a fair kick at the ball in our legal briefing. Do members wish to make any comments?

**Fergus Ewing:** We have had helpful advice from the clerks. The starting point is that the

advice that the rule on no more than five amendments of any substance being considered is not new. We are not asking for something that we have dreamed up since this Parliament was conceived. The Speaker's Counsel confirmed at a recent joint meeting that this had been the rule-of-thumb adopted for many years by Whitehall departments, following official guidance of at least 30 years' standing.

If that is the backdrop, I would have thought that there is a precedent for what we are trying to achieve. As a legal practitioner, I can say that it is difficult for professional users to find out what the law is if there is a plethora of documents. The danger is that practitioners might fail to notice the most recently enacted one—that can have drastic consequences.

We must consider in what circumstances there should be consolidation. The Executive suggests, in paragraph 6 of the note, that there is merit in developing what it calls a convention on the matter. What locus does this committee have to develop conventions? Does the Parliament yet have any conventions? If it does, what are they and should this committee be the body that focuses on them?

As a matter of common sense, we might be able to deal best with consideration of the merit of statutory instruments by recommending to the lead committee—or committees—that they might not want to consider in detail consolidatory measures, because they have been considered before. That would enable the committee to decide whether it should spend time debating the merits of statutory instruments.

**Bristow Muldoon:** We do not want to regiment things too much. There is not that much difference between what we want and what the Minister for Parliament wants. We will develop practical working guidelines for the operation of the Executive. As you said, convener, we are trying to streamline the work of the committee so that, if what the Executive wants differs from what we want in terms of presentation of statutory instruments and consolidations, the Executive has an explanation. I would be happy to flesh out our ideas into a guideline, or whatever we want to call it.

I do not think that it is practical to ask subject committees not to debate the merits of consolidation issues, as a committee could raise those issues in any case. I would be happy for you to respond to the letter from the Minister for Parliament to try to work out the way this committee works.

**David Mundell:** I agree with that. We will have to have some guidelines. I agree with Fergus that we do not want to become bound, as Westminster

might be, by something that happened in 1946 or by some foible of Henry VIII.

The benefits of consolidation are significant and I see reference to that in the "Parliament House Book". In my legal days, I went to update a copy of the "Parliament House Book" without having the previous book. I realised those benefits only when I tried to update it. There is the possibility that two or three statutory instruments might be missed out, which is not satisfactory. We want to stick to our pro-consolidation position.

**Trish Godman:** I agree as well. The word "convention" worries me a bit. I might be wrong, but it seems to imply that something has gone before but, in this Parliament, nothing has. On the other hand, there is a wealth of experience in Westminster on this matter—more than 30 years.

We need some sort of guidelines and, as Bristow says, other committees can use those as they see fit.

11:30

**The Convener:** Can I suggest that we write back to the minister, thanking him for his attempts to focus matters. We are also grateful for Alasdair Rankin's meeting with representatives of the Executive. However, we do not think that we can bind any parliamentary committee—we are charged with considering the vires aspects, not policy. We would like guidelines—not necessarily conventions, as Trish Godman pointed out—or some memorandum of understanding between our advisers and the Executive's legal advisers as to how matters should be progressed. If the Executive is not following that memorandum, perhaps it could assist us by telling us why not—that would reduce the need for such meetings.

We have some sympathy with the cut-and-paste approach; in the age of information technology, matters should be accessible and readable. I have been in offices where information that has not been updated litters the floor and where it is impossible to resolve matters, so the point about updating along the lines of the "Parliament House Book" is clear.

**Fergus Ewing:** In our earlier deliberations, we did not get as far as discussing paragraph 7 of the Executive letter of 3 November and the extensive comments and advice that we received from Margaret Macdonald. The Executive says that it is concerned by the view expressed in our 5<sup>th</sup> report that

"where it is proposed to amend an instrument made before devolution it is appropriate that the instrument should be remade as a Scottish subordinate instrument rather than amended".

We have been advised that, for various reasons,

we should stick with what we said in our report. The advice also indicates that, as long ago as 1970, the approach that we took was recommended by a Westminster legislation committee. At the time, that approach was widely welcomed by lawyers and the public. They wanted the Scottish corpus of law to be clear—not dependent on scrutiny of UK statutory instruments that could be deleted for England but that could remain extant for Scotland. Since accession to the European Union, the situation is further complicated.

I am sorry that I did not raise the matter earlier. I hope that there will be a re-think about the approach, given the strong arguments for our side of the case.

**Bristow Muldoon:** It would be helpful for us to raise that. We also welcome Fergus Ewing's recognition of the wisdom of Westminster on the matter.

**Trish Godman:** In paragraph 7 of the letter, Tom McCabe says that the instruments will be available through "bookshops and the website" for some time. That is relative—it could mean 25 years, but we do not know. We need to hang on to that point.

**The Convener:** From a petitioner's point of view—or for anyone involved in legislation—such matters are in the domain of the Scottish Parliament, regardless of whether the legislation was made by Westminster. If we amend legislation, that should be recorded—to ease the paper-chase, if nothing else. Perhaps we could go back to the Minister for Parliament to say that we are not satisfied.

**Fergus Ewing:** I was a bit slow to respond to Bristow Muldoon's low blow. I am sure that the excellent recommendation from the Westminster committee came from the highly intelligent and distinguished clerks. The Scottish National party has never had any quarrel with the clerks at Westminster.

**David Mundell:** I thought that Fergus was going to say that he had no objection because the recommendation came from a time when Dr Ewing was a member at Westminster.

**The Convener:** Thank you, everybody. That ends today's meeting.

*Meeting closed at 11:34.*





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