SUBORDINATE LEGISLATION COMMITTEE

Tuesday 9 May 2000
(*Morning*)

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SUBORDINATE LEGISLATION COMMITTEE
15th Meeting 2000, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)
Trish Godman (West Renfrewshire) (Lab)
*Bristow Muldoon (Livingston) (Lab)
*David Mundell (South of Scotland) (Con)

*attended

THE FOLLOWING MEMBER ALSO ATTENDED:

Dr Elaine Murray (Dumfries) (Lab)

WITNESSES

Andrew Dickson (Scottish Executive Rural Affairs Department)
Jane Hope (Scottish Executive Rural Affairs Department)
Murray Sinclair (Office of the Solicitor of the Scottish Executive)
Colin Wilson (Office of the Scottish Parliamentary Counsel)

CLERK TEAM LEADER

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 9 May 2000

(*Morning*)

[THE CONVENER *opened the meeting at 11:18*]

The Convener (Mr Kenny MacAskill): Good morning and welcome to the 15th meeting of the Subordinate Legislation Committee. The first item on the agenda is the delegated power of scrutiny of the National Parks (Scotland) Bill.

National Parks (Scotland) Bill

The Convener: We are joined by three members of the Executive's bill team, to allow us to take evidence and ask questions. We also welcome Dr Elaine Murray of the Rural Affairs Committee.

Do you want to make an introductory statement to the committee, or do you want to begin to answer questions from the committee?

Andrew Dickson (Scottish Executive Rural Affairs Department): I will introduce myself and the other members of the team, some of whom you will recognise. I am Andrew Dickson, head of the countryside and natural heritage unit in the Scottish Executive rural affairs department.

Jane Hope (Scottish Executive Rural Affairs Department): I am Jane Hope and I am head of the National Parks (Scotland) Bill team, working in Andrew Dickson's division.

Murray Sinclair (Office of the Solicitor to the Scottish Executive): I am Murray Sinclair from the office of the solicitor to the Scottish Executive, the lawyer on the bill team.

Colin Wilson (Office of the Scottish Parliamentary Counsel): I am Colin Wilson from the office of the Scottish parliamentary counsel, the draftsman of the bill.

The Convener: Thank you for coming.

Andrew Dickson: You have received from us a memorandum on the devolved powers in the bill, about which you asked a number of questions. We wrote to you a few days ago with answers to those questions.

The Convener: Following the briefing that we have received and the response to the points that we raised initially, do members have any questions?

David Mundell (South of Scotland) (Con): It would be useful to know why we are proceeding in this manner rather than through individual bills.

Andrew Dickson: Scottish Natural Heritage took the view and advised Scottish ministers that all national parks will have some common features, but other matters, such as the exact composition of the national park authority or the powers of the national park, will vary between parks. It would be entirely possible for the Parliament to consider individual bills for each proposed national park. However, because there is a degree of commonality in the basic provisions for a national park, it was thought sensible to have those provisions set out in primary legislation and to outline the arrangements for each national park in designation orders, to be made after consultation. That has been the approach from the outset. It may be argued that it represents a more economical use of parliamentary time and effort than having a separate bill for every national park.

Jane Hope: One of the advantages of proceeding in this way is that we can set out in the enabling legislation the statutory process that has to be gone through when setting up national parks. If everything is done through primary legislation, procedures can vary from park to park, as no process has been set out for people to follow. That is covered by sections 2 to 6 of the bill.

Bristow Muldoon (Livingston) (Lab): I accept the argument that having individual bills for each national park would not be the best way of proceeding. I am comfortable with the idea of subordinate legislation being used to designate individual national parks.

One of the committee's concerns is that an affirmative statutory instrument cannot be amended by Parliament; it can only be accepted or rejected. Would it be possible to adopt a practice similar to that which was adopted for the Deregulation and Contracting Out Act 1994, which has been described to us as a super-affirmative instrument? Under that procedure, a minister would announce an intention to introduce a statutory instrument and there would be a defined period during which the Parliament could make representations to the minister about the content of the instrument. At the end of the period, the minister would formally lay the statutory instrument before Parliament.

Andrew Dickson: The procedure that you have described would require fairly radical amendment of the bill. It is certainly a policy issue that the ministers could consider.

Under the procedure that is set out in the bill, reports would be made on national park proposals, which we expect would be the main way in which

a national park would be set up. Those reports would be the subject of wide consultation, which could include scrutiny by parliamentary committees. There would be nothing to stop interested committees asking for evidence during the consultation period, before a designation order is laid for affirmative resolution for acceptance or rejection. The fact that that process would allow Parliament to probe and to make points before the designation order was finalised would have a similar effect to what you have described. I am not familiar with the procedure that you outlined.

Murray Sinclair: The procedure could obviously be considered, but my recollection is that it is quite complicated. Given that there is already a full set of procedures for considering the proposals that would lead to an order, we are concerned that it would be unduly burdensome. However, we could obviously consider that proposal.

Bristow Muldoon: The general view of the committee is that the idea of super-affirmative instruments should be given serious consideration. I recognise that there will be opportunities for committee to be involved at an initial consultation stage. The concern is that, if committees took part in the initial consultation, they might not be able to reflect on the external responses before making submissions to the Executive. That is why I would be interested in hearing your detailed views on the procedures that I suggested.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I will return to the concerns that were raised during our initial consideration of the bill and the statutory procedures that have been set out. The designation order would follow consultation, but the six weeks that is required seems to be a desperately short period in which to consider a report, a statement or the findings of a local inquiry.

When the consultation process on the bill was under way in my constituency, I quickly became aware that constituents could not obtain copies of the bill because not enough had been published. That was some weeks into the consultation period, which was very short but slightly longer than the six weeks that is now envisaged.

I think that we can take it as read that the matters that will be contained in the designation orders will be highly controversial. In both cases, there has been a long and contentious debate on the extent of boundaries and powers. Therefore the decision of the reporter of the local inquiry or the conclusions of the statement will be extremely controversial. That is why I suggested that six months would be more appropriate than six weeks.

Do you not regard it as absolutely imperative, if national parks are to be effective and successful, that they are born with the fullest support of those who live and work in the area that is designated? Do you really feel that a period of six weeks is satisfactory?

11:30

Murray Sinclair: I will take those questions in order. Ministers have always made it absolutely clear that it is important that the idea of a national park should be accepted by the people who live and work in a national park area. That is part of the reason why there is the possibility for quite wide variation in the way national parks are set up in different areas.

As we said in our letter, the period of six weeks after the reporter has reported before ministers can make a designation order is not considered to be a period of consultation as such. The period of consultation is the earlier period when the reporter considers the views of all those who want to express an interest as well as the views of the Parliament and its committees. Six weeks is the minimum period.

I hope that we will not get to a position where, when the report is submitted after extensive consultation—which will be the culmination of a lot of discussion in the Cairngorms and in Loch Lomond and the Trossachs about what the national parks should look like—there are considerable differences of opinion in the area. Ministers would be very concerned if that were the case.

If that happened, it would be open to reporters to take longer to seek or consider further views given to them before bringing a designation order or not. Equally, as is the intention and the hope, if agreement had largely been reached on what the national park should look like, it would seem a little strange if ministers could not make a designation order for up to six months. It could be argued that that would import a degree of inflexibility.

Fergus Ewing: I want to follow up the statement that the proposal will be agreed, which is the nub of the problem. Agreed by whom? By the people who live and work in the national park, by the reporter, by ministers or by the outcome of an inquiry? Why has the Executive not included in the bill what would seem to be the most democratic method of consultation on the creation of a national park, namely, a local referendum of those resident within the proposed boundaries? Surely the lesson we have learned from the English national parks is that, unless you start off with public and explicit demonstration of the support of those who will have to live and work in the national park, you are setting off a wrong and dangerous track.

Andrew Dickson: You are venturing into an

area of policy, which is really for ministers rather than officials.

Fergus Ewing: It is an issue of consultation, which is a legitimate area for this committee.

Andrew Dickson: Ministers have decided not to go down the road of a referendum. A referendum would give rise to various questions, the first one being what question we would ask. Ministers have taken the view that it is better to provide for several rounds of extensive consultation, which have been going on for some time—the procedures for the passage of the bill are part of that process—so that, at the end of the day, they can reach a view about the degree of unanimity among those who live and work in the area on the details of what a national park would look like.

Fergus Ewing: Okay, so we have ruled out consulting the people by way of a referendum. Let us return to the proposal of a third way, with regard to the type of statutory instrument procedure that is used, as was suggested by my colleague Bristow Muldoon. It seemed to me that you were reluctant to consider that proposal, which I found disappointing. The words that have been used are "complicated", "radical amendment of the bill would be required" and "unduly burdensome".

To recap, it has been proposed that we employ a procedure that has already been used in relation to the Deregulation and Contracting Out Act 1994, which would allow us to consider amendment of a designation order. We desperately require a more flexible procedure in setting the boundaries of the national park, one that would allow members of this Parliament to argue for exclusion or inclusion of an area. We have already had a members' business debate about the inclusion of the Cowal peninsula.

It would be preposterous for this bill to be passed without a procedure whereby members of this Parliament could lodge amendments to subordinate legislation. This committee's legal adviser has provided a comprehensive and enlightening proposal, and I find it depressing that that should be dismissed as requiring radical amendment to the bill. Would it not require amendment only to section 5(3) and section 6, with regard to the designation order, plus a consequential minor amendment? In what way could it be described as a radical amendment to introduce a method of subordinate legislation that has already been tried and tested at Westminster?

Andrew Dickson: I do not know whether my legal colleagues want to say anything more about that. My immediate reaction to that suggestion—which was a new suggestion that I had not heard before—was to agree to go away and consider it further with ministers. Murray Sinclair or Colin Wilson may want to add something.

Murray Sinclair: No. I understood that to be the position. As an initial reaction to a proposal that had been put to us, I said that there may be concerns—not that there would be concerns—that the provision could add an unduly burdensome complication. All that I was signalling was the fact that that was something that we would have to consider.

Fergus Ewing: I have several minor points to raise, but I shall finish with this one. I would find it difficult to support this procedure, as endorsed in the bill, which seems to deny proper local consultation and restricts it to a possible minimum period of six weeks. In the light of the experience in Badenoch and Strathspey, if this procedure goes ahead, it is likely to imperil what might otherwise be support for the national park. Given the fact that we have waited 50 years for a national park, I find it incomprehensible that such a tight timetable is now being pursued.

Jane Hope: You are talking about consultation, and I would like to clarify something. There is provision in the bill for consultation on proposals, and there is no specification in that part of the bill on the time period for the consultation: it can be as long as is necessary. The question has already been put to the minister, when she appeared before the Transport and the Environment Committee, whether there should be some specification on that time period, and she agreed to consider it. I cannot say any more on that subject.

Sections 2 and 3 contain provision for consultation on the proposal, which is not restricted to six weeks. Section 5, which has been the subject of your questioning, does not concern the consultation period, but what comes after the consultation.

The Convener: It might be useful for committee members to try to work through matters according to the legal briefing. At the moment, we should concentrate on the delegated powers and the six-week notice period. We can then move on.

David Mundell: I would like to comment on the point that Fergus Ewing and Bristow Muldoon made about consultation. I am pleased that you are now indicating a more positive way of addressing that. In your opening comments, you spoke of the burdensome nature of bringing in an individual bill for each park. Although we might accept that burdensome nature, I think that it is unsatisfactory for parliamentarians to be offered take-it-or-leave-it legislation when, if there were some amendments to that legislation, people might feel more able to support it. We should look for mechanisms that would allow that, and we should regard the amendment of subordinate

legislation by the Parliament as something positive to achieve, rather than as something burdensome.

It is my experience of consultations that a number of organisations come out of the woodwork of which local people have no knowledge and over which they have no influence. Local people do not know what those organisations are going to say. Scottish Natural Heritage is one such organisation; it is not directly accountable to local people. At this committee, we regularly see all sorts of bodies whose existence the average member of the public is not aware of. Once consultation has taken place, everybody should be able to understand what other consultees have said and should be able to respond to it.

Andrew Dickson: I do not want to add to anything that we have said about the consultation process, which is intended to be inclusive and extensive.

The Convener: I appreciate that the question of super-affirmative procedure has been sprung upon you and that you are having to think on your feet, but I have some sympathy with Fergus Ewing's point, because it seems that radical amendment to the bill would not be required. There may be procedural problems concerning our powers, and the Procedures Committee of the Parliament would have to consider that.

Do you accept that it is theoretically possible that, despite that possible future requirement for procedural changes, only minor amendment is required now? Given the magnitude of the parks proposals and their effects on people in substantial geographical areas, should the minister not give a clear indication that super-affirmative procedure, or whatever terminology may be used, would be the method used?

Andrew Dickson: That is an issue that the committee has raised and that we will take away and consider. Part of that consideration will be on the amendments that are required to the bill as it stands, and the implications of those amendments. As you mentioned, there may be general implications for the Parliament's involvement in subordinate legislation. That will obviously be a matter for yourselves, in the first instance.

The Convener: Unless you have some super-affirmative procedure whereby amendment can take place, what is the purpose of the six-week time scale for the minister, apart from perhaps allowing the entire procedure to be aborted? What do you envisage the minister doing in that six-week period? Without the super-affirmative procedure, would it not be simply a case of the minister saying either "Yes, I am going further" or "No, I am abandoning it entirely"?

Andrew Dickson: In a sense, the period is a safeguard to prevent any minister reacting in a precipitate way to the reporter's report. The six weeks—which is, as I have said, a minimum—gives a guaranteed time for ministers to think with some care about the position that they have reached. They could decide to take longer; they could decide to take into account other views that were being put to them. What they cannot do under the bill as it stands is simply take a snap decision as soon as the consultation period is over.

11:45

The Convener: What room for manoeuvre would you envisage being available within that six-week time scale without having to stop and start again?

Andrew Dickson: It would depend on the position that ministers found themselves in and the picture that had emerged as a result of the consultation that had taken place. I think that the bill says that ministers may, but need not, make a designation order if it becomes clear that there is no reasonable basis for going forward with one. It would be open to ministers not to do so and to start the process again, although they may be rather reluctant to do that—it would depend on the circumstances.

The Convener: Would you see advantages in having a super-affirmative procedure for instances where one part of an area in a designation order indicates that it does not wish to be included? Subject to changes in standing orders, that would give the flexibility for the designation order to proceed but would allow Parliament to delete the part that does not wish to be included. It would avoid the snakes and ladders of starting the procedure all over again.

Andrew Dickson: Ministers and civil servants will have to consider that idea carefully.

Murray Sinclair: If that is a concern in relation to any particular proposal for an order, we would hope to obtain that sort of information from the consultation procedure that we have in mind prior to the six-week period we are discussing.

Dr Elaine Murray (Dumfries) (Lab): I am not a member of this committee, so I thank the convener for allowing me to speak.

In considering this legislation, one of the concerns of the Rural Affairs Committee, as the lead committee, was that if we did not get it right this time, there was no way of going back later, when a designation order was being made, to make an amendment. We have not yet discussed the issues surrounding marine parks, which are rather more complicated than land-based parks. If

we do wish to consider a marine park, would a super-affirmative procedure not take care of some of the concerns about extending the powers to marine areas?

Andrew Dickson: I can only say off the cuff that it might. I would not want to go further than that.

Murray Sinclair: We would still need the general power to make the necessary modifications to the bill, as many of the core provisions of the bill as it is drafted are, for want of a better description, land-based. The way in which it would be exercised would be very different if you had the sort of alternative affirmative procedure that you are describing.

Colin Wilson: That is right. There are two issues: the extent to which the bill might work in relation to marine parks, and exactly what is being proposed, whether it is a wholly marine area or part land and part water. There are all kinds of possibilities. As Murray Sinclair says, some of the provisions of the bill are geared largely towards land-based parks, and need to be examined. The power of amendment that the bill contains at the moment is designed to address that.

The Convener: We have dealt with delegated powers and the six-week consultation period. Unless committee members have any other points to raise concerning modifications, or any of the other matters that we have raised with the Executive, we will move on.

David Mundell: Is it thought that some amendment to the bill will be required fully to adopt the principles of a marine park, or is the draft bill regarded as the finished article?

Andrew Dickson: To turn that round, what has been included in section 29 of the bill is a response to the comment that the bill should take more explicit cognisance of the possibility of marine national parks. There is no doubt that section 29 is inclusive enough. There may be a question whether, as we said in the letter that you received, the power could be restricted more in some respects, while dealing with as many of the issues that might arise in future, as yet unknown, with marine national parks as we can foresee. That is what we and ministers are examining at the moment.

The Convener: The Transport and the Environment Committee appreciates the potential difficulties of marine national parks. Either section 29 and the bill must be expanded substantially, or the reference to marine national parks must be deleted. However, we would not want to do that. Are you satisfied that section 29 will be sufficient to cover the future designation of a marine national park, or do you envisage difficulties because of the complexities of directives in European legislation?

Andrew Dickson: I have a bit of difficulty with that question, simply because we do not know what range of proposals might emerge in future, for partly land-based, partly sea-based national parks, or even wholly sea-based national parks. Section 29 grants a wide-ranging power. Whether or not section 29 appears in this bill, if the Parliament decided that marine national parks were a rather different kind of animal, it could legislate for them separately at a future date. Murray Sinclair may want to comment on the legal aspects of that.

Murray Sinclair: Subject to what Colin Wilson might say, our view would be that section 29 is designed to include a wide-ranging power that will enable us to do whatever is necessary to give effect to potential proposals. That power is to be exercised in accordance with European Community law: those are the restrictions within which we always have to operate, and we would have to consider that when we have any firm proposal. Section 29 is as far as we could reasonably go in paving the way for a marine park in the future.

Colin Wilson: Yes. We are looking over the horizon to a future that we cannot yet see. Without flexibility, there is a risk that a widely supported proposal might not be implemented under the bill.

Fergus Ewing: I would like to return to section 28—the other section 28. You will be relieved to hear that the committee was unanimously in favour of retaining this section 28, subject to your explanation. We have noted your response to section 28(4), on the power to modify the procedure in the event of de-designating a national park area.

Do you think that it is appropriate to specify the powers to which the modifications should relate? Furthermore, can you expand on your comments in paragraph 4.3 of your letter, in which you say that the justification of the provision is “appropriate flexibility”? What does such flexibility entail? If the bill sets out a democratic procedure for creating a national park, should such a procedure not also apply if a national park were to be scrapped?

Andrew Dickson: A modification order does various things; for example, it might simply abolish a national park, and it would be only fair to consult the national park authority on such a proposal. However, for obvious reasons, that provision cannot be included in the bill as drafted before there are any national parks. Although section 28(4) of the bill contains provision for modification, its power is not extremely wide, as it restricts itself to the modification of sections 2, 3, 4, 5 and 6 of the act.

Again we must speculate a little. In advance of knowing what kind of modification of an existing

national park might be appropriate, ministers would not want to restrict further the order-making power. For example, a proposal to change the composition of the national park authority might or might not require a reporter to report on a national park's boundaries.

David Mundell: On the issue of the laying of reports, will you expand on paragraph 2 of your response? You state that there is only an intention to lay reports; however, we feel that there should be a requirement to do so.

Andrew Dickson: Strictly speaking, a requirement to lay the report before Parliament would be almost unnecessary as the report will be in the public domain, where the Parliament—and anyone else—can consider it. However, if the committee felt that such a requirement would be desirable to avoid any doubt, we can certainly take that into account.

David Mundell: It might be helpful, as it would give the Parliament a clear locus.

Murray Sinclair: We can certainly consider that suggestion. We probably did not think that such a measure was necessary as the consultation procedures built into the bill should ensure that any reports are available to Parliament and others.

Fergus Ewing: Further to David Mundell's question, the duty of publication is contained in section 2(9), where the Scottish ministers may require SNH or some other appropriate body to prepare a report, which must be published. Furthermore, section 3 specifies that any statements that may be required by ministers must also be published. Section 4(1), which deals with the local inquiry procedure, states that after the publication of a report or statement, Scottish ministers

"may cause a local inquiry to be held".

Has any thought been given to a provision specifying a minimum time interval between the publication of the report or statement and the decision to convene a local inquiry?

12:00

Andrew Dickson: The practical answer is that a fairly formal affair such as a local inquiry cannot be set up at five minutes' notice.

Jane Hope: It is perhaps not appropriate to put a time scale on this matter, as it would be very difficult to predict. Furthermore, it was not immediately obvious why a minimum time period would need to be specified. Why should ministers not be allowed to take as little as three or as many as eight weeks to reach a decision on a local inquiry?

Fergus Ewing: I understand both the reasoning behind your answer and why there should be a huge range of alternative procedures such as reports, statements or local inquiries. The difficulty is that, because this is two-tier legislation, people who live and work in the proposed national park areas do not know whether SNH will prepare a report, which would be extremely controversial in the Cairngorms area, whether a statement will be issued or whether there will be a local inquiry.

Although I appreciate that the bill is an enabling bill to allow the maximum flexibility, does the Executive recognise that the existence of so many alternatives might begin to create confusion about the whole process between now and the creation of national parks, a situation which might not be desirable?

Andrew Dickson: If I may say so, that is an interesting point of view. On this issue, we are kind of damned if we do and damned if we don't, because, as you rightly say, much flexibility has been built into the bill. Although I appreciate your point that a series of different possible roads appears to be open, I hope that that would not create confusion. The key point is that there should be adequate and comprehensive consultation procedures. The basic thinking is that, as we cannot predict the particular proposals for each national park, such alternatives might be necessary at some point and the provision simply gives flexibility for those alternatives to be used.

Jane Hope: The procedures are not all that different. The bill contains safeguards and there is scope to add to the procedures if necessary. For example, a public inquiry might be needed in addition to what has already been done. However, the point is that no one knows yet whether an inquiry will be needed for a particular national park.

Fergus Ewing: With respect, do you accept that if the minister decides to instruct SNH to prepare a report under section 2 of the bill instead of simply issuing a statement, some people might regard it rather odd for that body to preside over a process that partly determines the economic and social development of the area? That would be an entirely different procedure from the minister preparing a statement, for example.

Andrew Dickson: It would not necessarily be procedurally different. I take your point about the angle from which SNH might be perceived to be coming—ministers would have to think about that when they considered which procedural road to go down.

Fergus Ewing: We have had an interesting discussion, but it has illustrated some of the problems that are involved in the proposals. It would be helpful if ministers indicated what consultative procedures they intend to employ with

regard to each of the proposed national parks. That would shed more light on the debate and it would help my constituents.

Andrew Dickson: We will communicate your request to ministers.

The Convener: I thank our witnesses for their attendance—we appreciate the tightness of the time scale to which you are working. The committee will make its report in due course.

The committee will now run through the points that were raised and decide what, if anything, we will say to the lead committees. We will start with delegated powers of scrutiny and super-affirmative procedure.

Fergus Ewing: The witnesses showed the characteristic restraint for which the civil service is rightly famous. The proposals for super-affirmative procedure would achieve flexibility and would address some of the points about which we were originally concerned regarding the shortness of the six-week period. I endorse the proposals in Margaret Macdonald's legal briefing.

In response to your question, convener, the witnesses were unable to explain satisfactorily the point of the six-week period, if it is not to facilitate a process of consultation. They told us that that period would prevent precipitate action, which is—as an explanation—meaningless. There must be a way in which MSPs could amend the powers and composition of the board, the boundaries of the park and address other matters that might be contained in the subordinate legislation. Without that, we are embarking on a dangerous journey. We have an opportunity to make a substantive improvement to the bill by recommending that we follow Margaret Macdonald's proposal.

Bristow Muldoon: In fairness, we dropped that issue on the witnesses and, because of that, I can understand their unwillingness to agree or disagree at the moment. I acknowledge that they will consider the matter from the Executive's point of view. The creation of a super-affirmative statutory instrument would be appropriate for a bill such as this. We should endorse the approach that the lead committee is considering.

It might be appropriate for the convener to correspond with the Procedures Committee to ask it to consider making that a common approach to complicated pieces of subordinate legislation. The Procedures Committee would be able to raise that with the Executive.

David Mundell: I agree with Fergus and Bristow. We can acknowledge the arguments that the Executive makes for having a framework bill, but there must be some sort of protection from the other direction—it is not acceptable that MSPs might vote down something that they would agree with in amended form. The situation regarding future national parks—particularly their boundaries—is unclear and might be contentious. We are proposing a legitimate course of action and we should stick with it.

As Bristow Muldoon said, the proposal has wider implications for Parliament. There is no reason why Parliament should not consider amending subordinate legislation. We all know the pressure that the committee system is under because of the amount of work that must be done on bills and it is possible that allowing amendment of subordinate legislation might be a better way for Parliament to manage its work.

The Convener: It is true that we sprang the suggestion on our witnesses today, but I agree that the introduction of a super-affirmative procedure is an excellent suggestion. I am keen to ensure that other committees understand that the proposal is not an attempt to expand the Subordinate Legislation Committee's domain, but is intended to allow Parliament and the public greater opportunity for scrutiny. The procedure would not be used for dealing with run-of-the-mill statutory instruments. We understand the Executive's desire to save parliamentary time, but if parliamentarians and members of the public are to have any influence over an important issue that concerns a huge landmass, a super-affirmative procedure is necessary.

I agree with Bristow Muldoon that we should raise that with the Procedures Committee. Do members agree that we should do that and that we should suggest in our report that the super-affirmative procedure—which has been used in special circumstances in Westminster—be replicated in the Scottish Parliament to ensure greater democratic control and accountability? As Fergus Ewing said, the bill does not need radical amendment. However, the procedures require consideration and a position must be arrived at from which progress can be made when we come finally to deal with Loch Lomond and the Trossachs.

David Mundell: I do not accept that the proposal would be more burdensome than the introduction of separate bills.

The Convener: What about the production of reports? I got the impression that the Executive would do that if necessary; presumably, the committee would want to clarify that that is necessary. I do not know what members think about the six-week period between publication of report and laying of a draft order. To some extent, that ties in with the issue of the super-affirmative procedure, without which I see no need for the six-week period. Is that period simply to give the minister time to decide whether a mistake has been made or whether public opinion is agin the

findings of the consultation that took place before?

David Mundell: It seems to be simply to stop the minister acting quickly.

The Convener: What about modifications? Does the committee wish to say anything on that?

12:15

Fergus Ewing: We expressed the view previously that six weeks was inadequate and that there was a role for consultation after the report and the statement and, if appropriate, after the report following the local inquiry. At that point there would probably be a number of controversial issues arising in the area that was to be designated and, therefore, an opportunity for debate and discussion would be needed. That is why we recommended that the period should be six months rather than six weeks. I concede that we can discuss whether the period should be six months, but we would, presumably, adhere to our original proposal in the event that the Executive did not accept the super-affirmative procedure.

Bristow Muldoon: I understand that the period is not intended to be for further consultation. I am not sure what its purpose is, but I do not necessarily think that—after having gone through extensive consultation and possibly an inquiry—there should then be further consultation. I am not sure where it would all end. That is why, if there were controversial issues still to be addressed, we should go back to our earlier suggestion. That would give Parliament the opportunity to take on board any remaining controversial issues and discuss them. I am not sure that changing the six-week period to a six-month period would make any difference, because that would not introduce any further formal consultation, which would require that other changes were made. That would merely delay the time at which the minister could introduce the designation order, but would not require that there was further consultation.

Fergus Ewing: Six months would allow a longer period for people in the proposed national park area to consider the findings of the report following the local inquiry. By their nature, those decisions are extremely controversial. Six months would, therefore, provide a longer and more reasonable period than six weeks for consideration. I agree that the super-affirmative procedure would be desirable because it would enhance the role of Parliament and enable members to amend the designation order. We should, however, adhere to a longer period. Although the witnesses said that the six weeks were not intended as a consultation period, I think that they should be.

If Scottish Natural Heritage chose to produce a report and there was no local inquiry, that report would be highly controversial. If the area was made the subject of a designation order after six weeks, I fear—and I am thinking of the Cairngorms—that the national park would start off on the wrong basis. People would feel that there had not been proper consultation on the recommendation of what was, effectively, a quango.

The Convener: We seem to be agreed that we will suggest a super-affirmative procedure, and we also agree that there is doubt about the purpose of the consultation period. Perhaps we ought to flag up the question of what the Executive is trying to do in that period. The Executive says that it is not a consultation period, although there is a period for decision making.

David Mundell: It is a period for reflection.

The Convener: We could seek clarification on that, and point out that if there is to be a consultation period, it should be longer. Would that be acceptable, Bristow?

Bristow Muldoon: My only concern is that we should not add delay after delay after delay to the process. There will, undoubtedly, have been extensive consultation before the stage about which we are talking is reached. Clarification about the process would be useful. I acknowledge some of Fergus's concerns about SNH being called in to produce a report, but I suspect that that is straying out of the area of subordinate legislation and into areas of policy. Those are areas that Fergus might wish to pursue through the lead committee on this bill.

David Mundell: The Executive should be pressed for clarification on the purpose of the six-week period. It sees that period differently from Fergus. Reports on national park proposals are likely to be lengthy. What we consider to be an appropriate length of time is different if the period is to allow everyone to consider the report, than if it is merely to ensure that the minister does not make a decision the day after the report is published.

The Convener: It seems that we are heading for consensus. If the period is meant for reflection, there is logic to saying that there should be a shorter time scale. Otherwise, one might end up in a Lingerbay quarry situation, in which—God knows how many years on—no decision has yet been made. It could be argued that the last thing that anybody wants is a hiatus of nine months, during which nobody in, for example, the Cairngorms would know whether the national park designation was coming or not. If, however, the period is meant to be a consultative period, six weeks is clearly too short.

David Mundell: The purpose of the period is not clear. Bristow made the point—with which I agree—that, if our proposal were accepted, the

ability to debate the issues in Parliament and in committees would tidy everything up and allow all the points to be made. I would have thought that that would be attractive to ministers, because it would formally close the process in a way that everyone could see was democratic.

The Convener: Fergus, are you happy for the committee to seek clarification on whether the period is for reflection or consultation? If it is consultative, six weeks is too short.

Fergus Ewing: The Executive will say simply that the period is not consultative. My point, however, is that it should be—especially if the Executive uses the procedure to appoint a reporter but does not proceed with a local inquiry. It is open to the Executive to do that. As David Mundell said, the report is likely to be complex and the idea that there should not be a period within which that report should be considered is foolish. There should be a period to consider the report, but six weeks is too short. I would not go to the wall for a six-month consultation—one does not want to remain in limbo forever. A shorter period, for example four months or slightly less, would be considerably better than six weeks.

My concern is a practical one. In the initial consultation exercise for the bill people in my area were on the phone to me saying, "It is two weeks into the inquiry. We can't get a copy of the bill." If we cannot get copies of the report, history will repeat itself. Instead of there being consensus, there will be considerable fears regarding lack of consultation. Local people will want to meet in their community councils, chambers of commerce and other organisations to discuss the findings of the report. A longer period would allow that process to take place. It would also allow us to be informed after people had had a decent opportunity to consider the report and to make representations.

Those are the arguments that I canvassed in this committee when the matter was first raised. I will not go to the wall on six months. Bristow Muldoon—or another member—said that six months was too long. I think that there should be a longer period than six weeks, although I accept that I could be accused of straying into consideration of the merits of the matter, and I would not want that to happen.

Bristow Muldoon: I do not know whether we really want to extend the debate much further today. I understand some of Fergus Ewing's concerns. He is closer to this issue than many other members, because he represents an area that will be affected. I understand that communities in the national parks will want their opinions on the definition of the parks to be heard. We should recommend to the lead committee that it seek clarification on the issues that have been raised. It could then consider whether it would be appropriate to extend consideration beyond the proposed six weeks, if it had not received satisfactory responses.

The Convener: I am happy with that view of laying reports. Are there any points on modifications?

Do members have any comments on marine national parks? The Transport and the Environment Committee took the view that it could take for ever and a day to go into the issue of marine national parks in depth. However, if marine national parks are covered sufficiently by the bill, the matter can be left as it is, without any problems being flagged up. We could ask the Procedures Committee about how that bill will progress, and I am told that that would not mean getting involved in policy matters.

I am open to views on the matter. I do not know how members of the Rural Affairs Committee felt about it, but members of the Transport and the Environment Committee do not want to impede the setting up of marine national parks. Members felt that that would be contrary to what we were trying to achieve. The consensus was that members wanted it to be possible to designate marine national parks in the future, and we want to ensure that the legislation will allow that.

David Mundell: There are always concerns about whether sections that are tacked on to a bill will meet requirements and whether they will lead to unexpected consequences. The witnesses' view was very much that which you have just outlined. Everyone must be satisfied that that section does what is intended and that it does not have unintended consequences that would cause more problems than would be solved.

The Convener: My general view on marine national parks is that we should not flag up too many issues. We might otherwise be in danger of opening up a hornet's nest. If the witnesses are happy, I am happy. Years down the line, there might be bridges to cross involving attempts to designate marine parks, EU regulations and fishing matters.

The other point is that designation orders should not be subject to modification—we might want to flag that up to the lead committee. That would also tie in with the super-affirmative procedure, which would be the method for getting round that potential problem. That might be another argument for moving towards super-affirmative procedure on the basis that the committee is not particularly happy about the route that is being suggested. That increases the need to view this as a special case.

David Mundell: Modifications of designation orders are a special case—it is accepted that the

super-affirmative procedure is being proposed, rather than a bill. In a way, that can be the criterion for a special case, as a conscious decision has been made to use an instrument instead of a bill.

The Convener: It is suggested that the marine parks orders should be subject to the same procedures.

There are no further comments on the item. The clerk is satisfied that the committee has reached consensus.

Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000 (SSI 2000/Draft)

12:30

The Convener: The legal adviser has not flagged up any points on this draft instrument. However, others have suggested that there might be difficulties when a landlord who wishes to enter into a licensing agreement cannot obtain one, although he is already seeking to enter into a formal tenancy agreement. We could ask the Executive whether it has considered the procedure whereby someone would enter an AT5 regulated tenancy without a licence being obtained.

David Mundell: That would be worth doing.

The Convener: We could pass on the Executive's response to the lead committee. Is that agreed?

Members *indicated agreement.*

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2000 (SSI 2000/Draft)

The Convener: No points arise from this instrument.

European Communities (Lawyer's Practice) (Scotland) Regulations 2000 (SSI 2000/121)

The Convener: This is a negative instrument, about which members received an e-mail from the Law Society of Scotland. We have also received advice from the committee's legal advisers. Are there any comments?

David Mundell: I should declare that I was a member of the Law Society of England and Wales, in case that is deemed to have any bearing on the matter.

The Convener: It has been suggested that there are no problems with this instrument. However, given the views of the Law Society and of the Dean of the Faculty of Advocates, we might want to ask the Executive whether it feels that there is a vires question about whether it has dealt properly with regulations 16.1 and 16.6.

David Mundell: There is no harm in asking the Executive to respond when significant concerns have been raised.

The Convener: Regulation 21 was also mentioned, but they might have misread that. Do members agree that we should alert the Executive to the concerns of those bodies and ask it to respond before we consider the matter again next week?

Members *indicated agreement.*

Scotland Act 1998 (Cross-Border Public Authorities) (British Wool Marketing Board) Order 2000 (SI 2000/1113)

The Convener: No points arise in relation to this instrument.

Right to Purchase (Application Form) (Scotland) Order 2000 (SSI 2000/120)

The Convener: This item is an instrument that is not subject to parliamentary control. No points arise in relation to it.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Partial Revocation (No 7) Order 2000 (SSI 2000/125)

The Convener: Again, no points arise in relation to this instrument.

That brings us to the conclusion of an epic meeting. Thank you for attending.

Meeting closed at 12:33.

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