

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 June 2000
(*Morning*)

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CONTENTS

Tuesday 27 June 2000

Col.

TRANSPORT (SCOTLAND) BILL	255
NATIONAL PARKS (SCOTLAND) BILL	258
POLLUTION PREVENTION AND CONTROL (SCOTLAND) REGULATIONS 2000 (SSI 2000/DRAFT)	260
MEAT (ENHANCED ENFORCEMENT POWERS) (SCOTLAND) REGULATIONS 2000 (SSI 2000/171)	261
CONTAMINATED LAND (SCOTLAND) REGULATIONS 2000 (SSI 2000/178)	261
ADVICE AND ASSISTANCE (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/181)	261
CIVIL LEGAL AID (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/182)	262
DEBTORS (SCOTLAND) ACT 1987 (AMENDMENT) REGULATIONS 2000 (SSI 2000/189)	262
DISCONTINUANCE OF PRISONS (SCOTLAND) ORDER 2000 (SSI 2000/186)	262
PRISONS AND YOUNG OFFENDERS INSTITUTIONS (SCOTLAND) AMENDMENT RULES 2000 (SSI 2000/187)	262
NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/188)	262
POLICE PENSIONS (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/193)	263
CENSUS (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/194)	263
EDUCATION (ASSISTED PLACES) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/195)	263
ST MARY'S MUSIC SCHOOL (AIDED PLACES) AMENDMENT (SCOTLAND) REGULATIONS 2000 (SSI 2000/196)	263
LOCAL GOVERNMENT PENSION SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/199)	263
EDUCATION (STUDENT LOANS) (SCOTLAND) REGULATIONS 2000 (SSI 2000/200)	263
SEED POTATOES (SCOTLAND) REGULATIONS 2000 (SSI 2000/201)	264
NATIONAL HEALTH SERVICE (PROFESSIONS SUPPLEMENTARY TO MEDICINE) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/202)	264
LOCAL GOVERNMENT (EXEMPTION FROM COMPETITION) (SCOTLAND) AMENDMENT ORDER 2000 (SSI 2000/206)	265
LOCAL AUTHORITIES (GOODS AND SERVICES) (PUBLIC BODIES) (SCOTLAND) ORDER 2000 (SSI 2000/207)	265
LOCAL GOVERNMENT ACT 1988 (COMPETITION) (SCOTLAND) AMENDMENT REGULATIONS 2000 (SSI 2000/208)	265
UNDERSIZED LOBSTERS (SCOTLAND) ORDER 2000 (SSI 2000/197)	266
UNDERSIZED SPIDER CRABS (SCOTLAND) ORDER 2000 (SSI 2000/198)	266

SUBORDINATE LEGISLATION COMMITTEE

21st Meeting 2000, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tw eeddale, 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

CLERK TEAM LEADER

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 27 June 2000

(Morning)

[THE CONVENER *opened the meeting at 11:42*]

The Convener (Mr Kenny MacAskill): Good morning, and welcome to the 22nd meeting of the Subordinate Legislation Committee. We must first decide whether to consider agenda item 6 on the committee report in private. In our pre-meeting discussion, we agreed that we had not yet had an opportunity to consider it, so I suggest that we should consider it in private after we have discussed the other items on our agenda.

Members *indicated agreement.*

Transport (Scotland) Bill

The Convener: Item 2 on the agenda is delegated powers scrutiny. We have received a further response from the Executive on the Transport (Scotland) Bill. Various points have been raised.

On section 1, we sought a response on the nature of the procedure to be used. I am not necessarily satisfied with the position on super-affirmative procedures. I am not sure what the Executive's exact intention is. If we are talking about only the strategies, I can understand that a negative procedure may be appropriate; but if a Highlands and Islands transport authority is to be created—and section 1 seems to be the only part of the bill in which that could be done—I think that considerable parliamentary scrutiny would be necessary to determine what would be included in that, what would be excluded and what the powers of the authority would be.

We should draw to the attention of the lead committee, the Transport and the Environment Committee, that if the Executive is simply suggesting the pulling together of strategies, super-affirmative procedures are probably unnecessary. However, if a Highlands and Islands transport authority is to be created, we would want there to be a mechanism whereby people in the area—and people outwith the area—who have a legitimate grievance could have some input.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I agree with that, convener, and I endorse your remarks about the proposed Highlands and Islands transport authority. When

matters relating to the powers of that proposed authority were canvassed by me in open question time during one of the meetings of the Parliament in Glasgow, the Minister for Transport and the Environment indicated that consultants are considering whether such an authority could have powers to buy and sell petrol, to try to deal with the problem of high petrol prices in the Highlands and Islands. From the minister's response, which is on record in the *Official Report*, it appears that the possession of such powers by a Highlands and Islands transport authority has been contemplated, and that the Executive may confer those powers on such an authority. If the authority is to possess such powers, the super-affirmative procedures should apply.

As a separate issue, I wonder whether the conferral of such powers would breach European Union competition rules if a Highlands and Islands transport authority were to receive state aid in excess of the de minimus amount of 100,000 ecus. It is difficult to see how such a body could purchase petrol without exceeding that limit. Given that ministers are considering conferring those powers to a body proposed under section 1, it would be useful for this committee to have a detailed response from the Executive on the issue of super-affirmative procedures and on whether the conferral of powers would comply with EU rules.

11:45

Bristow Muldoon (Livingston) (Lab): It is unclear what powers section 1 is intended to give to the Executive. Given that we have to report by Friday, I agree that it would be appropriate to draw the issue to the attention of the Transport and the Environment Committee, and to allow that committee to ask the Executive the appropriate questions as to what actions it intends to take. We could then come to a conclusion on whether we think that the proposed procedures are appropriate.

The Convener: We can certainly proceed in that way.

Section 34 is on the fuel duty rebate, a matter in which I have some interest. The suggestion by the Executive is that the level of detail may be inappropriate for regulations. My understanding is that the FDR is within the devolved competence of the Parliament, but that it is dealt with under licence by the Department of the Environment, Transport and the Regions.

The Road Hauliers Association has suggested that the FDR could be extended. It seems to me that for any scheme for which we have devolved competence, and in which the traffic commissioner and the DETR are involved, regulations may be

appropriate. They may not be, but the issue should certainly be considered; otherwise, we may have a democratic deficit. Even before we consider the possibility of its being extended, the FDR scheme for bus operators is already fairly complicated at present.

We should therefore suggest that, when considering section 34, it should be considered whether regulations should be published, as opposed to leaving it to the traffic commissioner to decide what is a registered route and leaving it to the DETR to administer that. That should be flagged up to the lead committee, which will doubtless take evidence on the issue from bus operators tomorrow.

Members indicated agreement.

The Convener: I do not know whether members wish to raise points on section 64 and the European convention on human rights, which extends into every facet of our lives.

Fergus Ewing: Saying that all legislation that this Parliament produces must be ECHR-compliant is different from saying that it is redundant to mention that requirement specifically in any legislation. We should ask for further information from the Executive on whether its proposed provisions, whatever they may be, will be ECHR-compliant. That is a distinct point. It is our duty to raise such issues of competence at the outset, rather than repenting at leisure at some future date.

The Convener: I go along with that.

Bristow Muldoon: One point that the Executive makes is that all legislation has to be ECHR-compliant, but it is entirely appropriate for the lead committee to pursue the Executive and seek assurance that section 64 does comply with the ECHR.

The Convener: To follow on from what Fergus said, it would seem to be good practice to use this method of looking at legislation, rather than doing so as an afterthought.

Fergus Ewing: I am sure that the lead committee would not be critical, and possibly would be appreciative, if issues of competence were flagged up by this committee. We are entitled to do that under our remit, in the hope that any fears will be readily dismissed by the response of the Executive.

The Convener: Also, it is not beyond the realms of possibility that at some stage something that is not ECHR-compliant could be within devolved competence. You cannot rely on the wisdom of everything that comes down. The methodology should be considered. The Executive should, as a matter of course, consider implications arising from the ECHR, irrespective of the source.

I do not have any points to raise on section 67(2). I am happy with the Executive's position on the electronic system. Does anyone wish to raise any points?

Fergus Ewing: Is the phrase

"or to any other circumstances whatsoever"

a normal statutory phrase?

The Convener: We are advised that it is.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): I think that we could agree with that power being used in this way.

The Convener: On section 69, it is suggested that we should welcome the inclusion of the formal consultation of Parliament. We can do so. It looks as if an amendment will be brought forward to deal with matters in section 78.

That is the Transport (Scotland) Bill dealt with.

National Parks (Scotland) Bill

The Convener: We move on to the National Parks (Scotland) Bill, as amended at stage 2. Amendment 121 in my name was lodged at stage 2. Although an Executive amendment dealt with the 12-week consultation period at local level, which we have all welcomed, no amendment was accepted at stage 2 with regard to the super-affirmative procedure. We have debated this matter before and my position remains that the super-affirmative procedure would be appropriate. It is my intention to try once again what was tried at stage 2.

I appreciate—I think that we all do—the Executive taking on board the 12-week consultation period. That consultation deals with people outwith Parliament, but there must be a consultation period within Parliament and an opportunity for Parliament to have input and to amend complicated regulations.

Fergus Ewing: The Executive has moved some way toward addressing the concerns, and it would be churlish not to acknowledge that. The 12-week consultation period obviously is better than six weeks. It is slightly shorter than I would have liked, as I mentioned at a previous meeting, but none the less, I welcome that. Of course, the consultation involves not this Parliament, but local authorities, community councils, persons representative of the interests of those who live, work or carry on business in the area, and such other persons as are thought fit. While that is to be welcomed, all that consultation is extra-parliamentary; it is not intra-parliamentary. The case for acknowledging in the bill the role of Parliament, and in particular the role of committees, is compelling.

Although I acknowledge the progress that has been made and the Executive's welcome concession, this might be an appropriate occasion for this committee to assess whether we believe that the super-affirmative procedure should be pushed. I say candidly that I have a considerable constituency interest in this matter. I hope that any member who has an interest in a matter such as a proposed national park in their constituency would have an acknowledged right to raise issues that emerge from a designation order and take them through the committee procedures with the possibility of amendment. That was one of the main reasons for having a super-affirmative procedure. Without that right we have consultation outwith Parliament, but strangely there is no right for MSPs to initiate that consultation process in Parliament for complete parliamentary involvement.

Ian Jenkins: I am inclined to agree with that principle. Presumably the initial 12-week consultation period would throw up documents that could be analysed by members who could have a further input through the committee system.

The Convener: From an Executive perspective, it would focus the points in dispute. It would allow the opportunity to describe potential stumbling blocks for MSPs of a certain party or with a specific constituency interest. The Executive could address those or could choose to take an issue head on and say, "No, we are putting it to the vote." At least this way, there is an indication from within Parliament as to what the problems are likely to be, whether they can be addressed and a consensus reached going through committee. If not, the Executive could take its chances in the chamber. That would draw the attention of Parliament to complaints that were raised.

Bristow Muldoon: In the response that we received from the Executive, Sarah Boyack's letter indicates that her expectation is that committees of the Parliament would become involved at the consultation stage. I do not think that the Executive's current position rules out the involvement of parliamentarians. I wonder whether that might give Fergus Ewing his opportunity to have constituency input.

Fergus Ewing: I again say that I welcome the broad response of the Executive on these issues. However, although it is welcome that the minister responsible for this piece of legislation recognises that committees should have a role, I think that in the interests of Parliament—and speaking as a member of this committee—it would seem to be more desirable that there is a recognised, explicit role for them in the bill.

I hope that the committee might agree that we could all support and subscribe to the discussions

that we had a month or so ago about the helpfulness of the super-affirmative procedure to the parliamentary process and, as the convener has acknowledged, to the Executive. That would give MSPs and Parliament rights and roles that are otherwise less well defined and perhaps uncertain.

The Convener: The Executive's intention might be to go down that route. My caveat would be that if that is the Executive's intention, it should say so. I am happy if that is where it is going, but that should be put on record; we would be grateful for that declaration. The Executive does not appear to be clear whether that is where we are going. Bringing this in would not deflect from its ability to get through matters by way of subordinate legislation, but it would allow members with a specific interest—from any party or geographical area—to raise points when otherwise they would have to put down notice of opposition.

Are you happy with that, Bristow? If we phrase it in that manner, we will not seek to impugn the Executive. If that is where ministers are coming from, we welcome that, but we would prefer it to be stated. If that is not the case, we would like the matter to be reconsidered.

12:00

Bristow Muldoon: I am comfortable with any clear statement that committees of the Parliament will have a clear role during the consultation period. Paragraph 16 of Sarah Boyack's letter certainly indicates that. If she says that in her letter, perhaps the Executive will be prepared to include it in the bill.

The Convener: We can ask the Executive to clarify matters and those who want to lodge amendments can do so.

The other matters that have been addressed—such as marine parks, appointments, on which Mike Rumbles has lodged amendments, and byelaw-making powers, on which the Executive has lodged amendments—are generally welcome. Does anybody want to make any specific points about those issues? If not, we shall move on to the next item.

Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/Draft)

The Convener: Agenda item 3 is Executive responses, the first instrument being the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/Draft).

One of the points that we raised about this instrument was that, although it might be fine to

have a right of appeal, it would be beneficial to ensure that the prospective appellant knows about that right of appeal. That is a point of principle. Although the regulation may apply more to companies than to individuals, it is a matter of getting the methodology right.

We should therefore draw to the attention of the Transport and the Environment Committee our view that it would be appropriate, if there is to be an appeal mechanism, that the mechanism should be readily available and a matter of common knowledge, without an appellant having to research the matter.

Bristow Muldoon: I agree that, for any procedure that involves a penalty, it should be a simple case of natural justice that any person or company should be advised of their rights of appeal. The fact that a company is involved should not allow that to be overlooked.

Meat (Enhanced Enforcement Powers) (Scotland) Regulations 2000 (SSI 2000/171)

The Convener: We thank the Executive for the information that it has sent us about this instrument. The order has been drawn to the attention of the Parliament and the appropriate information provided, so we can be satisfied that matters have been addressed.

Contaminated Land (Scotland) Regulations 2000 (SSI 2000/178)

The Convener: This instrument was drawn to the attention of the Executive. I do not know about Fergus Ewing, but I am prepared to accept the Executive's view as regards devolved competency, rather than that of the DETR. Nothing else was flagged up in relation to the instrument.

Advice and Assistance (Scotland) Amendment Regulations 2000 (SSI 2000/181)

The Convener: There was defective drafting in the explanatory notes to this instrument. The Executive has acknowledged that the notes are defective, so we shall simply draw that to the attention of the Justice and Home Affairs Committee.

Civil Legal Aid (Scotland) Amendment Regulations 2000 (SSI 2000/182)

The Convener: This instrument also contained a drafting error, and that has been acknowledged by the Executive. We shall therefore take the same course of action as with the previous instrument.

Debtors (Scotland) Act 1987 (Amendment) Regulations 2000 (SSI 2000/189)

The Convener: This instrument is the final one on which we have received a response from the Executive. Our query related to the definition of microwaves, as opposed to cooking instruments in general.

Ian Jenkins: The drafting looks clumsy and is not very clear. It might have been better if the Executive had referred to cooking implements, with microwave ovens as an add-on, without prejudice to the reference to cooking equipment.

The Convener: Shall we draw that to the attention of the Parliament, to see what it makes of the regulations?

Members indicated agreement.

Discontinuance of Prisons (Scotland) Order 2000 (SSI 2000/186)

The Convener: We now move on to agenda item 4, negative instruments. However, no points arise in relation to this order.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2000 (SSI 2000/187)

The Convener: Similarly, no points arise in relation to these rules.

National Health Service (General Dental Services) (Scotland) Amendment Regulations 2000 (SSI 2000/188)

The Convener: There is a minor point in relation to section 32E of the National Health Service (Scotland) Act 1978, which is cited as an enabling power, but there is no appropriate reference in the footnote. That can be dealt with through our usual procedure of writing to the Executive. Apart from that, no points arise in relation to these

regulations.

Police Pensions (Scotland) Amendment Regulations 2000 (SSI 2000/193)

Ian Jenkins: The regulations contain a wee drafting error. In regulation 3(1), the words “in the case of a woman”

appear in subparagraphs (a) and (b) but do not appear in subparagraph (c). I wonder why that is.

The Convener: We will draw that to the attention of the Executive and will also ask whether it is to consider consolidating these regulations.

Census (Scotland) Amendment Regulations 2000 (SSI 2000/194)

The Convener: No matters arise in connection with these regulations.

Education (Assisted Places) (Scotland) Amendment Regulations 2000 (SSI 2000/195)

The Convener: We shall draw a typographical error to the attention of the Executive. Nothing else arises in relation to these regulations.

St Mary's Music School (Aided Places) Amendment (Scotland) Regulations 2000 (SSI 2000/196)

The Convener: Again, the regulations contain a typographical error, which we will deal with in the usual fashion.

Local Government Pension Scheme (Scotland) Amendment Regulations 2000 (SSI 2000/199)

The Convener: No matters arise in relation to these regulations.

Education (Student Loans) (Scotland) Regulations 2000 (SSI 2000/200)

The Convener: Bristow Muldoon found the explanatory note for us. Apart from that, no matters arise—[*Interruption.*] Sorry, I am getting mixed up. The explanatory note to the instrument did not comply with statutory instrument practice.

We will ask the Executive why it did not proceed in that manner.

Fergus, did you wish to flag up anything in relation to these regulations?

Fergus Ewing: No.

Ian Jenkins: Some changes of substance to the regulations should, perhaps, be mentioned in an explanatory note. Of course, that is normal practice, is it not?

Seed Potatoes (Scotland) Regulations 2000 (SSI 2000/201)

The Convener: A number of issues arise in relation to these regulations.

Ian Jenkins: A mishmash of potatoes.

The Convener: The question again arises of offences being created. The only persons who could be guilty of an offence under regulation 3(5) are the Scottish ministers, but they are exempt from prosecution, which seems a bit bizarre. There are also difficulties with regulation 6, as it appears that the only sanction for failure to comply with regulations 6 and 7 is withdrawal of the certificate of classification. It may be that that was not the Executive's intention. A similar point arises in relation to regulation 9. We should ask the Executive what it intended, as these regulations appear to be rather strange. Perhaps the officials got mixed up when drafting these regulations.

Fergus Ewing: The Executive has done a reasonable job in trying to consolidate these regulations, but many points require to be cleared up and considered, according to our extremely helpful legal brief. In particular, there is a problem with the inadvertent omission of sanctions and the related failure to identify that. The various points that have been drawn to our attention should be examined closely by the Executive, in order to make perfect what is a reasonable bash.

The Convener: A similar point arises in relation to regulation 10, and there is a question of vires in respect of regulation 20. We will canvass those matters with the Executive.

National Health Service (Professions Supplementary to Medicine) (Scotland) Amendment Regulations 2000 (SSI 2000/202)

The Convener: Various points arise in relation to textual amendments, such as the definition of regulations. It also has been suggested to us that it is usual practice to include a reference to such provisions in the footnote to the enabling powers,

a reference that is missing in this case. Perhaps that should be dealt with. We will canvass the Executive.

Local Government (Exemption from Competition) (Scotland) Amendment Order 2000 (SSI 2000/206)

The Convener: This order breaches the 21-day rule. While we use the pressures on our legal office as an excuse, I, for one, will not criticise anything that seeks to do away with compulsory competitive tendering as soon as possible.

Bristow Muldoon: Good.

Local Authorities (Goods and Services) (Public Bodies) (Scotland) Order 2000 (SSI 2000/207)

The Convener: No matters arise in connection with this order.

Local Government Act 1988 (Competition) (Scotland) Amendment Regulations 2000 (SSI 2000/208)

The Convener: My comments on the 21-day rule and CCT also relate to these regulations, which we welcome.

Undersized Lobsters (Scotland) Order 2000 (SSI 2000/197)

Undersized Spider Crabs (Scotland) Order 2000 (SSI 2000/198)

The Convener: We now come to instruments not subject to parliamentary control. No points arise on the above orders.

We agreed earlier to take item 6 on the annual report in private.

12:11

Meeting continued in private until 12:24.

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