

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 12 September 2000  
*(Morning)*

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## CONTENTS

Tuesday 12 September 2000

Col.

FOOD PROTECTION (EMERGENCY PROHIBITIONS) (PARALYTIC SHELLFISH POISONING) (ORKNEY) (No 3) (SCOTLAND) ORDER 2000 (SSI 2000/266) .....	289
FOOD PROTECTION (EMERGENCY PROHIBITIONS) (AMNESIC SHELLFISH POISONING) (WEST COAST) (SCOTLAND) ORDER 2000 (SSI 2000/267) .....	289
PROHIBITION OF FISHING WITH MULTIPLE TRAWLS (SCOTLAND) ORDER 2000 (SSI 2000/226) .....	289
TETRACHLOROETHYLENE IN OLIVE OIL (SCOTLAND) REVOCATION REGULATIONS 2000 (SSI 2000/229) .....	291
EDUCATION (STUDENT LOANS) AMENDMENT (SCOTLAND) REGULATIONS 2000 (SSI 2000/240) .....	291
BEET SEEDS (AMENDMENT) (SCOTLAND) REGULATIONS 2000 (SSI 2000/246) .....	291
FODDER PLANT SEEDS (AMENDMENT) (SCOTLAND) REGULATIONS 2000 (SSI 2000/247) .....	291
CEREAL SEEDS (AMENDMENT) (SCOTLAND) REGULATIONS 2000 (SSI 2000/248) .....	292
OIL AND FIBRE PLANT SEEDS (AMENDMENT) (SCOTLAND) REGULATIONS 2000 (SSI 2000/249) .....	292
VEGETABLE SEEDS (AMENDMENT) (SCOTLAND) REGULATIONS 2000 (SSI 2000/250) .....	292
PROTECTION OF WRECKS (DESIGNATION) (SCOTLAND) ORDER 2000 (SSI 2000/287) .....	292
FARM WOODLAND PREMIUM SCHEME AMENDMENT (SCOTLAND) REGULATIONS 2000 (SSI 2000/290) .....	292
EDUCATION AND TRAINING (SCOTLAND) REGULATIONS 2000 (SSI 2000/292) .....	293
HUMAN RIGHTS ACT 1998 (JURISDICTION) (SCOTLAND) RULES 2000 (SSI 2000/301) .....	293
ENVIRONMENT ACT 1995 (COMMENCEMENT No 17 AND SAVINGS PROVISION) (SCOTLAND) ORDER 2000 (SSI 2000/180) .....	294
ADOPTION (INTERCOUNTRY ASPECTS) ACT 1999 (COMMENCEMENT No 2) (SCOTLAND) ORDER 2000 (SSI 2000/223) .....	294
NATIONAL HEALTH SERVICE (FUNCTIONS OF THE COMMON SERVICES AGENCY) (SCOTLAND) AMENDMENT ORDER 2000 (SSI 2000/224) .....	295
WELFARE REFORM AND PENSIONS ACT 1999 (SCOTLAND) (COMMENCEMENT No 8) ORDER 2000 (SSI 2000/238) .....	295
EDUCATION (LISTED BODIES) ORDER 2000 (SSI 2000/293) .....	295
STANDARDS IN SCOTLAND'S SCHOOLS ETC ACT 2000 (COMMENCEMENT No 2 AND TRANSITIONAL PROVISIONS) ORDER 2000 (SSI 2000/298) .....	295
FOOD PROTECTION (EMERGENCY PROHIBITIONS) (AMNESIC SHELLFISH POISONING) (WEST COAST) (No 3) (SCOTLAND) ORDER 2000 (SSI 2000/303) .....	296
GENERAL MEDICAL COUNCIL (LEGAL ASSESSORS) AMENDMENT (SCOTLAND) RULES 2000 (SSI 2000/308) .....	296

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## SUBORDINATE LEGISLATION COMMITTEE

25<sup>th</sup> 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 12 September 2000*

*(Morning)*

[THE CONVENER *opened the meeting at 11:15*]

**The Convener (Mr Kenny MacAskill):** Welcome to the 25<sup>th</sup> meeting of the Subordinate Legislation Committee. The first item of business is consideration of Executive responses to the numerous points that we raised at last week's meeting.

#### **Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (No 3) (Scotland) Order 2000 (SSI 2000/266)**

**The Convener:** We raised various points in connection with this instrument. We are advised that we should accept the Food Standards Agency's apology and draw the lead committee's attention to the fact that the headnote did not follow the correct form and that the defect has been acknowledged. Unless members are otherwise minded, I think that that is agreed.

#### **Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Order 2000 (SSI 2000/267)**

**The Convener:** Again, we raised various points about this instrument. We shall draw to the lead committee's attention the fact that a map was not included with the instrument—a matter that we have raised before.

#### **Prohibition of Fishing with Multiple Trawls (Scotland) Order 2000 (SSI 2000/226)**

**The Convener:** We raised a significant number of points about this instrument and we still seek clarification, not only about legal matters but about the definition of what constitutes a sound. Do members have any comments?

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** It seems that the Executive is suggesting that Jura means the same as the

Sound of Jura, and that the east coast of the one is the same as the east coast of the other. That seems rather unlikely to me. We should draw people's attention to that serious point of contention over the drafting of the instrument.

**Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP):** Presumably, the Sound of Jura refers to a stretch of water, but Jura is not a stretch of water. There must be a difference between water and an island. It seems rather odd that that has not been clarified in more detail.

Another point, which may have more legal significance, is that it is accepted that there was an error in referring to a council regulation. Reference was made to regulation 1259/99, when it should have been 1459/99. That seems to be a fairly serious defect, and members thought that it could have fatal consequences for the validity and effectiveness of the order.

I note that the Executive's reply states that the errors that have been made do not, in its opinion, prejudice the effect of the order, and one hopes that that is so. However, no authority is given for that view, nor any argument adduced as to why the Executive has reached the opinion that the order has not been prejudiced. It may be a clerical error, but it could have serious consequences. Because this is a matter that could arise in future when numbering errors are made, it would be extremely useful to receive a detailed statement of the Executive's reasoning and why it thinks that the order is not prejudiced.

Perhaps we could also have a useful exchange of views with members of the appropriate department to discuss the issues and be absolutely sure that the order is properly valid.

**The Convener:** It appears that there is a bit of an impasse, as the points that we raised seeking clarification and the response that we have received from the Executive do not tie up.

It is suggested that we report our position and the Executive's responses to the lead committee. Next Tuesday will be the 20<sup>th</sup> day since the instrument was laid before Parliament and that will be the day on which we ask the Executive to clarify matters and perhaps attend the committee meeting. We should put in a written submission now, either from the committee or from me as convener, to the lead committee, indicating whether we are satisfied, and that we are left in a position where we have raised various points which the Executive has not dealt with adequately. Perhaps we will be satisfied next week. We could then finally indicate to the lead committee in a note of one paragraph that we are satisfied—or not—after next week's meeting. Are members happy with that? Our legal briefing indicates that matters have not been addressed to our satisfaction.

**Tetrachloroethylene in Olive Oil  
(Scotland) Revocation Regulations  
2000 (SSI 2000/229)**

**The Convener:** It is suggested that the matters that we raised about these regulations should be drawn to the lead committee's attention, on the grounds of an insufficient footnote. To be fair to the Executive, it acknowledged that point.

**Education (Student Loans)  
Amendment (Scotland) Regulations  
2000 (SSI 2000/240)**

**The Convener:** Again, various matters were drawn to the Executive's attention about these regulations. It appears that we should draw attention to certain points again, as the regulations contain defective drafting. Do other members wish to comment?

**Ian Jenkins:** There is a difficult symbiotic relationship between the English regulations and the Scottish regulations. The time scales do not quite match, although one depends on the other. In this case, the Scottish regulations have had to, and will have to, wait until the English regulations, which have caused difficulties with timing in Scotland, have been put into proper order.

**Fergus Ewing:** There are points of ambiguity in relation to the definition of "metropolitan police district" and to the question of which meaning is to apply to the various periods that are specified in section 76 of the London Government Act 1963. Those are two examples of defective drafting to which it would be useful to draw the attention of the lead committee, so that that committee may deal with them.

The lead committee should also reach a view as to whether, from here on and for evermore, we will incorporate and import into Scots law the word "mortgage" from south of the border. Alternatively, will we preserve the phrase "heritable security", which has been good enough for Scotland for the past 300 years, from the days of Lord Stair onward?

**Beet Seeds (Amendment) (Scotland)  
Regulations 2000 (SSI 2000/246)**

**Fodder Plant Seeds (Amendment)  
(Scotland) Regulations 2000  
(SSI 2000/247)**

**Cereal Seeds (Amendment) (Scotland)  
Regulations 2000 (SSI 2000/248)**

**Oil and Fibre Plant Seeds  
(Amendment) (Scotland) Regulations  
2000 (SSI 2000/249)**

**Vegetable Seeds (Amendment)  
(Scotland) Regulations 2000  
(SSI 2000/250)**

**The Convener:** We will take the next items on the agenda together. Similar points were raised relating to all these instruments at our previous meeting. It is suggested that we should draw the attention of the lead committee and the Parliament to the defective drafting, which has been acknowledged by the Executive.

It is also suggested that we should raise points in relation to EC legislation and the requirement that such legislation should be produced timeously, in order to make it easier for those who advise us to follow the relevant circumstances. As matters were put fully to the Executive at our previous meeting, I do not know whether members wish to comment further.

**Protection of Wrecks (Designation)  
(Scotland) Order 2000 (SSI 2000/287)**

**The Convener:** It is suggested that we draw the attention of the lead committee and the Parliament to the Executive's response to the question whether maps should accompany the instrument. The Executive explained that there are sometimes good reasons for not producing maps, but in the main, it will do so.

**Farm Woodland Premium Scheme  
Amendment (Scotland) Regulations  
2000 (SSI 2000/290)**

**The Convener:** The suggestion is that we draw the attention of the lead committee and of the Parliament to these regulations on the grounds that they were laid in advance of the obligatory approval of the European Commission and that a devolution issue may arise, should that approval be withheld.

## **Education and Training (Scotland) Regulations 2000 (SSI 2000/292)**

**The Convener:** Questions were raised about these regulations, which have not been satisfactorily addressed. Does any member want to comment on this instrument?

**Fergus Ewing:** One important point has arisen, which I hope can be drawn to the specific attention of the lead committee, the Enterprise and Lifelong Learning Committee. Regulation 7(3) gives general powers under the statutory instrument for Scottish ministers to

“pay to learning account holders an additional grant in respect of any travel, accommodation or other costs”.

The provenance of that paragraph was a concession that a minister made to a member—me—in a stage 3 debate, that that power would be included in the statutory instrument. I welcomed that concession at the time. It now appears that that concession may not be enforceable. We learned this morning that the department “regrets the error” and will take steps to correct it “as soon as practicable”.

Given that this is an issue of considerable substantive concern, and that a concession was made in a stage 3 debate, the meaning of “as soon as practicable” and whether the correction will be made this year or next are matters of legitimate concern to the lead committee. As I understood it, the concession would be a power to pay for travel and grants for people in the Highlands and rural parts of Scotland this year, from the beginning, not from the end of year one.

I welcome the fact that the Executive has put its hand up and promised to sort the matter out. However, the serious question is whether people in remote parts of Scotland will benefit this year, or whether they will not receive the additional grants, which Parliament wanted them to receive this year, from the beginning.

**The Convener:** We can proceed in that way.

## **Human Rights Act 1998 (Jurisdiction) (Scotland) Rules 2000 (SSI 2000/301)**

**The Convener:** Various matters have been raised regarding the European convention on human rights. It is suggested that we might refer this instrument to the lead committee and to the Parliament on the ground that further explanation of the procedures was requested from and supplied by the Executive. We have received this instrument more for noting, and for the benefit of the lead committee, than for anything else. There are clearly substantial problems associated with

bringing in the new regulations.

## **Environment Act 1995 (Commencement No 17 and Savings Provision) (Scotland) Order 2000 (SSI 2000/180)**

**The Convener:** It is suggested that we simply draw the Parliament's attention to the delay in referring this instrument and the fact that an explanation has been provided.

## **Adoption (Intercountry Aspects) Act 1999 (Commencement No 2) (Scotland) Order 2000 (SSI 2000/223)**

**The Convener:** There appears to be a catalogue of problems with this instrument. I do not know whether anybody wants to comment.

**Bristow Muldoon (Livingston) (Lab):** In its response, the Executive recognised that the instrument is ultra vires, and it is taking action to correct that through the commencement of a section of the relevant act by the Department of Health in England. Once that takes place, we will proceed with an order that is in accordance with the powers of the Scottish ministers. At this stage, it is essential that we draw the lead committee's attention to the fact that, as it stands, this statutory instrument is ultra vires.

**Fergus Ewing:** We could also draw the lead committee's attention to the irony that there can be no corrective statutory instrument until such time as Westminster acts. The law of adoption in Scotland must sit and wait until the Department of Health in England and Wales gets around to doing something about the matter. I do not think that that is what devolution is supposed to be about.

11:30

**Ian Jenkins:** There is a vires issue concerning this instrument, as there was with the Education and Training (Scotland) Regulations 2000, although we did not mention it at the time. Such issues are obviously important to the whole system. Our legal adviser's recommendation is so eloquent and full that I would like to read it out for the record.

**The Convener:** Why not?

**Ian Jenkins:** The legal advice says that the instrument should

“be drawn to the attention of the Parliament on the grounds that it is ultra vires, outwith devolved competence, purports to have retrospective effect where the parent act confers no express authority so to provide, the Explanatory note is defectively drafted and there was undue delay in submitting

it to the Parliament for scrutiny”.

I would have said that that was a full house, or a royal flush.

**Bristow Muldoon:** The Executive's response seems to indicate that it expects fairly prompt action from the Department of Health in England. The lead committee might want to pay close attention to the situation and encourage the Executive to keep pressing its counterpart body south of the border to proceed promptly.

**The Convener:** To its credit, the Executive has acknowledged the problems.

**National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2000 (SSI 2000/224)**

**The Convener:** It is suggested that we draw the attention of the lead committee and the Parliament to the failure to cite all relevant enabling powers in the preamble to the instrument.

**Welfare Reform and Pensions Act 1999 (Scotland) (Commencement No 8) Order 2000 (SSI 2000/238)**

**The Convener:** It is suggested that the instrument is drawn to the Parliament's attention on the ground of undue delay, which is a matter that we have canvassed before.

**Education (Listed Bodies) Order 2000 (SSI 2000/293)**

**The Convener:** It is suggested that we draw the instrument to the attention of the lead committee and the Parliament on the ground of defective drafting, which has been admitted by the Executive. Points were raised in an argument during the legal briefing session on whether Scotland should be mentioned in the title. There seems to be at least some merit in that suggestion for people who will be involved in scrutinising these matters.

**Standards in Scotland's Schools etc Act 2000 (Commencement No 2 and Transitional Provisions) Order 2000 (SSI 2000/298)**

**The Convener:** It is suggested that we draw the Parliament's attention to the Executive's full and helpful response as providing the required explanation. The lead committee can act on that

recommendation as it wishes.

**Fergus Ewing:** As we reach the last of these Executive responses, I want to say how refreshing it is for the Executive to apologise openly for so many errors on so many occasions. Anyone who says that politics means never having to say that you are sorry should read through the report of this committee meeting. I hope that the Executive's example is taken up elsewhere.

**Trish Godman (West Renfrewshire) (Lab):** By all parties.

**Fergus Ewing:** I was actually thinking of ministers, but certainly all parties should follow that example.

**Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 3) (Scotland) Order 2000 (SSI 2000/303)**

**The Convener:** We now move on to affirmative instruments. No points arise on this instrument.

**General Medical Council (Legal Assessors) Amendment (Scotland) Rules 2000 (SSI 2000/308)**

**The Convener:** Apart from the grammatically incorrect notes, no points arise on this negative instrument, and we can deal with it in the normal way.

That concludes our agenda.

*Meeting closed at 11:34.*



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