

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 September 2000
(Morning)

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SUBORDINATE LEGISLATION COMMITTEE

26th 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 Renfrew shire) (Lab)

*Mr Kenneth Macintosh (Eastwood) (Lab)

*Bristow Muldoon (Livingston) (Lab)

*David Mundell (South of Scotland) (Con)

*attended

WITNESSES

David Ford (Scottish Executive Rural Affairs Department)

James Shaw (Scottish Executive Solicitor's Office)

Lindsay Anderson (Scottish Executive Solicitor's Office)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper

Alistair Fleming

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 19 September 2000

(Morning)

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

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

The Convener (Mr Kenny MacAskill): Good morning. Welcome to the 26th meeting of the Subordinate Legislation Committee. Welcome also to Kenny Macintosh, who joins us to make up the membership shortfall that we have had for some time.

We are joined for the first item by three officials from the Scottish Executive: David Ford, the branch head of fisheries strategy at the rural affairs department; and James Shaw and Lindsay Anderson from the solicitor's office. I thank you for coming along. You probably realise that the 20-day time limit is almost up. We have various matters to raise with you and we are anxious to be able to give a further written communication to the lead committee. Do you have any comments on the matters that we have raised to date?

James Shaw (Scottish Executive Solicitor's Office): As you may have been informed, the draftsman of this instrument is unfortunately not available this morning.

The Convener: We were told.

James Shaw: We will assist as best we can. The draftsman briefed me last week and I am happy to deal with legal questions.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): Before we go on to the technical issues, will you remind us of the real purpose of the instrument?

David Ford (Scottish Executive Rural Affairs Department): The instrument is one of two that form a package of measures designed to save undersized haddock in the North sea and off the west coast of Scotland. The council noted in December last year that stocks in general were under pressure. A particularly good year class of undersized haddock was due to enter the fisheries this year. The UK made a commitment to introduce measures to save as many of the small fish as possible. That meant that legislation had to

be in place by the summer. The main purpose of the instrument is to protect the incoming year class of haddock.

Fergus Ewing: Mr Ford, in your letter of 10 July to the Presiding Officer, you describe the purpose of the instrument and go on to state that the measures in the instrument were

"dependent on our securing the agreement of the Norwegian authorities that boats with nets configured to meet the Scottish regulations would be allowed to fish in the Norwegian section of the North Sea."

Does that mean that the instrument incorporates and gives effect to law so that Scottish fishermen can fish in Norwegian waters?

David Ford: No. The instrument was drawn up with an unprecedented degree of co-operation with the fishing industry. Many Scottish fishing boats fish in both Scottish and Norwegian waters. It was considered an unreasonable burden to make them have two sets of fishing gear. The idea was to allow some element of uniformity, making it possible for the fishermen to use the same gear in Scottish and Norwegian waters. If the Norwegians had not given their agreement, the fishermen would not have been keen to support the instrument. Norwegian support was the difference between having the support of the fishermen and the possibility of a bit of antipathy towards the legislation.

Fergus Ewing: Yes, but the instrument brings in measures that are necessary to secure the support of the Norwegian authorities for allowing Scottish fishermen to fish in Norwegian waters.

David Ford: That is not what the legislation does. We negotiated separately with the Norwegians to tell them what our legislation is and to ask whether they would accept that configuration of gear being used in their waters. I am not sure that I follow your question.

Fergus Ewing: I am trying to get a practical handle on this before we move on to the technical questions, in case another committee—such as the Rural Affairs Committee—wants to consider the issue. From my reading of your letter to the Presiding Officer, it seems that if the instrument is invalid, Scottish fishermen could conceivably be fishing illegally in Norwegian waters.

David Ford: No. The instrument goes beyond what is required in Norwegian waters. The difficulty is that Norwegian waters have a minimum mesh size of 100 mm. British legislation does not have such a minimum mesh size. We were seeking the compulsory introduction of a 90 mm square mesh panel, which is smaller than the 100 mm of the Norwegian regulations. The Norwegians would consider that to be below their minimum mesh size.

However, because a square mesh panel is inserted in such a way that it remains open throughout fishing, it is equivalent to 106 mm of diamond mesh. We had to persuade the Norwegians that that was the situation. All we were doing was seeking the agreement of the Norwegians that they would allow what on the surface appeared to be a smaller mesh, but is in fact as selective as the gear that they have.

Fergus Ewing: Thank you. The Scottish Fishermen's Federation might be interested in considering that.

Moving on to the technical aspects, I understand that there was a mistake in a reference to another statutory instrument in a footnote to the instrument. In your response of 13 September to the committee, paragraph 2 stated:

"the view is taken that as the footnote does not form a substantive part of the instrument the error in this respect does not prejudice the effect of the Order."

It would be helpful if you could give some legal authority for that proposition, either by way of a previously decided case or in some other form. Legal authority would normally be given to support a proposition of that nature.

James Shaw: I am afraid that you have caught me slightly off guard. I did not discuss that point with the draftsman. The view is that footnotes assist the reader. There are occasions when, through pressure of time, a footnote might not be provided—that is unfortunate. I noticed the request for an authority, but I did not read it as a legal authority. If I had, I would perhaps have picked up Bennion on interpretation, which might have assisted us. However, I did not do that. I can add no more to what the draftsman has already said. It is a general proposition that footnotes are an assistance to the reader and no more. The Interpretation Act 1978 will provide assistance if a footnote is not provided.

Fergus Ewing: We made it fairly clear during the previous meeting, especially during the oral contributions, that that is exactly what we wanted: legal authority. We have not got any, which is unfortunate. To ask the question in another way, if the reference does not matter, why is it in the footnote?

James Shaw: As I said, it is to assist the reader. It is unfortunate if the footnote is wrong. I apologise again, as I saw the report of the meeting only first thing this morning. I seized upon it then. I appreciate that this is your last day for reporting to the lead committee, but I am not sure that I can do anything in the time available.

Fergus Ewing: I understand that you are not the author of the instrument, but we are concerned that any questions about its validity could be a serious matter.

James Shaw: I understand.

Fergus Ewing: Moving on from the footnote, is it correct that the sole purpose of referring to council regulation 850 of 1998 in the interpretation section is to incorporate in the order the legal European definition of mesh size?

James Shaw: That is correct.

Fergus Ewing: Would it not have been better—and certainly much simpler—to have incorporated in the interpretation section something along the lines of "mesh size means" and then its legal definition?

James Shaw: Absolutely. I have no difficulty with that. Again, in my discussion with the draftsman, he conceded that that would have been a better way of doing it. He drafted it using a standard form of drafting where many references to council regulations are necessary. Given the short nature of the instrument, it could be said that a better way of drafting is as you have suggested.

Fergus Ewing: I turn to paragraph 5 of your letter to the committee of 13 September. This is the last area of concern to me. If there is any question about the validity of the instrument, which it seems to me is still possible, it would be right to correct it, rather than to ignore it.

I admit that I found it difficult to understand the argument in paragraph 5. In particular, the sentence that begins "On the other hand" seemed to be nonsense to me. Could you explain it to me? Perhaps something is missing from that sentence, which I will read for the record:

"On the other hand, it is considered that since the amendments to 850/98 are not relevant to the purposes for which reference to that instrument there is no prejudice to the effect of the Order. It is considered that the unfortunate consequence of the wording may be an unnecessary search but that no alteration to the meaning which it is intended should attach to 'mesh size' in article 3 of the Order would in fact result."

Can you explain what the sentence beginning "On the other hand" means? Could it be that words are missing from that sentence?

James Shaw: I am not sure that words are missing. That is a difficult problem. The consequence of accepting that a better way of drafting the order is to define mesh size rather than the council regulation, is that the order would say "Mesh size is defined in council regulation 850/98, article 3"—full stop. It is accepted that some of the amendments that are provided in the original interpretation are not correct and that some have been omitted. However, we would not have had to include those amendments to the council regulation if we defined mesh size, as article 3 is not amended at all.

For example, you might draft a piece of

subordinate legislation under an act of the Scottish Parliament, the principal set of regulations of which has been amended 10 or 15 times—I appreciate that the committee has problems with how many times regulations are amended—but in this case the amendments have yet to be consolidated. If in your new legislation you referred to one unamended regulation from the principal set, you would footnote that regulation as “SSI whatever, as amended”.

In other words, there are amendments to the principal regulations, none of which is relevant to this particular regulation. Therefore, because there are no relevant amendments to article 3 of the council regulation, which is where mesh size comes in, the position is that even if the errors in this order—the incorrect references and the omissions—were all corrected, the definition of mesh size would not be affected. If only council regulation 850/98 was mentioned, that would provide the whole story, as far as mesh size is concerned.

Fergus Ewing: I think that I understand that—the clerks are helpful in that they assist people like me to understand such arguments. However, I was further puzzled when you appeared to be saying that the regulations that were not referred to—namely 2723/1999, 812/2000 and 1298/2000—amended regulation 850/98 but did not in any way deal with the question of mesh size. In other words, they were relevant to the question of mesh size—is that correct?

James Shaw: They were irrelevant to the question of mesh size.

Fergus Ewing: If that is correct, why did you say that the reference to 1259/1999 should have been to 1459/1999, when 1459/1999 was also irrelevant to the question of mesh size?

James Shaw: That is an inherent part of the loop in the argument that we are having. If we were to correct the definition of the council regulation—rather than using mesh size instead—we would have to insert all the relevant regulations properly, because we are defining the council regulation. The Interpretation Act 1978 does not attract the favour of European Community legislation, and therefore we would need to add in every single amendment, because we would be defining the whole regulation. The draftsman is trying to correct the problem that has been created. However, if mesh size were defined, he would not need to. The argument is circular, I am afraid.

Fergus Ewing: The regulation that was referred to in this statutory instrument was 1259/1999, which is to do with the common agricultural policy. Is that correct?

James Shaw: I have been advised that that is

the case, although I admit that I did not check it. I am taking that as read.

Fergus Ewing: I mentioned that because if any fishermen read the *Official Report* of this meeting, they might then be able to make head or tail of what is to happen. If fishermen are going to be accused of crimes under instruments of this nature, I would not be at all surprised if the lawyers direct them to a copy of the *Official Report*, on the basis that if we cannot get it right, how can they.

11:30

Bristow Muldoon (Livingston) (Lab): I would like to raise the question of the definition of the coastline, which was raised in previous correspondence. In paragraph 8 of its response of 13 September, the Executive recognises that moving the words “the Sound of” would not be appropriate, as that would change the definition of a piece of coastline that we were trying to refer to. However, in paragraph 9, it suggests that the word “coast” can be used to refer to the boundary of the sea as well as its normal usage referring to the edge of a piece of land rather than the edge of a piece of sea. For example, I would regard Aberdeen as being on the east coast of Scotland rather than on the west coast of the North sea. In normal usage, that is what people would understand by the word “coast”.

Is that usage standard in the definition of fishing boundaries, or is it specific to the instrument and its predecessors? I recognise that the order follows the wording used in a previous statutory instrument—the Norway Lobsters (Prohibition of Method of Fishing) Order 1993—but I am curious about whether that would be regarded as a standard way of defining boundaries of the sea and land in such legislation.

David Ford: I do not know whether it is a standard definition, but it has been used in the past, notably in the 1993 order. We took the view that, as the definition has been working for seven years and is understood by fishermen, there was no reason to change it. It is a sensible way in which to refer to coasts. In paragraph 9, we say that the

“east coast of the Sound of Jura”

is more specific than the

“west coast of the mainland of Scotland”

and focuses the fishermen’s minds more closely.

I understand your point about normal usage meaning that we sit on land and imagine that the coast is the edge of the land. However, this and similar orders are aimed at fishermen who are sitting in a boat on the sea, whose perception may be different. Fishermen understand well what is

meant by a coast of the Sound of Jura, the north coast of the English channel, or whatever, and I do not believe that that is a contentious definition.

Bristow Muldoon: Would it be appropriate to have a consistent definition, which could be used in all such legislation?

David Ford: It depends on the area of sea that is being considered. For example, "the east coast of the Atlantic ocean" may not be appropriate. However, that form of definition may be more appropriate for smaller, enclosed areas of sea—for example, the Welsh coast of the Irish sea—and it would probably be better to leave the definition to the individual case. Fishermen are familiar with the Sound of Jura, and citing it helps to focus their minds on where 56 deg north is, and where we are setting the line of difference.

The Convener: In shellfish matters, we have been dealing with degrees of longitude and latitude. I understand where you are coming from, and I take full cognisance of the argument concerning the north coast of the English channel. However, as we are talking about quasi-criminal matters of where fishermen can go, would not a more specific definition be better for fishermen, rather than something that appears to be ambivalent?

David Ford: I am not sure what is not specific about the east coast of the Sound of Jura at 56 deg north.

The Convener: What problems would arise for the fishing industry if the statutory instrument was rejected by the Parliament, or withdrawn pending amendment?

David Ford: There would be problems for two reasons. First, fishermen wanted and asked for the instrument, so it would send a bad signal if it were to fall on what would seem to be a technicality.

Secondly, withdrawing the instrument would remove the restriction on twin rigging. The line that was drawn on the west coast and which has been in place for seven years has not been changed by this legislation. If the instrument were withdrawn, however, that line would fall. That would allow fishermen to move further north with smaller mesh nets and to fish with twin rig gear in the Minches, off the west coast of Scotland. That would create a lot of disruption in the fishing industry, which generally supports this instrument. Similarly, there are boats that have invested in gear with 80 mm twin rigs to fish in the Fladen grounds. They would be uncertain whether they could continue to use that gear, because the instrument allows a derogation to fish.

The Convener: If Parliament were to say, "We are not opposed to the general tenor of the

subordinate legislation, but we don't believe that the current SSI adequately addresses the issue," what would be the time scale for the withdrawal of this instrument—as has happened with others—and the bringing back of an amended SSI? Would the hiatus cause a significant problem?

David Ford: I do not know what the time delay would be, but it would be several weeks or longer. There would be an immediate hiatus, because if this order is annulled, it ceases to have effect. That would create many problems. Fishermen have told me that they do not want confusion with either of these orders, because it is important that the conservation measures are enacted. There is a strong signal from the industry that fishing stocks are greatly under threat, and that technical measures to help conservation must be developed and enforced. The industry is doing a lot of self-policing. It would do the industry no favours whatever if there were legislative confusion over the measures to save stocks. Few fishermen would thank us for withdrawing this order.

The Convener: But what if it were withdrawn for a better drafted order? Why would that cause a problem, apart from the fact that an order would not exist for a period of weeks?

James Shaw: I want to be clear about what we mean by "withdrawn". This instrument has been made and commenced, so we would need to go through the annulment process, if that is what is desired. I do not want to indicate to my colleague that he could simply instruct the instrument to be withdrawn.

The Convener: The issue of whether to annul it will not be for us, but for the lead committee. If, following our suggestion, that committee moved for annulment, but suggested that it would be favourably inclined towards an SSI with a slightly changed form of words, what would be the time scale and what would be the problem? Fishermen want some certainty, but if they knew that another instrument was coming, would there be a massive crisis over a period of weeks that would jeopardise the industry?

David Ford: It is difficult to predict the future. I cannot say.

Bristow Muldoon: There is an alternative. If the Executive accepted that certain aspects of this SSI were not best worded, it could proceed with the current SSI, but indicate that an updated one would be brought forward in due course. That indication could be made to the lead committee.

James Shaw: I am not the draftsman, but if such an indication were given by this committee or the lead committee it would, as always, be taken on board by the Executive. An amending instrument might come into force, or a replacement instrument if it were small enough. I

cannot put myself on the line, because this is not my area, but such matters would always be considered if the indications were that the instrument was going against the flow.

The Convener: Unless there are further points that they wish to put to the committee, I thank the witnesses for coming along and answering our questions.

We must send a letter to the lead committee. Do members have any comments after hearing further information from the witnesses? Our legal adviser said that a footnote is not always required, but the major point is that a footnote should be correct. To an extent, the Executive has not answered the point on authority—if a footnote is to be inserted, it should be correct.

Fergus Ewing: For future reference, could we ask the Executive to give us an authority for the proposition that footnotes can be ignored if they contain a mistake? I imagine that that point will arise again, and it would be nice not to have to reinvent the wheel when it does so. We requested an explanation at the previous meeting, which, to be frank, we did not receive.

The Convener: I remind members that we must put something in writing, which, I presume, will be included the Rural Affairs Committee's papers. We need to send a letter that gives our view of how satisfied or otherwise we were about today's evidence.

Bristow Muldoon: Rather than encouraging the lead committee to reject the order, it appears to me to be more appropriate to draw to that committee's attention all the points that we have made, both in previous correspondence and in the course of today's meeting. Perhaps that would encourage the lead committee to raise these issues with the Executive, with the result that an amending piece of subordinate legislation is introduced to improve the order.

It would also be appropriate for the Subordinate Legislation Committee to raise with the Executive Fergus Ewing's request for general clarification on the point about footnotes.

The Convener: I am sympathetic to that proposal. Is that the consensus? Bristow Muldoon is quite right: we do not want to throw the baby out with the bath water. Perhaps we should draw to the Executive's attention the fact that the order has fundamental flaws and that the situation should be sorted out for everyone's sake.

We are not looking for more work, but we would be happy with the introduction of a further instrument to sort out the problems that have not been addressed properly. We remain convinced that there are fundamental problems with the order, but for the industry to have some certainty

we will allow it to go forward. We will canvass the point raised by Fergus Ewing on the authority for ignoring footnotes and so on. Are members agreed?

Members indicated agreement.

Food Irradiation Provisions (Scotland) Regulations 2000 (SSI 2000/309)

The Convener: The next agenda item is negative instruments. Various points were raised about these regulations. Do members wish to comment?

Mr Kenneth Macintosh (Eastwood) (Lab): I have a question about regulation 3(b) and the definition of ionising radiation. I do not believe that it is the job of the Subordinate Legislation Committee to question the policy behind this regulation, but it would be interesting if the lead committee could find out why the levels have been set at those indicated. A later note gives more details about the levels, but that note does not explain why the levels have been set as indicated.

The Convener: I think that we are entitled to ask whether we can take a view on that point, as the levels appear to indicate a significant shift. Shall we seek clarification on that point?

Mr Macintosh: In that case, perhaps it would be a case of asking the lead committee—

The Convener: We should draw the lead committee's attention to the significant increase in the levels. I presume that we can flag up to the Executive that we are drawing that issue to the attention of the lead committee, as the Executive may care to provide an answer to that committee.

David Mundell (South of Scotland) (Con): We should make clear who is guilty of an offence under the new regulation 6(a). It is clear that that is not clear, if that is not tautologous.

It would be appropriate to ask why certain definitions, such as "ultimate consumer" and "catering establishment", are not free-standing definitions but seem to refer to food labelling regulations. We should also ask whether the words that are added by regulation 9(a) refer to the purpose of the radiation or to the radiation itself.

The Convener: The same applies to regulation 11(a). There is a reference to the relevant schedule, which makes the regulation difficult to follow. We will seek clarification on that point.

Our legal adviser suggested that we should raise a question about section 40(2) of the Food Standards Act 1999 as well as the points that we have raised before.

If members are agreed, we will go to the Executive with those points.

Members *indicated agreement.*

Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (SSI 2000/320)

The Convener: There are some minor typographical errors in these regulations. Our procedure is that we do not write to the Executive officially, through the formal channels, regarding such minor matters, but they will be drawn to the Executive's attention.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 2) (Scotland) Partial Revocation Order 2000 (SSI 2000/313)

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (No 3) (Scotland) Partial Revocation Order 2000 (SSI 2000/318)

The Convener: Item 3 on the agenda is items that are not subject to parliamentary control. No points arise on these orders.

National Parks (Scotland) Act 2000 (Commencement) Order 2000 (SSI 2000/312)

The Convener: Item 4 is on instruments that are not laid before the Parliament. No points arise on this order.

Act of Sederunt (Evidence of Judgments etc) (Human Rights Act 1998) 2000 (SSI 2000/314)

The Convener: This instrument has a small typographical error and a missing reference.

Unless there are other points, that brings the meeting to a conclusion.

Mr Macintosh: Were we not going to seek some clarification about the use of the internet?

The Convener: The point that you raise is about the use and definition of the internet and the authority for internet usage in court judgments. We

want a basic breakdown of where we are going with those issues, how the courts will perceive the use of the internet and which case is cited as an authority. We will seek clarification on those points and await the response with interest.

Meeting closed at 11:47.

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