

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 12 December 2000  
*(Morning)*

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# CONTENTS

Tuesday 12 December 2000

Col.

TRANSPORT (SCOTLAND) BILL .....	365
COMMON AGRICULTURAL POLICY SUPPORT SCHEMES (MODULATION) (SCOTLAND) REGULATIONS 2000 (SSI 2000/429) .....	376
FINANCIAL ASSISTANCE FOR ENVIRONMENTAL PURPOSES (SCOTLAND) ORDER 2000 (SSI 2000/430) .....	376
CONTROL OF POLLUTION (REGISTERS AND CONSENTS FOR DISCHARGES) (SECRETARY OF STATE FUNCTIONS) AMENDMENT REGULATIONS 2000 (SSI 2000/432) .....	377
ENVIRONMENT ACT 1995 (COMMENCEMENT NO 19) (SCOTLAND) ORDER 2000 (SSI 2000/433) .....	377
DIVORCE ETC (PENSIONS) (SCOTLAND) AMENDMENT (NO 2) REGULATIONS 2000 (SSI 2000/438) .....	377
FOOD PROTECTION (EMERGENCY PROHIBITIONS) (AMNESIC SHELLFISH POISONING) (WEST COAST) (SCOTLAND) PARTIAL REVOCATION ORDER 2000 (SSI 2000/434) .....	378
FOOD PROTECTION (EMERGENCY PROHIBITIONS) (AMNESIC SHELLFISH POISONING) (WEST COAST) (NO 2) (SCOTLAND) PARTIAL REVOCATION (NO 5) ORDER 2000 (SSI 2000/435) .....	378
FOOD PROTECTION (EMERGENCY PROHIBITIONS) (AMNESIC SHELLFISH POISONING) (EAST COAST) (NO 2) (SCOTLAND) PARTIAL REVOCATION ORDER 2000 (SSI 2000/436) .....	378
EUROPE FAMILIARISATION SCHEME .....	378

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## SUBORDINATE LEGISLATION COMMITTEE

36<sup>th</sup> Meeting 2000, Session 1

### CONVENER

\*Mr Kenny MacAskill (Lothians) (SNP)

### DEPUTY CONVENER

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

### COMMITTEE MEMBERS

\*Trish Godman (West Renfrewshire) (Lab)

\*Mr Kenneth Macintosh (Eastwood) (Lab)

\*Fiona McLeod (West of Scotland) (SNP)

\*Bristow Muldoon (Livingston) (Lab)

David Mundell (South of Scotland) (Con)

\*attended

### WITNESSES

John Dowie (Scottish Executive Development Department)

Richard Lyall (Scottish Executive Development Department)

Bill McQueen (Scottish Executive Development Department)

Murray Sinclair (Office of the Solicitor to the Scottish Executive)

### CLERK TO THE COMMITTEE

Alasdair Rankin

### ASSISTANT CLERKS

Ruth Cooper

Alistair Fleming

### LOCATION

Committee Room 3



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 12 December 2000*

*(Morning)*

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

**The Convener (Mr Kenny MacAskill):** Good morning and welcome to the 36<sup>th</sup> meeting of the Subordinate Legislation Committee.

### Transport (Scotland) Bill

**The Convener:** The first agenda item is scrutiny of the delegated powers in the Transport (Scotland) Bill as amended at stage 2. We welcome four representatives of the Scottish Executive; they will introduce themselves and then give a brief introduction to the amendments that have been made to the bill. The committee will then consider those amendments and seek clarification on any points that arise.

**John Dowie (Scottish Executive Development Department):** I am the bill team co-ordinator for the Transport (Scotland) Bill.

**Murray Sinclair (Office of the Solicitor to the Scottish Executive):** I am the instructing solicitor on the bill.

**Bill McQueen (Scottish Executive Development Department):** I am the head of transport division 2, one of the responsibilities of which is buses policy.

**Richard Lyall (Scottish Executive Development Department):** I work with John Dowie.

**John Dowie:** Members have received a revised memorandum from the Executive. The amendments to the bill are there for a mixture of reasons. Some are Executive amendments introduced during stage 2 and some are committee-inspired amendments agreed at stage 2. Some amendments confer entirely new order-making powers, while others modify order-making powers that were in the bill as introduced. We are happy to take any questions that committee members wish to ask.

**Trish Godman (West Renfrewshire) (Lab):** I think that the witnesses have been asked this question before, but I want to ask it again. The bill contains no formal requirement to consult and you do not seem very keen to include such a requirement. You talk about consultation, but it is

not formalised.

**John Dowie:** To which bit of the bill are you referring?

**Trish Godman:** You talk about consultation throughout the bill, and we wondered why it was not formalised.

**Mr Kenneth Macintosh (Eastwood) (Lab):** In section 36A, for example.

**John Dowie:** There is quite a lot of provision throughout the bill for consultation at various stages—consultation by the Executive and, especially for the powers that they discharge, by local authorities. Bill McQueen may want to comment on section 36, on the bus fuel duty.

**Bill McQueen:** Are we talking about the bus user complaints tribunal that ministers propose to set up?

**Trish Godman:** Yes.

**John Dowie:** Yes, I am sorry.

**Bill McQueen:** I am not quite sure what Trish Godman's point is.

**Trish Godman:** The Executive intends to consult, but if you do not consult the right people, some will be able to claim that they were not consulted. Why is the consultation not more formalised?

**Bill McQueen:** Ministers explained in a proposal document that they wanted people who used bus services to have more of a voice. The power to set up a complaints tribunal was trailed by ministers in discussion with the Transport and the Environment Committee and with other interlocutors. We have set out the bones of how ministers envisage the complaints tribunal working and what it is there to do. Subordinate legislation is provided for to allow ministers to specify some of the nuts and bolts of the tribunal's working arrangements—whether it would employ salaried staff, what the terms of appointment would be, and other such details. However, I seem to be missing the point about consultation.

**Murray Sinclair:** I think that the point is that we do not have a statutory requirement to consult any particular person before we make regulations.

**Trish Godman:** Yes.

**Murray Sinclair:** The committee will appreciate that, because of stage 2 amendments, at some points in the bill we have made consultation a more or less specific statutory requirement before the Executive exercises certain subordinate legislation making powers. In the context of section 36A, we took the view that it would be neither necessary nor appropriate to be prescriptive. Before exercising a power to make

regulations, we would always consider whether we should be consulting interested parties. As a matter of course, we would consult those parties. We simply thought that that practice would continue and that it would not, therefore, be appropriate or necessary to be more prescriptive by writing a precise requirement for statutory consultation into the bill. We need a degree of flexibility.

**Fiona McLeod (West of Scotland) (SNP):** Although you are trying to achieve a degree of flexibility, is there a possibility—when so much is being produced by subordinate legislation—that where you do not specify whom you will consult, you will be open to litigation? In many sections of the bill, you say that you will consult appropriate parties. You do not use the words “appropriate parties” but that is what you mean. However, if you put that in the bill as often as you have done, will not people come forward and say that they should have been consulted but were not?

**Murray Sinclair:** The legal situation is that, if you do not comply with a statutory requirement to consult, you have acted unlawfully if you then exercise the power. That is reasonably clear. Otherwise—and especially in relation to a power such as this, where we do not have a statutory requirement to consult—we are, as a matter of law, required to act reasonably. If we act unreasonably, we act unlawfully. In accordance with that general duty to act reasonably, we would, among other things, consult appropriate parties.

**John Dowie:** From an administrative point of view, I would add that as a matter of practice we go out of our way to reach all interested parties. We have long-established consultation lists and quite good networks that we can tap into on different topics. Clearly, we would aim our consultation at parties with a specific interest; but any consultation documents would also be made generally available on the website and in other places. That would give an opportunity for parties that we might not have anticipated having an interest to be involved in the process.

**Bill McQueen:** Now that I have grasped the point, let me add to that reply. In the context of the buses provisions of the bill, we have for the past 18 months to two years had meetings of the buses sub-group of the National Transport Forum for Scotland, on which are represented local authorities, the Strathclyde Passenger Transport Authority, the traffic commissioner, the bus industry, the Confederation of Passenger Transport UK, the disabled transport lobby and the community lobby. It is fair to say that, for just about all the provisions in the bill, we have put the intentions of the minister's proposals—and, in some cases, the fine details—to that sub-group and have had extensive dialogue. There has been

consultation, and we would expect that the minister, in consulting about the regulations that are envisaged in the provisions on buses and other topics, would go back to that body to seek its views on any draft of guidance or regulations that was being prepared. An iterative process would begin. As John Dowie says, a good deal of such consultation has gone on already. We would expect that to continue and to be the norm.

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** If things were done the other way, and consultation was made a statutory obligation but missed someone out, would the danger be that the whole consultation process could be challenged?

**Murray Sinclair:** In practice, I hope that that would not happen, but it is theoretically possible. Differential provisions, especially when one of those provisions requires the consultation of a particular group as a matter of statute, risk giving undue prominence to that group. Such provisions may also risk straying from the idea of consulting everyone who might want to have a voice.

**Fiona McLeod:** Ian Jenkins has just raised the point, but I am not sure that I have heard the right answer. Murray Sinclair talked about statutory responsibility and reasonableness in law. On many occasions the bill opts for reasonableness rather than statutory responsibility. John Dowie then talked about the extensive list of consultees. I want to point out that having an extensive list of consultees on section 70 of the bill did not work, because it was only at the end of stage 2 that some very interested lobby groups raised their concerns. Because so many of the powers in the bill will be effected by subordinate legislation, I am concerned that taking the route of reasonableness rather than statutory responsibility will leave the Executive open to that section 70 situation recurring.

11:30

**John Dowie:** Bill McQueen will correct me if I am wrong. The issue that arose regarding section 70 did not concern a lack of consultation. The concerned party had been involved in the process. It was more a case of delaying the process to allow those people to form and then express a view.

**Bill McQueen:** The intent behind the provision was published in the minister's proposal document. That orange document came out in February and the draft bill had the section in it when it was published in June. As far as I am aware, the first written representation that ministers saw from Capability Scotland was submitted very close to the third consideration session at stage 2. Ministers might argue that the

section 70 provision—which had long been sought by many disabled groups—was widely signalled.

**Fiona McLeod:** I am concerned that we are not getting an answer. I do not want to debate section 70—we have done that elsewhere. I was using that section to illustrate the argument of reasonableness versus statutory requirement. There will be occasions on which something drops through the net and, once the bill is law, organisations might refer to the law to ensure that they get their say.

**Murray Sinclair:** It is a balancing act. In certain circumstances, in which it is clear that there would be some value in specifying a statutory consultee, we will do that. However, there are problems regarding the undue prominence point that I made earlier. More commonly, we would simply rely on the general rules of reasonableness and on the practices that we have been following for a number of years, and we would hope that that would not give rise to the sort of problem that you have mentioned. As Bill McQueen said, a statutory requirement to consult would not have solved the section 70 problem.

**John Dowie:** That is an important point. I suspect that either a general duty or a duty that included named parties would still leave the Executive vulnerable to the sort of problem that you identified. Delivering requires us to adopt good practice, to go out of our way to contact all the parties that have an interest and to make things available to them—whatever is included in the bill.

**Mr Macintosh:** I must address the same point, as I need further clarification. You have amended the bill and inserted a statutory obligation to consult under section 1(1A). No list of consultees is given, but I acknowledge the fact that you have said that the Executive has every intention of consulting the relevant bodies. Why do you choose to make it a statutory obligation in sections 1(1A) and 1(2A) to consult those bodies, without naming them, whereas in other sections of the bill—specifically 3A(1), 36A(1) and paragraph 1 of schedule 1—there is no statutory requirement to consult? Why do you choose to make consultation a statutory requirement in one section and not in others?

As Murray Sinclair said earlier, if a consultation is statutory it has greater importance than another, non-statutory consultation. You seem to have reached a different judgment in the different sections. Why not be consistent and make consultation statutory—or non-statutory—throughout the bill?

**John Dowie:** We have included a statutory provision to consult in section 1, because any regulations made would place specific duties on

named bodies. We are also considering including a statutory requirement to consult in terms of the direction-making power in section 2. That is essentially a political judgment. We felt that it was reasonable, on the grounds of equity, that those named bodies should have a specific, statutory opportunity to contribute and express their views both when the initial duty was placed on them and if ministers decided that a direction was required to deliver on the substance of section 1.

**Mr Macintosh:** Does that imply that the other duties are not on other named bodies, but on the Executive, and that, therefore, you will consult as a matter of course?

**John Dowie:** I have not read through the specific sections that you mentioned, but there will be varying circumstances throughout the bill.

**Murray Sinclair:** In section 1(1A), any order made will be directed at certain public bodies, therefore it seems right to make it statutory for those bodies to be consulted before a requirement is made of them. Subsection 1(1A)(b) is there simply to make clear—bearing in mind the undue prominence argument that I made earlier—that that does not mean that we will not consult anyone else whom we think appropriate. The provision is for public bodies, and subsection 1(1A)(b) is designed to make it clear that we recognise that we will not limit ourselves to consulting just those public bodies.

**Bristow Muldoon (Livingston) (Lab):** I understand the point that my colleagues are making. We should remember, however, that prior to any regulations coming into effect they will come before both this committee and the lead committee. Members of both committees would therefore have the opportunity to question whether appropriate consultation had been conducted. That is a safeguard which ensures that no statutory instrument will be introduced without appropriate consultation.

**The Convener:** Given the diverse nature of the bill, rather than include piecemeal the duty to consult on regulations depending on the issues, would not it have been simpler to include at the outset a duty to consult where that would be relevant? That duty could permeate the bill from start to finish and there would be no need for joint strategies and bus consultation.

**John Dowie:** I understand your point. However, the circumstances that are described throughout the bill vary considerably. It is a wide-ranging bill that covers many different aspects of transport. The circumstances that arise in part 1, which we have just discussed, are quite different from those that arise in part 2 concerning the bus provisions, and in part 3 concerning charging. There is a balance to be struck and it is right that the bill

should reflect those different requirements in the relevant places.

**The Convener:** Is it intended that the bus user complaints tribunal, which is introduced in section 36A(1), would be listed under the Tribunals and Inquiries Act 1992?

**Murray Sinclair:** Yes, but I have not considered that point in any detail. According to customary practice, it would be a tribunal for those purposes but I cannot say that with certainty.

**Bill McQueen:** The question is whether the parking adjudicator would be considered a tribunal under the auspices of that act.

**Murray Sinclair:** We could clarify that issue in writing to you, if that would be helpful.

**The Convener:** I raise the matter out of curiosity.

Section 37B seems, in part, to decriminalise bus lane contraventions, but subsections (7) and (8) allow the possibility of creating criminal offences. What sorts of criminal offences will be created by subordinate legislation if the first subsections of section 37B decriminalise the nature of the offence? I presume that there might be circumstances that involve lying or not returning matters. What sort of criminal offences are being considered?

**Murray Sinclair:** We wish simply to ensure that when a new charging scheme for a bus lane is contravened or misused—for want of a better phrase—such incidents can be addressed by a criminal offence that has a level 5 penalty. I am trying to think of a specific example of a contravention for which the charges might be imposed.

**The Convener:** I can envisage a scenario where one would get a ticket—as I did yesterday—for parking a car without having the appropriate time on the ticket, or for giving false details and so on. I presume that the offences relate simply to bus lanes and not to road user charging schemes.

**Murray Sinclair:** The situation is much more like the parking regime that you mentioned, convener. The offences will have a fairly limited penalty and are for those people who do not comply with the charging regime by not paying up within a given period.

**The Convener:** Do the offences relate to the decriminalisation aspects of bringing in the new ticketing regime, or will there be offences that relate more to the nature of the bus lanes? I am trying to imagine whether the procedure will revolve around the dispensing of the ticket, how people will respond to that, whether they will respond correctly and so on.

**Murray Sinclair:** All the offences will be related to the decriminalisation of contraventions of the bus lanes. People will be subject to a civil penalty in the first instance rather than to a criminal penalty. However, the offences that we have in mind are similar to those that were created for decriminalised parking offences, where, if the civil penalty provision is infringed, there is a need to retain a criminal penalty system as a backstop.

The offences will all relate to the means by which the charges are enforced, and the charges will be made as a consequence of bus lane contraventions.

**The Convener:** Will there be a triple yellow line scheme, or something similar, infringements of which would be subject to a criminal charge, as opposed to a normal bus lane contravention, which would be subject to a civil penalty?

**Murray Sinclair:** No.

**John Dowie:** There is no change to the existing arrangements for bus lanes.

**Trish Godman:** Section 37B(7) states:

“The Scottish Ministers may make regulations about notification, adjudication and enforcement of charges”.

Could you expand on and clarify what you mean by adjudication?

**Murray Sinclair:** We would be able to adjudicate—presumably through the parking adjudicators—on whether an individual has been charged properly. Similar provision was made for the decriminalised parking regimes.

**Mr Macintosh:** Will people be able to appeal?

**Murray Sinclair:** Yes.

**The Convener:** In relation to section 47(4) and the further regulations for fitting immobilisation devices, does the Executive intend to implement an appeal scheme, or will people simply have to cough up to get their car released? Will there be an opportunity for people to submit a formal notice of appeal so that they can have their day in some sort of tribunal later?

**John Dowie:** The Executive intends to have an appeal mechanism. Just as with parking arrangements and bus lanes, where it is possible for reasonable grounds for dispute to exist, there will be appeal arrangements for immobilisation devices. Unfortunately, I cannot give members chapter and verse on how those arrangements are knitted into the bill.

**The Convener:** Do members wish to raise other points or make concluding remarks?

**Fiona McLeod:** We have come back to where we started, which was the question whether there should be an overarching provision on



consultation in the bill, which would make consultation a statutory responsibility, rather than relying on the reasonableness argument, where the Executive might find itself becoming involved in litigation. That problem was reflected in our questioning.

**John Dowie:** The other side of that argument is whether such a provision would have a practical effect on the ground, which is key.

11:45

**The Convener:** I thank the witnesses for taking the time and trouble to come in and answer our questions.

I do not know what members made of that session—it was certainly more polite than last week's discussion.

**Trish Godman:** I think that the witnesses had been warned before they came. There was not quite so much stonewalling as last week.

**The Convener:** What views do members have on the issue of consultation?

**Ian Jenkins:** I am inclined to accept the witnesses' arguments, as long as the principle that the Executive will consult is in place—that has been said again and again. It will be open to people to challenge a consultation on the basis of reasonableness, whereas it might cause more bother if consultation were to be made statutory. Perhaps I am just a softie.

**Bristow Muldoon:** I am also inclined to accept the explanations that the witnesses gave. As I said earlier, a safeguard exists, as both the Subordinate Legislation Committee and the Transport and the Environment Committee can review regulations that are introduced.

**Fiona McLeod:** I worry about that. Whether this committee or the lead committee can make an impact on regulations depends on how the regulations are introduced. Regulations can come before us and we can say, "We do not think that they are right," but nothing happens. If consultation is made statutory and becomes a matter of principle in the legislation, there it is—that would mean that consultation must take place.

**Bristow Muldoon:** I understand that the committee can have an impact on any statutory instrument that is introduced. Some instruments are subject to the affirmative procedure while others are subject to the negative procedure, but ultimately it would be possible for the Parliament to reject an instrument because of a widespread belief that it was flawed.

**Mr Macintosh:** Although I had reservations about the lack of consistency in the Executive's approach to consultation, the principle of

consultation is apparent throughout the bill. I was quite satisfied with the witnesses' explanations, particularly in response to questions about certain sections under which the Executive would impose a duty to consult on other bodies. When it came to considering Executive consultations, the duty was in place already—the Executive did not have to impose that duty on itself. That explanation was straightforward and there is no doubt that consultation is implicit throughout the bill. One could always use the argument that the Executive will change, but the principle that consultation can be challenged on the ground of reasonableness will always be in the bill.

**The Convener:** Part of the problem may be the nature of the bill, which is a bit of a dog's breakfast—road user charging, buses and whatever. I would be sympathetic to the idea that the extent of a consultation should be on the face of the bill. However, in such a bill consultation is varied—horses for courses.

**Ian Jenkins:** Should we draw someone's attention to that?

**The Convener:** How do you feel about that, Fiona? Others may be slightly more relaxed about it than I am.

**Fiona McLeod:** Do we produce a report to go along with stage 3?

**The Convener:** Yes. We report to Parliament, as does the Transport and the Environment Committee.

**Fiona McLeod:** Will that report be available to members on the day of the stage 3 debate?

**The Convener:** Yes. The report of any committee that has had input into the bill will be available.

**Fiona McLeod:** The fact that we raised concerns with the Executive about consultation and the difference between statutory responsibility and reasonableness will be known to the Parliament.

**The Convener:** Yes. It has been pointed out to me that the reasonableness will depend on whether a legitimate expectation has been set up. It is a matter of balance. I am all in favour of consultation, but when it becomes too prescriptive, we are in danger of slowing down the ability to implement regulations that could otherwise be dealt with quickly. If they have to be knocked around in the National Transport Forum for Scotland or wherever, it is simply delaying the necessary legislative process.

**Ian Jenkins:** During consideration of the Standards in Scotland's Schools Act, Fiona McLeod wanted schoolchildren to be consulted about decisions that affected their lives. In

principle, that is perfectly right, but it should not mean that every single pupil should have to fill in a form saying what he or she thinks. The element of reasonableness is important. There is a danger that someone might come along and say that when they were in primary 3 they were never asked about what should be on the school menu.

**Fiona McLeod:** That brings us back to the argument about reasonableness versus statutory requirement. If the requirement is statutory, it is clear whether one has a right to be consulted; if it is simply a question of reasonableness, there will be certain groups that would argue that it was reasonable for them to be consulted.

**Ian Jenkins:** I think that the argument goes the other way.

**Mr Macintosh:** I am not sure whether a statutory requirement makes it any clearer. It is very difficult to legislate for every scenario that could arise. Statutory consultation does not necessarily cover every situation, whereas a reasonable duty to consult would.

**Trish Godman:** I do not agree. That is interesting—the women are saying something quite different from the men. Fiona McLeod is right—interpretation is the key.

**The Convener:** We could draw it to the attention of the Executive and explain the nature of the argument. We would leave it to those in power to take their own view. We might suggest that “reasonableness” is open to interpretation. Does that satisfy you, Bristow?

**Bristow Muldoon:** I would be satisfied with a paragraph indicating some of the questions that have been raised. I would like the report to reflect the fact that the committee was not unanimous in its views.

**Mr Macintosh:** Ultimately, we accepted the Executive’s argument—we are just raising the point.

**The Convener:** We are drawing the questions that we raised to the attention of Parliament. We can say that there is a debate as to whether consultation should be statutory, that the committee was divided and that it is for individuals to make up their mind.

We have clarified the issues about tribunals and about decriminalising bus lanes. I was curious about where things were going.

**Fiona McLeod:** The point was about whether the bus user complaints tribunal will be listed under the Tribunals and Inquiries Act 1992. The answer was yes, then it was perhaps and then that it was customary practice. The witnesses said that they would let us know.

**The Convener:** Perhaps we should suggest that

a tribunal such as this should be subject to the same rules, regulations, duties and obligations as any other, given the nature of the beast.

### **Common Agricultural Policy Support Schemes (Modulation) (Scotland) Regulations 2000 (SSI 2000/429)**

**The Convener:** Various points were raised on the regulations and we have received a response. Do members wish to comment on it?

**Mr Macintosh:** I was intrigued by the matter. I would not want to hold up the statutory instrument, but it is a matter of interest. I accept that the payment is not a tax; it is a subsidy. If it was an income payment and therefore liable to income tax I could see it being a tax, but as it is a subsidy that is being redirected, I can understand the thinking as to why it would not be a tax. I would welcome clarification as to what is a tax.

**The Convener:** I am with you on that. I do not want to interfere with what is beneficial. We do not have time to seek that clarification, but we can mention it in the report to the lead committee. The Executive may respond to the lead committee and we can see that response.

### **Financial Assistance for Environmental Purposes (Scotland) Order 2000 (SSI 2000/430)**

**The Convener:** We have received an explanation on the points that we raised about the order. We will draw it to the attention of the lead committee that further explanation was required and supplied.

**Control of Pollution (Registers and Consents for Discharges) (Secretary of State Functions) Amendment Regulations 2000 (SSI 2000/432)**

**The Convener:** Various matters were raised regarding defective drafting in the regulations, which has been acknowledged. The substantive points related to European convention on human rights issues, which have been clarified. We will draw that to the attention of the lead committee and provide the explanation. The matter is complicated and I am happy to accept the Executive's views as I am unsure about it. We will see how matters develop.

**Environment Act 1995  
(Commencement No 19) (Scotland)  
Order 2000  
(SSI 2000/433)**

**The Convener:** We again raised ECHR issues in respect of the order. We will draw the attention of Parliament to the response and provide the explanation.

**Divorce etc (Pensions) (Scotland)  
Amendment (No 2) Regulations 2000  
(SSI 2000/438)**

**The Convener:** The regulations breach the 21-day rule, but a reason has been given. It is probably necessary that the regulations are dealt with expeditiously, given what happened on the previous occasion.

**Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland)  
Partial Revocation Order 2000  
(SSI 2000/434)**

**Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 2) (Scotland) Partial Revocation  
(No 5) Order 2000 (SSI 2000/435)**

**Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Partial Revocation Order  
2000 (SSI 2000/436)**

**The Convener:** No points arise on the orders.

**Europe Familiarisation Scheme**

**The Convener:** The final item on the agenda is the European Parliament study visit.

In view of the parliamentary debate and what may happen thereafter in respect of committee membership, we should perhaps consider our nominee at a future meeting, having noted our intimation to the conveners group and others that we want a member of the committee to go on the visit.

*Meeting closed at 12:00.*



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