SUBORDINATE LEGISLATION COMMITTEE

Tuesday 5 June 2001
(*Morning*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 5 June 2001

SUBORDINATE LEGISLATION COMMITTEE
19th Meeting 2001, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
*Ms Margo MacDonald (Lothians) (SNP)
*Bristow Muldoon (Livingston) (Lab)
David Mundell (South of Scotland) (Con)

*attended

WITNESSES

Tim Ellis (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 5 June 2001

(*Morning*)

[THE CONVENER *opened the meeting at 11:27*]

The Convener (Mr Kenny MacAskill): Good morning. I welcome everyone to the 19th meeting of the Subordinate Legislation Committee in 2001. We have received apologies from David Mundell and Gordon Jackson.

Housing (Scotland) Bill

The Convener: The first item on the agenda is the scrutiny of the delegated powers in the Housing (Scotland) Bill, as amended at stage 2. We require to take evidence this morning because the stage 3 debate on the bill takes place next week and we will not have time to correspond with the Executive and report. As a result, I am grateful to Tim Ellis and Murray Sinclair for coming along to give evidence. Perhaps the witnesses will introduce themselves and make some preliminary remarks on subordinate legislation matters in the bill.

Tim Ellis (Scottish Executive Development Department): I am with the housing bill team.

Murray Sinclair (Office of the Solicitor to the Scottish Executive): I am with the solicitor's office as the instructing solicitor on the bill.

Tim Ellis: We do not have any particular comments to make. We are ready to answer any questions that the committee might have.

The Convener: We have had a legal briefing, which has raised only a couple of points. New subsection (3A) in section 6 of the bill refers to

"serious danger to other occupiers or staff of the accommodation".

Has any consideration been given to any "serious danger" to the individual occupant? There have been previous situations in tenements or four-in-a-block housing where an individual has refused to leave. How does section 6(3A) relate to a situation in which a tenant might not necessarily be a danger to others, but might be a danger to himself or herself?

Tim Ellis: It is perhaps worth giving some background to this new subsection, which was suggested not by the Executive, but by Robert Brown. A number of amendments to section 6 tried to pin down the kind of regulations that should apply in this case, and in the end the committee decided that most of the amendments should be withdrawn. However, Robert Brown's amendment, which introduced new subsection (3A) to section 6 was agreed to. It was intended to give some steer to the sort of situations that the regulations would cover.

We have kept the provision quite general because it is very tricky to get the right balance between the rights of the individual and the rights of other occupants and the landlord or the owner of the accommodation. We want to address all those issues in our consultation on any future regulations. We have not given any specific thought to the issue, other than to identify that it exists and is quite tricky to resolve.

The Convener: Does a gap exist? For example, how would we address a situation in which everyone, apart from one person, leaves a tenement? Do other parts of the bill contain other methods of short-circuiting that individual's tenancy?

Tim Ellis: There are various issues to address in that respect. This provision does not cut across the criminal legislation that would still be used to take someone into care or to remove them if they were a danger to themselves. The people in question have an occupancy agreement instead of a tenancy arrangement, and as the bill contains powers to prescribe the terms and conditions of any such agreement, those provisions could be used to address such circumstances.

Murray Sinclair: It is fair to say that we had not considered the fact that there would be a need to make an earlier termination because of a perceived danger to the occupier himself.

The Convener: The only reason I ask is because, as a practising solicitor, I came across certain examples in the city of Edinburgh. For example, when Wimpey Homes took over Pilton, people simply refused to leave their houses, even though their circumstances were unpleasant and they were in some theoretical danger. If there was structural damage to a multiple let, some obstinate person might simply say, "It is no danger to me". How do we address the rights of that individual when it is not necessarily in their own best interests to stay?

11:30

Tim Ellis: We are well aware that there are many difficulties. Part of the problem is that the law in this area is a bit unclear, to say the least. We suggested this proposal both to provide a more structured basis for giving rights to individuals, so that they could not be thrown out

without any notice whatsoever if that was unreasonable, and to ensure some protection for other occupants if the person's behaviour might be a danger to them.

The Convener: I am probably still thinking of tenancy law in relation to housing, in which, if one wanted to short-circuit a period of notice, one would go to the sheriff seeking a shortened induciae or period of notice. How do you expect to deal with such matters? Will the regulations set a required number of days for a notice period, or will they contain some mechanism for going to the sheriff? It seems inappropriate to set an arbitrary number of days when one could ask a sheriff for a period of 24 hours, three days, seven days or whatever length of time was felt necessary.

Tim Ellis: The homelessness task force contains a subgroup that is beginning to consider such issues. The subgroup initially felt that the situation was relatively straightforward, in that the regulations would simply specify a number of hours or days required for a period of notice. However, it has come to the conclusion that the matter is more tricky than that, and wants to give quite serious consideration to how best to frame things. I certainly do not have a definitive answer to your question, nor do I think that such an answer would be possible. The whole purpose of the consultation and the task force subgroup's detailed examination is to ensure that all the angles are covered.

Murray Sinclair: That said, we thought that the period of notice would be included in the regulations, instead of having a mechanism for going to a sheriff in advance. The sheriff would get involved if the minimum period specified in the regulations was not complied with for any reason.

Ms Margo MacDonald (Lothians) (SNP): Forgive me for not knowing the answer to this question, but is there any form of appeal against that?

Murray Sinclair: I realised that I was wrong immediately I said that the sheriff would get involved. The appeal would take the form of a judicial review on the basis that the law relating to the minimum period of notice as set out in the regulations had not been properly complied with. In that way, there would be a recourse to the courts. It would simply be a straightforward legal question that centred on whether the minimum period in the regulations had been complied with. As a result, it is fair to say that section 6 does not confer a right of appeal; however, we would say that such a right is not necessary because the ordinary recourse to the courts in legal issues of this nature will apply and will suffice.

Ms MacDonald: Are we trying to improve the situation, not just in relation to the supply of housing and the regulations that apply to social housing, but as far as the individual is concerned?

Murray Sinclair: Yes, but in this and other contexts, we take the view that there is nothing wrong with judicial review as a remedy. It is the ordinary remedy for someone who is aggrieved because a legal regulation has not been complied with. As a result, there is no reason to do anything further.

Tim Ellis: It is important to point out that the bill contains provision for buildings to which a full tenancy applies, as well as introducing the concept of a short Scottish secure tenancy. The intention is, as far as possible, to move people who currently have only occupancy agreements to that new short tenancy, which confers greater rights and contains rights of appeal.

There will still, however, be people who live in very short-term accommodation, such as hostels, for whom such a tenancy arrangement would be inappropriate. Section 6 attempts to provide a framework in which those basic rights can be set out.

Ms MacDonald: I agree with the intention. That is what I am saying—the bill is trying to improve matters. I am not at all sure, however, that you have the structures in place to deliver your intentions.

The Convener: Will we have to revisit this issue when the homelessness task force reports? The ears of most committee members prick up when we hear that judicial review is the method of appeal. I would be extremely wary if a judicial review were a tenant's only right of appeal against a three-day or five-day notice. The time scale, cost and bureaucracy involved would seem quite intimidating.

Murray Sinclair: We can certainly give some thought to widening the power to make regulations that provide more of an appeals procedure.

Ms MacDonald: From the point of view of the people who would be affected by this part of the bill, a less bureaucratic and intimidating procedure might be called for.

Murray Sinclair: As I say, we are now thinking about simply extending the power to give us more flexibility to react to whatever the task force proposes.

The Convener: I used to deal with housing legislation, and I always thought that the balance with the sheriff was reasonably fair. Even if a short period of notice to remove travelling families from an area was sought, it was felt that at least some method existed of ensuring that a hearing could take place. I would not rule out the use of the courts as unnecessarily bureaucratic. That might be an easier way of balancing rights than simply

putting a provision in subordinate legislation.

Murray Sinclair: We are aware that a summary application to a sheriff would in some ways be more beneficial than going to the Court of Session.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Would an attempt be made to define serious danger? Would that be done in regulations, or is that up to common sense? Are there implications for human rights?

Murray Sinclair: We would not define serious danger. As the powers are worded, the regulations could not define serious danger. The phrase "serious danger" is in the bill. We would be happy to leave it there and leave it to the common sense of the courts to work out what serious danger was. We hope that no human rights difficulties would be encountered, as, one way or another, we will provide proper access to a court.

Ms MacDonald: May I ask a specific question? I understand that there may be no answer to it. We are talking about serious danger to those to whom someone may live close. I do not want to be pejorative about some medical conditions, but I am sure that the witnesses can imagine how some people may suffer from an infective condition, for example. Are such conditions considered serious danger? Can a person be removed because they suffer such a condition? That person has not done anything—they are something.

Murray Sinclair: That is not the sort of danger that we had in mind. We had in mind danger—Tim Ellis will correct me if he disagrees—that is unavoidable. The dangers about which you are talking—the risks that are involved in such conditions—ought to be avoidable.

Tim Ellis: We are mainly talking about hostels whose residents suffer from conditions that may include alcoholism and where there is a danger of abuse as a consequence of people being drunk and posing a danger to other people in the hostel. That is my understanding of where Robert Brown was coming from when he lodged the amendment that added section 6(3A). However, he devised that amendment. It is not always possible to get to grips with the detail of what an MSP proposes.

Murray Sinclair: That was the danger, rather than a private health danger that resulted from something that proper practices ought to be able to deal with.

Ms MacDonald: Could the committee ask the homelessness task force to consider that issue?

The Convener: We could seek clarification. If I were in a hostel into which someone came with tuberculosis, and they refused treatment, I might take the view that they were a serious danger not only to me, but to other residents. That person, through ignorance or whatever, might say, "I'll just lie down and stay in my bed."

Murray Sinclair: As I said, we would be happy to leave such issues to the common sense of a court, to decide according to the arguments that were put to it.

The Convener: We will raise that issue in our discussion later.

We wish to raise a point about insolvency and schedule 7A. Elsewhere, we are trying to provide some protection for home owners and tenants when building societies initiate repossessions, because they have little protection in such circumstances. We are in danger of replicating the problems that we have had in private sector home ownership if we do not specify the rights that are available and when matters will be triggered.

If a housing association, or anyone operating a hostel in multiple occupancy went bust and became insolvent, what would be the rights of the individuals in the premises? At present, if you rent a house and the house is repossessed, that is tough, until the legislation changes. What cognisance has been taken of that change in attitude about balancing the interest of the financial institution or liquidator against that of the people in the premises?

Tim Ellis: To an extent, schedule 7A is aimed at trying to find that proper balance. When someone wants to enforce their security, the schedule enables Scottish ministers or the regulator to step in and say, "Let's hang fire for a while." We opted for a period of 56 days in which to allow people to think and get round a table to try to reach a solution, so that the interests of the tenants and the lenders could be protected. A purpose of the legislation is to ensure that provision is made to allow people to put things on hold instead of rushing full scale into repossession. That would allow the interests of tenants as well as lenders to be taken into account.

The Convener: I appreciate that deciding when to take the step or use the trigger mechanism that would do that is complicated. If you go too early, the liquidation or receivership might not follow through, but if you go too late, I presume that you will have to specify a follow-through time. Has that yet been thought through?

Tim Ellis: The provisions are analogous to provisions in the Housing Act 1996, which have not been used in the five years or so since they were introduced. We very much hope that the provisions in schedule 7A will never have to be used. I understand that, in the south, one or two dummy runs have been performed, to work out what would happen. No significant problems were encountered. One or two tweaks were needed, which we have taken account of in our bill.

It is true that there is no experience of how the provisions operate. What is key is the point at which the first step is taken and how that is defined. We are aware that we may need to clarify that in the light of experience. That is what the regulation-making power in paragraph 1 of schedule 7A will deal with.

11:45

Bristow Muldoon (Livingston) (Lab): I presume that the aim of the provision is to ensure that if a registered social landlord—RSL—faced insolvency, a period could be provided in which to explore whether another RSL could provide a rescue package, to prevent harm to the tenants. That period would allow the Executive and other RSLs to discuss the situation and try to construct such a package.

Tim Ellis: Absolutely. The period is a moratorium on a legal proceeding to enable a rescue package to be put together, whether with another RSL or a lender that provided additional finance, for example. The wording of the provisions has deliberately been kept relatively flexible to allow different solutions to be found.

Murray Sinclair: Paragraphs 4, 5 and 6 of schedule 7A are the key paragraphs that provide for the moratorium and establish a formal structure in which to make proposals during the moratorium for alternative ownership and management of the land, to protect the interests of tenants, among other things.

Tim Ellis: Schedule 7A must be considered in the context of schedule 7, which carries over to the regulator extensive powers from the Housing Associations Act 1985 to take steps when a danger of insolvency exists, to transfer land, for example. The regulator has quite strong powers to step in and sort out the problem. The provision is a last resort, to allow the other powers to be used if necessary.

The Convener: How will that interact with insolvency law? My understanding—I am not an experienced practitioner in the subject—is that the rights of the liquidator are immense, but his responsibilities are fairly minor. If a moratorium is available, is there a danger of a hiatus in which the liquidator has no vested interest in doing anything until the moratorium ends and he can realise or liquidate the asset, and the social landlord, because he is in liquidation, can do nothing because he would contravene many requirements of liquidation? What thought has been given to balancing that? During the moratorium, the landlord should not be able to disappear into a bunker and say that the liquidator has the responsibility, and the liquidator should not be able to say, "There's nothing in it for me. I'll review the matter at the end of the moratorium, when I'll look for a buyer."

Murray Sinclair: The key point is that the moratorium would last for only 56 days and is intended to prevent the disposal of land, when it is perceived that disposal of land by the liquidator in accordance with his duties under insolvency law would not be apt. The 56 days provide the regulator, or the Scottish ministers through the regulator, a fairly limited window of opportunity in which to try to produce an alternative that will suit everyone. I am no expert in insolvency law, but from a limited recollection of my time as a trainee, I think that 56 days in the context of a winding-up is not too much of a hiatus.

The Convener: Would it be fair to say that you would expect the liquidator to safeguard the assets, as I presume that it would be his responsibility to do?

Murray Sinclair: The liquidator would not be able to sell the land.

The Convener: That clarifies matters for me. I thank the witnesses for taking the time to come here and clarify matters. We did not have many points to cover, but my knowledge and understanding of matters has improved.

I do not know what we want to report. We raised only two points.

Much more thought must go into section 6(1). It would be a bit of an oversight not to consider the circumstances of the occupier himself as opposed necessarily to his hostel colleagues. Serious danger does not seem to be specified.

Ms MacDonald: The witnesses have acknowledged that they are trying to pick their way through it, but they know that they have not managed that. Let us point out to the homelessness task force that the draft bill has an area of great uncertainty that would render the intended improvements to the provision of hostel tenancies and the rights of the tenant not as good as we would want them. We have not said that; we just say that the provisions do not look good.

The Convener: I understand that the task force cannot do everything. There is a fair bit to be fleshed out that is of significance to individuals and institutions. We await with interest the outcome, as presumably do other members of Parliament.

Ms MacDonald: The sheriff courts will be busy on a Monday morning.

Ian Jenkins: In essence, we should leave such matters to the common sense of the sheriff and to case law.

Ms MacDonald: The sheriff would say that the problem should have been sorted out before it reached him.

The Convener: I am more worried about the fact that the mechanism has not been thought through. I would have been happier if the witnesses said that they would replicate what happens now. I understand that that process might not be so simple, but we need to flag up the fact that there is a fair bit to be considered.

Ms MacDonald: The witnesses excused themselves by saying that they wanted to put people into short tenancies as soon as possible. The implication was that the hostel occupancy would not last for long and may not affect many people. Hmmm.

Ian Jenkins: How will that be reported by the *Official Report*?

Ms MacDonald: What, hmmm?

The Convener: We must say that certain matters need to be flagged up. We are not criticising the legislation as such. We understand that the task force must examine it, but fairly serious and important points need to be considered. That is less so with the insolvency matter, but we must sort out the trigger mechanism. Is it when people are served with initial writs for sequestration or is it further down the line? I appreciated the difficulties of going too soon—if someone were not sequestrated, one would put the wind up them. But if that does not happen, people can be left high and dry. Matters must be clarified. Margo MacDonald, do you have any further points?

Ms MacDonald: No.

Rendering (Fluid Treatment) (Scotland) Order 2001 (SSI 2001/189)

The Convener: Item 2 on the agenda is the consideration of Executive responses.

We have received a courteous explanation of the order, which we shall draw to the attention of the lead committee.

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (Scotland) Order 2001 (SSI 2001/195)

The Convener: Agenda item 3 concerns instruments not subject to approval. No points arise on the order.

Farm Business Development (Scotland) Scheme 2001

The Convener: Minor matters arose such as typographical errors, the vires of paragraphs 5(b) and 8, which appear to the committee to reproduce the substantive provisions of section 29(3) of the parent act, and why section 28 of that act has been cited as an enabling power. Does anyone wish to comment, other than simply to await the Executive's response?

Designation of Bell College of Technology (Scotland) Order 2001 (SSI 2001/199)

The Convener: Item 4 on the agenda is instruments subject to annulment. No points arise on the order.

Bell College of Technology (Scotland) Order of Council 2001 (SI 2001/2005)

The Convener: Does Bristow Muldoon wish to comment on the fact that this is a statutory instrument as opposed to a Scottish statutory instrument?

Bristow Muldoon: I do not have a particular comment—I was interested in the different procedure that was applied in this case. It might be useful for us at some stage to understand the circumstances in which the Privy Council would be likely to make orders, as opposed to other forms of statutory instrument being used.

The Convener: That is a valid point. It seems bizarre that two matters relating to the Bell College

of Technology are dealt with in two different ways. We could raise that and ask generally what the remit is regarding when matters would come in through UK legislation.

Ms MacDonald: That is important.

The Convener: That might be going too far, but we can certainly ask why this has happened in this instance.

Consultative Steering Group Principles

The Convener: This item concerns the Procedures Committee inquiry into the application of consultative steering group principles in the Scottish Parliament. I think this is going round every committee. Our committee operates rather differently and we do not have the same interaction with the public as do other committees. Unless anyone is otherwise minded, a polite letter could indicate that we feel rather out on a limb. We are charged to do a specific task, but it is not the same as other committees.

Ms MacDonald: But it is nice and cosy.

I have a question that arises out of the difference between an order in council and an order of council. Our legal advice says that orders of council are usually in relation to the constitution of colleges, universities and professional bodies. Would that apply to the Parliament? If that is the case, that is an important instrument. I heard Helen Liddell saying the other night that if there were to be changes to the Scotland Act 1998 it would not be done after a debate, but by an order in council. I assumed that it was an order in council, but I wonder whether it is an order of council.

The Convener: We are being advised no. The response that we get to the question flagged up by Bristow Muldoon may give us some indication and we can always pursue the matter in due course, to try to work out what matters are being fired at us.

Ms MacDonald: With vigour.

Equal Opportunities

The Convener: The Equal Opportunities Committee is looking for a representative to attend a workshop on the mainstreaming of equal opportunities in committee work on the evening of 20 June. I do not know whether there are any volunteers.

This may well fall into the same category as the paper on the CSG from the Procedures Committee in that, from our perspective, mainstreaming equal opportunities in this committee is a bit like interacting with the public. If no one volunteers or wishes to consider it, we will put it on the agenda for a later date and advise those who are not here that there is a vacancy. We do not require to nominate anybody—it is only if we wish. Unless we nominate someone to go grudgingly we can leave it to see whether there is a volunteer.

Ms MacDonald: I am being very stupid, but what does mainstreaming equal opportunities mean?

The Convener: That is probably the purpose of going.

Ms MacDonald: I thought that you needed to know before you went.

The Convener: I am advised that they are not sure about the techniques themselves, so apparently you would have to look, learn and listen. We can come back to that at a later meeting.

Meeting closed at 11:59.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 12 June 2001

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £500

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178