

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 September 2001
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

24th Meeting 2001, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tw eeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)

*Colin Campbell (West of Scotland) (SNP)

*Gordon Jackson (Glasgow Govan) (Lab)

*Bristow Muldoon (Livingston) (Lab)

*David Mundell (South of Scotland) (Con)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 September 2001

(Morning)

[THE DEPUTY CONVENER *opened the meeting at 11:28*]

The Deputy Convener (Ian Jenkins): Good morning. I welcome everyone to the 24th meeting of the Subordinate Legislation Committee. As deputy convener, I am standing in for the moment because we currently have no convener. My first happy duty is to welcome Colin Campbell as a new committee member. Colin, the pre-meeting has given you a glimpse of how gripping the committee will be.

Colin Campbell (West of Scotland) (SNP): Absolutely.

Convener

The Deputy Convener: The first item on the agenda is the choosing of a new convener. First, I pay tribute to Kenny MacAskill, who convened our meetings with insight, wisdom, wit and humour. I trust that our new convener, whoever he or she might be, will do as good a job.

The Parliament has determined that the committee members eligible to be convener should be members of the Scottish National Party. Do I have any nominees?

11:30

Colin Campbell: Yes, surprisingly. I have much pleasure in nominating Margo MacDonald.

The Deputy Convener: Margo, are you happy to accept the nomination? Happy might not be the right word.

Ms Margo MacDonald (Lothians) (SNP): Yes.

The Deputy Convener: Are committee members agreed that Margo MacDonald should become convener of the Subordinate Legislation Committee?

Ms Margo MacDonald was chosen as convener.

The Deputy Convener: I am delighted to hand over the chair to Margo MacDonald, and all her wit, wisdom and humour.

The Convener (Ms Margo MacDonald): Thank you.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Congratulations. *[Interruption.]* Oh. Knocking over that bottle of water was a symbolic gesture.

The Convener: Were you christening me or the table?

First, I should say that it is very nice to have been chosen as convener, because I now have the nice seat. I also want to thank Kenny MacAskill for his convenership of the committee from the beginning. After I received all the papers for this meeting, I decided that he was a man to be much admired and that any congratulations are not gratuitous.

Interests

The Convener: My first duty is to ask the new committee member to declare any interests.

Colin Campbell: Looking down the list of instruments to be discussed today, I think that I might be chronologically entitled to home energy efficiency schemes. Nevertheless, I have no specific interest to declare, other than the fact that I own a house.

Sexual Offences (Procedure and Evidence) (Scotland) Bill

The Convener: The next item on the agenda is scrutiny of delegated powers. We have received the Executive's response to points that we raised about the Sexual Offences (Procedure and Evidence) (Scotland) Bill. In policy terms, the bill is sensitive and important. Although it is not within the committee's remit to comment on that matter, we must carefully consider the sections of the bill that concern us.

First, we pointed out that, if passed, the bill will confer on ministers the power to make affirmative statutory instruments to alter the list of sexual offences in new section 288C(2) of the Criminal Procedure (Scotland) Act 1995. As we cleared up a specific question concerning classification before we opened the meeting, I do not think that there is any need to draw the Executive's attention to anything else in this proposed section of the bill. Instead, we will refer the bill to the lead committee, with the proviso that I mentioned at the start.

Although we are satisfied with the use of affirmative instruments in relation to this bill, the lead committee should be extremely careful about how they are implemented. The last thing we want to do is to subject the legislation to the sort of pressure that can come from campaigns that are run after particularly interesting cases. Although it is not within the committee's remit to deal with that

matter, we will draw it to the attention of the lead committee.

Do we have anything else on that matter? Does Gordon Jackson want to comment?

Gordon Jackson (Glasgow Govan) (Lab): No. I did not say anything.

The Convener: Do members want to add any points?

Ian Jenkins: The Executive's explanation was broadly acceptable.

The Convener: We had, as usual, quibbles about some of the syntax in the bill, but we have not gone into that matter in detail.

Public Appointments (Parliamentary Approval) (Scotland) Bill

The Convener: We move on to the delegated powers scrutiny of the Public Appointments (Parliamentary Approval) (Scotland) Bill. Alex Neil MSP has introduced the bill. Committee members saw nothing in the bill that caused them concern.

Ian Jenkins: I understand that Alex Neil is happy with the subordinate legislation procedures that were attached to the bill and we are happy to endorse that.

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No 3) Regulations 2001 (Draft)

The Convener: Item 5 on the agenda is Executive responses. We might want to draw the attention of the lead committee and the Parliament to the draft advice and assistance regulations, because further explanation is required from the Executive. The Executive acknowledges that the regulations are defectively drafted because it omitted to cite a relevant enabling power in the preamble to the regulations.

Ian Jenkins: We can draw the attention of the lead committee to those matters.

Fishing Vessels (Decommissioning) (Scotland) Scheme 2001

Ian Jenkins: We asked the Executive five questions about this instrument and it has acknowledged the accuracy of some of our points. We need further clarification on our fifth question, which was about the method of choosing applications for approval. The formula that is used if the numbers of applications go over the limit is

not clear, but it should be clear. It is not clear how the various elements of that formula are to be rearranged to allow an applicant to qualify for a grant. We should draw that fact to the attention of the lead committee and the Parliament.

The Convener: No member found that formula clear. We understood what the Executive was trying to do, but we could not understand how it was trying to do it. The committee can suggest that further clarification is required in relation to the committee's questions 1 and 5. Clarification is perhaps also required about question 4.

There is an unexpectedly limited use of the powers in relation to the failure to provide for a right of appeal against decisions to recover grant under paragraph 16 of the instrument. Members might remember discussing our concerns about that matter, which should be brought to the attention of the lead committee.

It should also be brought to that committee's attention that there is defective drafting in relation to the inclusion of unnecessary words in paragraph 2(1) of the instrument, including what is covered by the phrase "sea fish". Presumably, the matter is about drafting and not about taste, or whatever.

Child Minding and Day Care (Registration and Inspection Fees) Amendment (Scotland) Regulations 2001 (SSI 2001/214)

The Convener: The committee recommends that SSI 2001/214 should be drawn to the attention of the lead committee and the Parliament, because the 21-day rule is breached and that raises the same issues as those arising from the breaching of the 21-day rule in SSI 2001/216. The indicated cost increases raised the question of whether that would constitute an unusual or unexpected use of the enabling power. If members remember, the fees just shot up, but I forget by how many hundred per cent.

David Mundell (South of Scotland) (Con): We could not calculate by how much.

The Convener: We thought, however, that the difference in quantity was so large as to constitute an absolute difference and we questioned that.

Nursing Homes Registration (Scotland) Amendment Regulations 2001 (SSI 2001/215)

The Convener: The committee suggests that the attention of the lead committee be drawn to SSI 2001/215 because further explanation of the

content is required. Also, providing for the charging of a fee of first registration for "annual continuation of registration" in addition to a registration fee represents, at best, an unusual or unexpected use of the enabling power. The committee was confused about that matter. Does David Mundell remember the discussion about that?

David Mundell: The confusion is because the initial fee is paid twice, effectively. In effect, the health department is holding a deposit and that is not the normal way of paying fees of that kind.

The Convener: We recommend that the lead committee should give this matter its attention, because it deals with policy rather than technical matters, does it not? It is on the borderline and we do not want to be caught there.

Nurse Agencies (Increase of Licence Fees) (Scotland) Regulations 2001 (SSI 2001/216)

Ian Jenkins: This is another case where the Executive has breached the 21-day rule for no apparently good reason. We should, again, draw its attention to that.

The Convener: I have been advised that the Executive is considering that matter as a general question, along with breaches in the 21-day rule. We keep picking those up. Practically everything in the briefing papers involves picking up breaches of the 21-day rule.

Bristow Muldoon (Livingston) (Lab): We are right to raise concerns about the 21-day rule. However, with regard to this sequence of instruments, we should note that the department concerned was heavily involved in a major bill. The work that was carried out on that bill forms a major part of its explanation of why it has breached the 21-day rule. We should take some cognisance of that fact.

The Convener: We have said that we understand and are sympathetic. However, we have questions about whether the department had enough personnel to hand and other matters. The fact remains that rules are rules and this committee is supposed to keep them. Thank you, Bristow.

After such a long period of time, the increases in the fees provided for in the regulations might, without any staging, constitute an unusual or unexpected use of the enabling power. That is the same point that we have made previously.

11:45

Town and Country Planning (General Development Procedure) (Scotland) Amendment Order 2001 (SSI 2001/245)

The Convener: The committee asked three questions about the order. The committee recommends that the order should be drawn to the attention of the lead committee and the Parliament, as requiring further explanation. The Executive has supplied an explanation, but we are still not certain that it has answered all our questions, although it has taken a good shot at it. Do members agree to draw the order to the attention of the lead committee?

Members indicated agreement.

Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Amendment Regulations 2001 (SSI 2001/248)

The Convener: Now I know why I came into politics.

The committee recommends that the regulations be submitted to the lead committee for consideration. A headnote was missing from the regulations, so further confirmation is required that the regulations should be made available free of charge to all those who can prove that they purchased the original defective regulations. Do members agree?

Members indicated agreement.

Plant Health (Great Britain) Amendment (Scotland) Order 2001 (SSI 2001/249)

The Convener: We do not understand why the amendment order was not put into effect, although it could have been because of pressure of time before the recess. The committee should draw the order to the attention of the lead committee because the Executive failed to implement a European Community obligation and that raises a devolution issue. Who would have thought it where plant health is concerned? Do members agree to send the order to the lead committee?

Members indicated agreement.

Sea Fish (Specified Sea Areas) (Regulation of Nets and Other Fishing Gear) (Scotland) Amendment Order 2001 (SSI 2001/250)

The Convener: We asked for further clarification on the regulations. We recommend that the lead committee should consider the regulations because further explanation is required in relation to question 1 as well as to question 2, which deals with defective drafting.

I am informed that the Executive is introducing regulations. We received a nice letter from the Executive, which agreed with some of the points that we made.

Foot-and-Mouth Disease (Control of Vaccination) (Scotland) Regulations 2001 (SSI 2001/261)

The Convener: The Executive has been commendably frank in its response to the committee's question as to why the 21-day rule was breached, but not as to why the directive was not implemented earlier. The committee should consider whether to draw the regulations to the attention of the lead committee and the Parliament on the grounds that the delay in implementing Community obligations and the breach of the 21-day rule required further explanation, which the Executive has now supplied. The regulations are also defectively drafted. Do members agree to send the regulations to the lead committee as a matter of course, despite the Executive's further explanation?

Members indicated agreement.

Town and Country Planning (General Permitted Development) (Scotland) Amendment (No 2) Order 2001 (SSI 2001/266)

The Convener: The order replaces SSI 2001/244, but contains serious defects. We recommend referring the order to the lead committee and the Parliament on the grounds that the powers of the Executive to make the order required further explanation.

The order is also defectively drafted in that the definition of "category A listed buildings" refers to the coming into force of the principal order rather than—as intended by the Executive—the coming into force of the present order.

With reference to the new definition of
"historic garden or designed landscape"

which has been inserted into the 1992 order, no mention is made—either in the footnote or in the explanatory note—of details of the publication or of where a copy of the publication can be obtained.

Ian Jenkins: The Executive has supplied a reference in its response, but it is not in the order, as it should be.

The Convener: It is not only lawyers who refer to orders. They must be accessible and this one is not. We should tell the lead committee that it ought to consider the order to make the legislation clearer and more accessible. Do members agree?

Members indicated agreement.

Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2001 (SSI 2001/267)

The Convener: The regulations have caused great concern because they could contravene the Scotland Act 1998. The regulations refer to a benefit or a payment that could impinge on social security payments, which are a reserved matter. Although it pains me to say it, we must ask the Executive to reconsider its response.

Gordon Jackson: Are Scottish statutory instruments subject to approval from Sir David Steel's office in the same way as bills are?

The Convener: No.

Gordon Jackson: So a bill must have a certificate of competence from Sir David Steel, but an SSI does not need one? Other than the Subordinate Legislation Committee, is there a vetting department?

The Convener: No.

Gordon Jackson: That sounds like a gap. It seems odd that David Steel's legal office has to declare primary legislation competent when a great deal of legislation is produced by statutory instrument. Why should the same office not have to declare that subordinate legislation is competent?

Ian Jenkins: In a sense, that is our job.

Gordon Jackson: It is our job and it is not our job.

Bristow Muldoon: Gordon Jackson's point is that the Parliament cannot proceed with a bill unless Sir David's office proves that it is within the competence of the Scotland Act 1998. A parallel procedure should exist for statutory instruments.

Gordon Jackson: Bristow Muldoon points out that there should be a procedure for statutory instruments parallel to that for bills. I have no

concluded view. It simply interests me why the Executive does not have to run subordinate legislation past the same people past whom it must run bills.

The Convener: The Westminster rule is that statutory instruments must be accompanied by, if you like, a bill of health from the minister concerned.

Gordon Jackson: It would be interesting to ask about this.

The Convener: There is perhaps a gap, which is another good reason for the committee to return the regulations to the Executive to look at again. We are not quibbling with the policy decision. We are asking whether the policy objective can be achieved by that mechanism.

David Mundell: Is it appropriate to ask for a witness to come before the committee?

The Convener: Yes, we could do that.

David Mundell: It is important that the matter is resolved because the regulations raise a significant issue. We are, as you pointed out, trying to be helpful. There is no point in our moving to the next stage if somebody then comes forward to say that the regulations are invalid.

Gordon Jackson: That is right.

David Mundell: We must have a clear focus. Are the regulations valid? The Executive's response did not make that as clear as would have been helpful. It would be helpful if the Executive could set out the evidence for us.

The Convener: We are under pressure of time, but we could invite a witness to next week's meeting. Can we say who we want to talk to, or does the Executive say whom it wants to send?

Gordon Jackson: We have legal advice that the regulations are ultra vires.

The Convener: We suspect that they may be ultra vires.

Gordon Jackson: I thought that the legal advice was that we had a strong suspicion.

The Convener: That is right; we have a strong suspicion.

Gordon Jackson: If the Executive's advice is that the regulations are competent, we want to hear from somebody who has the technical ability to tell us why that is. There is no point in our cross-examining someone on the issue about which we are disturbed if that person does not have the technical ability to tell us the reasoning. We want to hear from somebody—whatever their title is—who can argue their corner.

The Convener: I assume that a lawyer will be

sent. I absolutely demand that the lawyers on the committee are here to question him.

Colin Campbell: Do we need a constitutional lawyer?

The Convener: No, Gordon Jackson will do. *[Laughter.]* We will write to the Executive to ask whether we can have a witness.

Gordon Jackson: Does the meeting have to be next week?

The Convener: I am afraid so.

Gordon Jackson: I will not be here next week.

The Convener: We could have the meeting on another day if you are willing. I think that the matter is important enough for us to convene on another day—we need you to attend, Gordon.

Gordon Jackson: Can I talk to you about that later, convener?

The Convener: Is the suggestion that we convene on another day—provided that we get a quorum and find a suitable time—acceptable to members? The matter will arise again so we should take this opportunity to question the Executive.

Bill Butler (Glasgow Anniesland) (Lab): Given the importance of the matter, it would be acceptable to meet at another time, as long as we can find an appropriate time to do so.

The Convener: How about Saturday morning?

Bill Butler: An appropriate time, convener.

David Mundell: As long as we have the meeting in Moffat town hall, I am available.

The Convener: The clerk will check the availability of Moffat town hall.

Do members want to do anything else at this stage, or shall we wait to hear from the Executive witness before deciding our next move?

Bill Butler: It would be wise to hold fire until we hear from the witness because everything else will build on that—or not as the case may be.

The Convener: We shall do that. I will be in touch with members over the next 24 hours to try to fix a time for the meeting.

Processed Animal Protein (Scotland) Regulations 2001 (SSI 2001/276)

12:00

The Convener: After that excitement, we move to the animal protein regulations. We asked the Executive for an explanation of three points. A mistake in the drafting appears to suggest that

feedingstuff for animals for human consumption must be produced in the same premises as feedingstuff for pets. That is obviously not the intended effect of the regulations. Members will be pleased to hear that the Executive has agreed to amend the regulations as soon as possible.

The committee might wish to consider drawing regulation 12(1) to the attention of the lead committee. The regulation is defectively drafted, it might be ultra vires and it raises a devolution issue in that it fails properly to implement Article 2 of Council decision 2001/9/EC, which is acknowledged by the Executive.

We discussed the right of appeal of someone who, under the regulations, would lose part of their business if they had prepared the different types of feedingstuff in the same premises. Members might want to draw to the attention of the lead committee the question of whether that is a gap in the regulations.

Members might also want to draw the defective drafting of regulation 10(3)(d) to the lead committee. The repetition of the words “of the place of destination” does not add to the regulation. Do members agree to those suggestions?

Members indicated agreement.

Specified Risk Material Amendment (No 3) (Scotland) Regulations 2001 (SSI 2001/288)

The Convener: We raised a couple of points on the regulations. The regulations should be drawn to the attention of the lead committee and the Parliament because further information is required on proposals for the consolidation of the legislation. Also, the instrument is defectively drafted, in that reference to a relevant enabling power has been omitted. I confess that I did not pick that up. However, I am sure that members of the lead committee will work it out.

Registered Establishments (Fees) (Scotland) Order 2001 (SSI 2001/253)

The Convener: The Executive has supplied the committee with the information we requested and we suggest that the attention of Parliament be drawn to that fact. Do members agree to that suggestion?

Members indicated agreement.

Special Grant Report No 4 and Guidance for Local Authorities: The Domestic Water and Sewerage Charges (Reduction) (Scotland) Regulations 2001 (SE 2001/132)

The Convener: Item 6 on the agenda is instruments subject to approval.

No points arise on the regulations.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 5) (Scotland) Order 2001 (SSI 2001/295)

Gordon Jackson: The amnesic shellfish are back.

David Mundell: “We’re back.”

The Convener: I know, I know. I try to forget that.

Members will be pleased to hear that no points arise on the pro forma instrument. I just want to say its name once more: the Food Protection, open brackets, Emergency Prohibitions, close brackets; open brackets, Amnesic Shellfish Poisoning, close brackets; open brackets, West Coast, close brackets; open brackets, No 5, close brackets; open brackets, Scotland, close brackets; Order 2001, open brackets, SSI 2001/295, close brackets.

Colin Campbell: Well said.

The Convener: I practised that last night.

David Mundell: However, you are not going to do the same with the other ones.

The Convener: No, I have done it once—I do not need to do it again.

Right to Time Off for Study or Training (Scotland) Amendment (No 2) Regulations 2001 (SSI 2001/298)

The Convener: Agenda item 7 is instruments subject to annulment.

The regulations are self-explanatory. They contain a small printing error, but we are not going to make a big deal of that—we will point it out in a nice, informal letter to the Executive.

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (Orkney) (Scotland) Revocation Order 2001 (SSI 2001/294)

The Convener: Item 8 on the agenda is instruments not subject to parliamentary control.

No points arise on the pro forma instrument.

Foot-and-Mouth Disease (Ascertainment of Value) (Scotland) (No 4) Order 2001 (SSI 2001/297)

The Convener: We had a number of questions on the order and there are further questions for the Executive. The committee notes that the instrument was not accompanied by the customary Executive note and requests an explanation for the omission. The committee would welcome an explanation of the background to the instrument to satisfy itself that no European convention on human rights issues arise under article 14 as read with article 1 of protocol 1 of the convention.

The committee notes that the order was made on 30 August 2001 to come into force on the following day. Although the 21-day rule does not apply to the instrument, the committee would welcome an explanation of the speed with which it came into force and an indication of what steps have been taken to ensure that those affected have been made aware of its import. That is the important aspect.

The committee would also welcome an explanation of the effect of article 2(6) of the order. Neither section 31 nor schedule 3 of the Animal Health Act 1981 appear to contain any provision that requires the slaughtering of animals to be delayed. The reference to schedule 3(1) of the Animal Health Act 1981 is not understood, as there does not appear to be a provision in that act so numbered. In addition, paragraph 1 of schedule 3 of the act relates to the disease of cattle plague, which does not seem to be immediately relevant to the present order.

Although the matter is highly technical, it is probably important. Therefore, further explanation will be sought from the Executive.

That concludes this morning's agenda.

Gordon Jackson: I know that you are in a hurry, convener, but I want to raise an issue.

We talked about taking evidence on the conflicting legal advice affecting the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2001 (SSI 2001/267). As that evidence session would be difficult to set up, and

for another reason, I wonder whether it is necessary to take evidence, or whether those of us who were free could sit down with someone from the Executive and talk to them about it. That would allow us to focus our minds and would allow our legal adviser to take part in the discussion.

The Convener: It might be necessary to do both, as the issue sits at the interface between reserved and devolved powers.

Gordon Jackson: All I was thinking of at this stage—

The Convener: I am happy to do it—

Gordon Jackson: We are not in the business of being confrontational—we are in the business of trying to get things right. We do not object to the policy, but want to satisfy ourselves in a rather technical way that the regulations are competent. Forgive me if the suggestion is too commonsense for Parliament, but why should we not sit down with our team and their team—admitting that we are unsure of the answer—to thrash out the issue between us. That way, our legal adviser would get to join in the discussion. That would be in some ways better, as the point is hers. However, if everybody thinks that the matter has to be dealt with in a formal setting, so be it.

The Convener: There would have to be some formal explanation. It would be necessary to meet formally and informally; or to just do the formal part.

Gordon Jackson: Informal meetings can be set up while the Parliament is on, for example. We cannot meet as a committee while the Parliament is on—that is much harder to set up. Meetings to thrash things out can be set up at any time—you do not need a quorum. Under standing orders you cannot have a committee meeting while the Parliament is meeting. That is just a suggestion.

The Convener: It is a good suggestion. I would like to do that—it would be my way of proceeding. However, I am not sure, first, whether we could do that and secondly, whether doing it that way would have other implications. The Subordinate Legislation Committee must be absolutely correct.

Gordon Jackson: I was not suggesting doing something incorrect.

The Convener: I know that. Would I even suspect that of you?

David Mundell: Whatever happens, we must have something on the record to show how we reached our conclusion.

Colin Campbell: There would have to be a rerun in public.

The Convener: That is what I was saying—you must do both or take just the formal option.

Bill Butler: Perhaps you could take advice, convener, and the committee would accede to that.

The Convener: Thank you. I was going to ask if that would be okay. There is no disagreement among us. That is the easiest way of cutting through a complex business. I will seek advice.

Meeting closed at 12:12

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