

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 18 September 2001
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

25th 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

WITNESS

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 18 September 2001

(Morning)

[THE CONVENER *opened the meeting at 11:37*]

The Convener (Ms Margo MacDonald): I welcome everybody to the 25th meeting in 2001 of the Subordinate Legislation Committee.

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

The Convener: Item 1 is Executive responses.

We will take the Home Energy Efficiency Scheme Amendment (Scotland) Regulations 2001, (SSI 2001/267) first, because we are taking evidence from Scottish Executive officials and they have been waiting patiently outside. We will move that up to be the first item and then return to the normal running order.

I welcome Geoff Huggins and Murray Sinclair to the committee and thank them for their attendance. We asked for an explanation from the Executive on aspects of the regulations because there was a doubt about their vires, among other things. Would either of you start with a statement of the Executive's point of view on the matter?

Murray Sinclair (Office of the Solicitor to the Scottish Executive): I am happy to expand on the line of reasoning that was set out in our written response to the committee's question.

The committee is asking whether the regulations are within the devolved competence—that is, the competence of the Scottish ministers—as conferred by the Scotland Act 1998. In answering that question, one must have regard to the test that is set out in section 29(3) of the Scotland Act 1998. That test is applied principally to determine the legislative competence of the Parliament. However, in terms of section 54 of the Scotland Act 1998, it is applied to determine the devolved competence of Scottish ministers.

The test determines whether a provision that has been made in the exercise of devolved competence does or does not relate to reserved matters. It provides that

"whether a provision ... relates to a reserved matter is to be determined ... by reference to the purpose of the provision, having regard (among other things) to its effect in all the

circumstances."

You will not be surprised to learn that the provision is deliberately worded. It was intended to effectively replicate a test that was employed in a similar context when power was devolved to the Parliaments in Australia and Canada. When the Scotland Act 1998 was being put together, it was acknowledged that sometimes a question arose of whether a provision related to a reserved matter was about a reserved matter and should therefore be viewed as not within the competence of the Parliament.

It might be difficult to draw narrow dividing lines in relation to that question, but that is the principal guide. We must see whether the provision that is being made by the regulations—on the application of the purpose test and having regard to its effect in all the circumstances—does or does not relate to any matter that is reserved by schedule 5 of the Scotland Act 1998.

The committee has suggested that there is a question whether, even on the application of the purpose test, the regulations relate to social security as that matter is reserved by schedule 5 of the Scotland Act 1998. As indicated in the Executive's response, our position is that, on a true application of the purpose test, we do not think that the subject matter of the regulations relates to that reservation.

The terms of the power that we are exercising are in section 15 of the Social Security Act 1990. Those terms make clear that the purpose for which the regulations are made is

"the improvement of energy efficiency in certain dwellings".

I am reading from the description of section 15 of the Social Security Act 1990. We would therefore say that our purpose in making the regulations has been to improve energy efficiency in certain dwellings. Therefore, on the application of the purpose test, the subject matter of the regulations is not about social security and does not relate to that reserved matter.

That is the principal position. I should say, however, that the committee might have been influenced by the fact that section 15 is contained in an act that is called the Social Security Act 1990. In response to that, I simply point out that the long title of the Social Security Act 1990 makes express reference to the fact that the act will

"make provision for the payment of grants for the improvement of energy efficiency in certain dwellings".

That is mentioned separately from the reference in the long title to the amendment of the law "relating to social security". That makes it clear that when the Westminster Parliament was enacting the Social Security Act 1990, regardless of the short

title of that act, in specifically making provision for the payment of grants for the improvement of energy efficiency in certain dwellings, Westminster intended to make provision for a purpose other than a social security purpose.

Similarly, I refer the committee to section 23 of the Social Security Act 1990. That section underlines my point by providing that the 1990 act may be cited as the Social Security Act 1990. It also provides that the 1990 act, other than section 15, may be cited together as the Social Security Acts 1975 to 1990. Section 23 makes it clear that, for statutory purposes, the definition of the Social Security Acts 1975 to 1990 includes the 1990 act, but does not include section 15 of the 1990 act. That is the power that we are exercising to make the regulations. That underlines the point that, when it was enacting the 1990 act, Westminster did not think that section 15 was legislation for a social security purpose.

That is all I have to say by way of opening remarks.

The Convener: When I heard the proper long title of the 1990 act, I began to believe a bit more in the purpose argument advanced by the Executive. However, that is a personal opinion.

Bill Butler (Glasgow Anniesland) (Lab): Is there even the smallest doubt that the regulations do not meet the true application of the purpose test?

Murray Sinclair: I would be lying if I did not say that there is scope for some doubt. The simple reason is that in almost all such questions there is always scope for an argument. That is in the nature of the sort of questions that we often have to face.

Bill Butler: Is there no reasonable doubt?

11:45

Murray Sinclair: I cannot say that no doubt exists. There is often scope for doubt. I understand how the argument can be made, but the question is whether the Executive considers that that argument is correct. On balance, we do not think that it is correct. On a proper application of the purpose test, the matter does not relate to social security. We can see the argument, but we do not think that it is correct.

Bill Butler: Is there any reasonable doubt in your mind or that of the Executive?

Murray Sinclair: There is none.

Bristow Muldoon (Livingston) (Lab): My question is about the Scotland Act 1998, which mentions housing grants in connection with reserved social security matters. How do you interpret the phrase "housing grants"? Does it

include housing benefit, which is a social security measure, rather than housing grants that are aimed at improving the fabric of a house?

Murray Sinclair: I understand that housing benefit is the form of benefit that the words from the social security reservation to which you refer were meant to cover and that payments such as that which we are discussing were not meant to be covered. As section 15 of the Social Security Act 1990 says, such payments are intended to improve energy efficiency in some houses. That is a different matter.

The Convener: Bristow Muldoon has opened up a can of legislative worms. The committee might agree that it accepts your explanation this time, but you have said that housing legislation can be used to confer a benefit.

Murray Sinclair: The point that I intended to make was that a fairly strong argument could be made about the provision of housing benefit and legislation to provide housing benefit in terms of the relevant reservation. The situation depends on the legislation that purports to make such a provision. A stronger argument could be made that such a housing provision was for a social security purpose, but not all forms of housing regulation could fall foul of the social security reservation. As I said, the situation depends on the legislation that is under consideration.

Bristow Muldoon: I read the social security reservation as referring to income support measures, such as housing benefit. It is clear that housing is a devolved matter.

David Mundell (South of Scotland) (Con): My concern about the purpose argument is that, taken to its logical conclusion, it would mean that we could legislate on any reserved matter, provided that we said that the primary purpose of our legislation concerned a devolved matter. We could legislate on defence if we said that the primary purpose of the legislation related to road safety. At what point can that argument be curtailed? It seems to cut across the intention of the Scotland Act 1998 with regard to reserved and devolved powers.

Murray Sinclair: I think that I understand why you ask that question. The answer is that we determine whether any provision falls within the Parliament's legislative competence or the ministers' devolved competence by considering section 29 of the 1998 act and the purpose of the provision under consideration. We could not legislate on a matter that was clearly beyond our competence, such as asylum, on the pretext that our purpose was not to deal with asylum, unless we could persuade a court that, viewed objectively, the purpose of the provision, having regard to its effect in all the circumstances, was

not to deal with the status of asylum seekers, but to deal with a matter that was not reserved.

If the regulations were challenged, a court would consider the question. In much case law from Canada and Australia, the courts applied that difficult test, which was used to ascertain whether, viewed objectively, a provision that prevented the trade of milk between southern Ireland and Northern Ireland concerned trade, which was a reserved matter, or public health and the quality of milk, which was a devolved matter. The Judicial Committee of the Privy Council held that the subject of the relevant provision was devolved. Even though the provision could be argued to be a barrier to trade, its true purpose related to health. We must consider such a question. The test is not without limits; rather, it provides the limits within which it must be decided whether the provision goes too far.

David Mundell: Your argument suggests that you interpret the Parliament's legislative competence as being wider than the public commonly perceives it to be, because public perception is based on the list of reserved matters.

Murray Sinclair: I do not want to speculate on what public perception might be. When the Scotland Act 1998 was discussed in Parliament, it was made clear that the test of whether a provision related to a reserved matter was not literal. Just because a provision uses a word that is used in one of the reservations, it does not mean that that provision deals with a reserved matter. That is why the purpose test in section 29 of the 1998 act was included. The test whether a provision relates to a reserved matter, for the purposes of the 1998 act and devolution, is not literal. The test is determined by

"the purpose of the provision, having regard ... to its effect in all the circumstances."

David Mundell: Does everything fall within a definition?

Murray Sinclair: The question is whether, considering the subject matter of a provision, the purpose of that provision is the same as the purpose covered in the reservations.

The Convener: I will put the matter into plain English: the courts will eventually decide the purpose.

Murray Sinclair: We are discussing legal questions that would be decided by the courts if the legislation were challenged, as such questions have been decided in similar contexts elsewhere.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): I will return to what Margo MacDonald said. I became more convinced by Murray Sinclair's argument when he mentioned the long title to the Social Security Act 1990 and

the exclusion of section 15 of that act from the combined reference to the Social Security Acts 1975 to 1990. That is a strong argument.

I would like you to ease the committee's conscience. Do you believe that the Executive would win any legal challenge to the regulations because of the arguments that you have made? Are you confident that, if we allow the regulations to be made, you will have a strong argument that the courts would be likely to uphold?

Murray Sinclair: Yes.

The Convener: If your heart is pure, it will be okay.

Do any other members want to add anything on the vires of the regulations?

David Mundell: I want to ask just one question.

The Convener: Just a wee one.

David Mundell: Would legal advisers in the Scotland Office be likely to share Murray Sinclair's view?

Murray Sinclair: I am not in a position to comment on that. That would be speculation. I hope that they would share my view. I have no reason to doubt that, but I cannot say that I know their view.

The Convener: That question was most interesting.

Colin Campbell (West of Scotland) (SNP): It certainly opens up an interesting area of investigation.

The Convener: We planned to ask further questions of the Executive. We may not want to go into the nitty-gritty of them all, but do members have other questions?

Ian Jenkins: We asked the Executive why regulation 1 of the principal regulations was included only in part 1 of the instrument. The Executive has acknowledged that that is a drafting error. It is unclear whether applications are to be made under both parts of the regulations or under part 1 exclusively. That makes for a lack of clarity—are we talking about part 1, part 2 or both parts?

Murray Sinclair: Our response acknowledged that there is scope for clarification. We will take steps in due course to do that, probably by introducing a consolidated set of regulations. That would be helpful and it would allow us to incorporate clarificatory provision.

Ian Jenkins: Thank you.

The Convener: That sounds okay.

A general point, which applies to many of the regulations that come before the committee, is the

place of electronic communication in making applications under regulations.

Murray Sinclair: We will examine that point. It was thought that electronic applications would not be feasible in this case, as the regulations require applications to be signed. At the present time, it is difficult to make an electronic application and to have it signed. We will examine that, as the situation could change.

The Convener: We also asked you to re-examine the question of applications from sub-tenants. The Executive seems not to intend to allow sub-tenants to apply for a grant, but the committee believes that the regulations do not make that position clear.

As there are no further questions for the witnesses, I will sum up.

At the beginning of the discussion, there was talk of unreasonable and reasonable doubt. Murray Sinclair conceded that he could see why doubt might exist. Although committee members had doubts about the question of vires, are we agreed that we are now minded to proceed?

Members indicated agreement.

12:00

The Convener: I thank the witnesses for their attendance.

We will all need to bone up on section 29 of the Scotland Act 1998. Before we move on, I ask members to clarify our position on the regulations, as differing shades of doubt—let me put it that way—were expressed. Are we agreed that, because the regulations appeared to relate to social security provisions, there was doubt about the question of vires? However, we are now minded—

Bristow Muldoon: That overstates my position, as it would appear to suggest that we are on the side of doubt. I accept that doubt was raised. I also accept the argument that the primary purpose test would show that the regulations fall within the powers of the Scotland Act 1998. Shades of doubt may exist, but, as far as I am concerned, the recommended action, as drafted, overstates the committee's position.

Bill Butler: I have thought about the question and I tend to agree with Bristow Muldoon. I asked whether reasonable doubt existed and that was answered. We may have doubts about a lot of the subordinate legislation that comes before us but, unless reasonable doubt exists, we do not draw our doubts to the attention of the lead committee.

Having heard Mr Sinclair's explanation, I do not have a reasonable doubt that the regulations are ultra vires. I accept his argument about the

purpose test. Given the fact that the long title of the Social Security Act 1990 includes the phrase

"to make provision for the payment of grants for the improvement of energy efficiency in certain dwellings",

I have no reasonable doubt that the regulations do not relate to social security. That means that they are quite properly within the vires of the Scottish Parliament.

The Convener: I think that Mr Sinclair said that he could see why doubt should have been raised, but that in the opinion of the Executive that was incorrect.

Bristow Muldoon: I took a note of what Mr Sinclair said, which was that there is no reasonable doubt that the regulations meet the true application of the purpose test. In my opinion, for what it is worth, if there is no reasonable doubt, no compulsion exists. We should not refer the regulations to the lead committee and the Parliament. We should do that only if reasonable doubt exists.

The Convener: I was not suggesting that we refer the regulations to the lead committee. That is what we do with legislation that needs to be re-examined. The recommendation was for us to indicate to the lead committee that doubt was expressed. We are neither quantifying the degree of doubt, nor are we suggesting that the lead committee needs to act. However, if the ultimate test is for the matter to be decided by the courts, we should record our doubts, where they exist.

Bristow Muldoon: My concern about the recommended course of action, as drafted, is that the word doubt is shown in relation to the phrase social security, which suggests that we have formed a view that the regulations relate to social security. That is not my position—the regulations are an energy efficiency measure.

We must report on the issue, however, and it would be more acceptable to report that the committee sought explanation from the Executive about the question of vires. Subsequent to hearing the evidence, the committee noted the Executive's position, which is that the regulations satisfy the purpose test of section 29(3) of the Scotland Act 1998. The recommended course of action, as drafted, says only that the Executive's position is noted.

The Convener: I might be in a minority of one in saying that, in our note to the lead committee we should record that initial doubts were expressed about the question of vires, but that the committee was prepared to note the Executive's explanation. However, David Mundell does not agree.

David Mundell: I do not disagree with the convener's suggestion but, as was conceded by the Executive, we have entered new territory. This

is the first time that Executive lawyers have put that interpretation of the Scotland Act 1998 on the record. If I were the convener or Mr Campbell, I would be delighted to have heard that interpretation, as it is the widest interpretation of the Scotland Act 1998 that I have heard.

Although the interpretation is reasonable and credible, it calls into doubt all those who have criticised the number of so-called reserved matters that have been debated by the Scottish Parliament. On the basis of Mr Sinclair's argument, nothing is reserved, provided that the purpose of the discussion falls within devolved competence.

The Convener: Mr Campbell and I will look up the traffic regulations for the Helensburgh area. [Laughter.]

Bristow Muldoon: I wish to distance myself from the comments that David Mundell made. That is not my interpretation of Mr Sinclair's evidence. David Mundell and I can agree to differ on that.

David Mundell: I did not necessarily want Mr Sinclair to interpret the Scotland Act 1998 as he did, but I think that we will hear much more about that interpretation of the rules.

The Convener: The debate might be the first of many pleasures to come. As we may return to the matter, I will allow members some leeway to put their thoughts in the *Official Report*.

Bill Butler: For the *Official Report*, I clarify that I do not share David Mundell's interpretation of what Mr Sinclair said. To put it kindly, I think that David Mundell's interpretation overstates what was said. As befits someone in his station, Mr Sinclair was very cautious, careful and clear. All of us should follow his good example.

The Convener: As I said, his heart is pure.

Colin Campbell: Mr Sinclair is a civil servant. In Mr Sinclair's absence, Bill Butler is trying to defend what Mr Sinclair said. I will not say whether the regulations are a coach and horses through the Scotland Act 1998. The committee should look after its best interests. If the issue is going to end up in court, the committee should record that there was some doubt about the regulations, but that that doubt was removed by the professional advice that the committee received.

The Convener: There are shades of difference in the committee and we must find a form of words on which we agree. Initially, the committee wondered whether there was a doubt about the vires of the regulations as they were introduced under social security legislation. The committee asked for clarification and reassurance on various points and heard the Executive's response from Murray Sinclair and Geoff Huggins. Do members agree that we should note that the Executive is

confident in its interpretation?

Bill Butler: Should we record that the committee was substantially reassured—I think that the convener used those apposite words—and then noted the Executive's position?

Ian Jenkins: In case that was not what the convener wanted to say, I point out that I think I used those words.

Colin Campbell: Credit where credit is due.

The Convener: Is that agreed?

Members indicated agreement.

The Convener: That will be recorded in the Committee's report. Just wait until we discuss traffic regulations in Helensburgh.

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

The Convener: Several points have been raised on the order. On the whole, the committee and the Parliament have been very sympathetic to the Executive over the problems that it faces in respect of regulations concerning foot-and-mouth disease. The committee may therefore be prepared to accept the explanation for the absence of an Executive note. I believe that it was agreed that notes would be provided if necessary. The absence of a note may inconvenience the committee's legal adviser, but—if we are generous—we should admit that sometimes circumstances are such that an Executive note may not be provided. In this case, there were time pressures. I am sure that the Executive realises that we would prefer a note, but we will not push it any further on that.

Are members agreed?

Members indicated agreement.

The Convener: There is also a question of discrimination. Depending on when people applied, different levels of compensation were paid. It is argued that, at the outset, an artificially high value was put on stock that had to be destroyed, but that that value was readjusted. Therefore, there was less compensation for those who were compensated under the permanent and adjusted figure and it appears that there was some discrimination; on the other hand, under the European convention on human rights, if compensation is objectively justified and proportionate, the Executive will not be held guilty of any breach.

Does the committee agree to note that it is glad that the Executive admits to the existence of discrimination, but that, given the pressure of

circumstances, that discrimination was not unreasonable or disproportionate?

Bristow Muldoon: When the foot-and-mouth outbreak was at its peak, individual assessments of animals could have added further delays to slaughtering. The situation is now far more under control and it is far more practical and reasonable to introduce individual assessments.

Colin Campbell: I agree, but that does not change the fact that some farmers who are getting less will feel discriminated against. They may not have been discriminated against legally, but they may feel much worse off than they would have been if they had received compensation earlier.

The Convener: The committee can sympathise with the farmers, but cannot do much more than that.

Colin Campbell: I am not suggesting that it can.

The Convener: The lead committee can take other decisions. Our recommendation is that, as far as the regulations and their application is concerned—

Bristow Muldoon: The noise that members can hear is a water bottle falling and not a weapon being thrown.

The Convener: They all say that, as Gordon Jackson would tell members.

At the start of the meeting, I should have mentioned that Gordon Jackson notified the committee that he would not attend and offered his apologies. That will be recorded in the *Official Report*.

Are members agreed that they will give the Executive the benefit of the doubt?

Members indicated agreement.

The Convener: There is a question about the steps that have been taken to ensure that those affected were made aware of the order, which came into force on 30 August 2001. Again, I am inclined to say that, because of the pressure of circumstances, we should not judge the Executive too harshly, but the committee may feel differently. The 21-day rule was breached, but we should give the Executive leeway for the same reasons as on the previous matter. I have been corrected—the 21-day rule did not apply.

Ian Jenkins: The committee should draw the instrument to Parliament's attention as it required further explanation by the Executive. The committee should also draw Parliament's attention to the fact that article 2(6) is defectively drafted, as the Executive has acknowledged. That is regrettable, but it does not hold anything up.

The Convener: I was stumbling towards that

recommendation.

Holyrood Park Amendment Regulations 2001 (Draft)

12:15

The Convener: Do we wish to make any points on the regulations? In another capacity, some of us might wish to comment on a related subject, but that is a different matter. The regulations refer to heavy vehicles in Holyrood park. Immediately, my antennae start wiggling, but we cannot do much about it in the committee.

Rural Stewardship Scheme (Scotland) Regulations 2001 (SSI 2001/300)

The Convener: Agenda item 3 is instruments subject to annulment. It is suggested that we ask the Executive for an explanation of the vires of regulation 17.

Ian Jenkins: It appears that regulation 17 creates a criminal offence. It is not clear whether that is possible under the Environment Act 1995. The regulations also refer to the European Communities Act 1972, but there remains doubt about whether Scottish ministers can properly create a criminal offence under regulation 17.

The Convener: Is this a case of falling between two stools, in that two acts, the Environment Act 1995 and the European Communities Act 1972, are concerned? We can ask the Executive to give an explanation.

Ian Jenkins: A similar difficulty arises in relation to regulation 11. An explanation is required for the powers under that regulation.

There is a wee bit of redundancy: regulation 16 appears not to be necessary, as the provision already exists in legislation.

Moving on to definitions, the term "application for aid" is used in places, but elsewhere the word "application" is used on its own. The terms seem to be used interchangeably in the regulations. Such a shortcoming in definition can be awkward. That does not look like good drafting.

Bill Butler: We could ask the Executive to explain the purpose of regulations 17(3) and 17(4), which appear to be a repetition of provisions that already exist under the Criminal Procedure (Scotland) Act 1995.

Colin Campbell: Regulation 14(5) provides for the serving of notices by post. The Executive should be asked why that is required.

National Health Service Trusts (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/301)

The Convener: The committee would like to congratulate the Executive on the regulations—we could send our congratulations in a nice wee card. The committee is pleased to note that, in effecting the amendments that are contained in the regulations, the Executive has chosen to consolidate the five previous sets of regulations relating to the membership and procedure of national health service trusts. The previous relevant regulations are all revoked. Such a measure is tidy, which is what we like. Our congratulations to the Executive should be noted, given that we will, I imagine, raise questions about other parts of the regulations.

There may be an issue of drafting, but I leave that to the committee to decide. It appears that paragraph (5) of regulation 12 partly repeats paragraph (1) in relation to the regulation's application to committees. It might be useful if the Executive explained what, if anything, the provision relating to the application of the regulation to committees adds to the similar provision under paragraph (1).

Ian Jenkins: The consolidation of the existing sets of regulations is a good thing, but the explanatory note does not highlight all the amendments that have been effected. It would be nice if the note drew those together.

We could also draw the Executive's attention in the usual way to some typographical errors.

The Convener: The usual way being through an informal letter. At some point, we will need to ask the Executive about that recurring problem. Presumably, having so many errors in drafting wastes somebody's time.

Health Boards (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/302)

The Convener: Our comments on the regulations will be similar to those that we have just made on the National Health Service Trusts (Membership and Procedure) (Scotland) Regulations 2001. In the preamble to the Health Boards (Membership and Procedure) (Scotland) Regulations 2001, there is a reference to schedule 1(6) of the parent act, the National Health Service (Scotland) Act 1978. The relevance of that power is not clear, so the Executive should be asked to explain what is meant.

We might consider asking the Executive why the

changes to the existing regulations are not highlighted in the explanatory note—we referred to that under the previous regulations that we discussed. Secondly, we need an explanation of the effect of regulation 11(5), as read in conjunction with regulation 11(1). Thirdly, why is it stated in regulation 2 that the members of boards are to be appointed by the Scottish ministers, given that schedule 1(2) of the parent act contains the same provision? Fourthly, there are, once again, typographical errors, which we draw to the attention of the Executive in an informal letter. Is it agreed that we ask the Executive those questions?

Members indicated agreement.

Scottish Social Services Council (Appointments, Procedure and Access to the Register) Regulations 2001 (SSI 2001/303)

The Convener: The regulations set out arrangements for appointments to, and procedures of, the Scottish Social Services Council, which was established by the Regulation of Care (Scotland) Act 2001. They also provide for access to the register of social workers that the council maintains. The committee may wish to consider drawing to the attention of the Executive errors in the regulations.

Bill Butler: I wonder why the preamble does not refer to the fulfilment of the statutory obligation on the Scottish ministers under section 56(2) and schedule 2(7) of the 2001 act to consult prior to making the regulations. We also need an explanation of the vires of regulation 2(1), which permits the Scottish ministers to appoint "such number of members" as they "think fit".

The Convener: Those two questions are the most important. There is also an issue surrounding regulation 13. This is an old chestnut: can a charge be a nil charge? I am not sure. The committee may wish to give the Executive the benefit of the doubt in this instance. I am sure that we will.

Ian Jenkins: Absolutely.

The Convener: That is fine. It is just as well that we have decided that, as the same thing comes up later on a wider application of the interpretation of charges.

There is another question of vires. The words

"to the satisfaction of the Council",

which appear in regulation 13(3), may constitute a degree of sub-delegation that is not permitted by the enabling power. We should ask the Executive for a justification of that provision.

The matter of whether electronic communication is appropriate arises in relation to the regulations. Murray Sinclair said that the Executive was considering it in relation to the energy efficiency regulations. We should ask the Executive to clarify its attitude towards electronic communication in general. The question whether electronic communication is appropriate seems to come up every week. An informal letter is the proper approach—we do not wish to hit the Executive over the head.

We should ask the Executive to explain which power justifies the sub-delegation of fees to the council contained in regulation 13(5).

**Criminal Legal Aid (Scotland)
Amendment Regulations 2001
(SSI 2001/306)**

**Criminal Legal Aid (Fixed Payments)
(Scotland) Amendment Regulations
2001 (SSI 2001/307)**

The Convener: No points arise on the regulations.

**Firemen's Pension Scheme (Pension
Sharing on Divorce) (Scotland) Order
2001 (SSI 2001/310)**

Ian Jenkins: Should you declare an interest, convener, given that your husband was a fireman?

The Convener: He has got a pension, but it is just a wee one, so I will not bother.

David Mundell: He has to share it with you.

The Convener: I know—it buys the cat food. No points arise under the order.

**Education (Student Loans) (Scotland)
Regulations 2000 Amendment (No 2)
Regulations 2001 (SSI 2001/311)**

The Convener: Should we suggest to the Executive that it should consider whether the title of the regulations is unnecessarily complex?

Ian Jenkins: Yes.

The Convener: We will write the Executive a nice letter suggesting that it should find a better title for the regulations.

David Mundell: Perhaps there should be guidelines on the number of brackets in the title of an instrument.

Colin Campbell: And on whether they should be square brackets.

The Convener: As Ian Jenkins has said, we shall write to the Executive suggesting that the title is rather clumsy and unwieldy.

**Regulation of Care (Scotland) Act 2001
(Commencement No 1) Order 2001
(SSI 2001/304)**

The Convener: Do members have any comments?

Ian Jenkins: We did not get an Executive note on the order, but that is not particularly important in this case.

**Act of Sederunt (Rules of the Court of
Session Amendment No 4)
(Miscellaneous) 2001 (SSI 2001/305)**

The Convener: If anyone wants to know what this is about, the clerk will tell them.

Alasdair Rankin (Clerk): It is amendments to instruments containing rules of court.

Ian Jenkins: There are a couple of omissions in the footnotes and things but, again, it is nothing important.

The Convener: Other than those minor omissions, no points arise under the instrument.

**Land Registration (Scotland) Act 1979
(Commencement No 15) Order 2001
(SSI 2001/309)**

The Convener: We should bear in mind what we said about unwieldy titles. However, I am not sure that we can alter a title that goes as far back as 1979. Apart from that, no points arise in relation to the order.

Consultative Steering Group Principles

The Convener: May I have the committee's formal approval of the excellent letter written in my name to the Procedures Committee?

Members indicated agreement.

Ian Jenkins: It makes you feel good.

The Convener: Yes, it is heart-warming. Is this your last meeting as a member of the committee, Mr Mundell?

David Mundell: No, next week I will be presenting my report on my attendance at the international conference in Sydney.

The Convener: Everyone should be here early—with their didgeridoos.

Meeting closed at 12:30.

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