

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 November 2001
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

30th 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)
Murdo Fraser (Mid Scotland and Fife) (Con)
*Gordon Jackson (Glasgow Govan) (Lab)
*Bristow Muldoon (Livingston) (Lab)

*attended

CLERK

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 November 2001

(Morning)

[THE CONVENER opened the meeting at 11:29]

Delegated Powers Scrutiny

The Convener (Ms Margo MacDonald): We will start the 30th meeting of the Subordinate Legislation Committee in 2001. I have apologies from two members. Ian Jenkins is at an education conference in the Borders. Murdo Fraser has—mysteriously—not said where he is. [Interruption.] The clerk informs me that he is away to London, which is even worse.

Water Industry (Scotland) Bill

The Convener: Item 1 concerns scrutiny of the delegated powers in the Water Industry (Scotland) Bill at stage 1. As I went through the bill, I wondered at the number of instruments subject to the negative procedure that are involved, compared with the number of instruments subject to the affirmative procedure. That is a general point. If members do not want to raise anything else in general, we will consider the bill in more detail.

The bill is a considerable piece of legislation and the powers that it will confer on ministers are also considerable. It might be reasonable to ask the Executive for background information on how it envisages using those conferred powers, because that is a pointy-end bit of legislation that will affect consumers. Is Gordon Jackson not really fussed?

Gordon Jackson (Glasgow Govan) (Lab): I was indicating by my expression that I have no particular objection to anybody asking the Executive that sort of question. I gave a shrug of, "That's okay by me."

The Convener: That is all for part 1 of the bill. Part 2 of the bill is about the proposed drinking water quality regulator. I do not notice anything that we need to comment on. Do other members?

We must take note of something in section 24(1) of the bill. In principle, the power to specify the date on which the existing water and sewerage authorities will be dissolved seems acceptable. However, we question the procedure involved.

I am sorry. I have gone straight on to deal with

section 24(1), but we need to deal with an earlier section first. I am sorry if I have confused members.

We must consider the water panels first, which is section 2 of the bill. New water panels must be established. The minister will be given the power to establish the panels, but the bill does not say how many there will be or what their boundaries will be. It is reasonable for us to ask for much more explanation about how the delegated powers will be used to select the water panels and to ask how many panels there will be. Do members agree?

Members indicated agreement.

Bristow Muldoon (Livingston) (Lab): It is appropriate to ask those questions. I am a member of the lead committee that is looking at the bill and I can advise that it will be exploring those sorts of questions with the Executive.

The Convener: I would think so.

Bristow Muldoon: The lead committee wishes to find out how the Executive intends to establish the panels.

The Convener: There is the question of how, but we also—presumably—must determine whether the method for establishing the panels should be by subordinate legislation. If so, should the instrument be subject to the affirmative or the negative procedure? The Subordinate Legislation Committee still has a locus in the matter. We are asking for more details.

Section 15(1) of the bill will confer the power to prescribe the form and content of the register of enforcement and emergency notices. Again, that goes directly to the consumer end of the bill, so perhaps there should be more detail in the bill about the information to be shown on the register of enforcement notices. Yes or no?

Members indicated agreement.

The Convener: In part 3, section 24(1) confers a power to specify the date on which the existing water and sewerage authorities are to be dissolved. The Executive may have gone about this—although perhaps not—in a rather convoluted way. There might be an easier way of establishing the procedure. Gordon Jackson is looking at me in amazement.

Gordon Jackson: Not at all.

Colin Campbell (West of Scotland) (SNP): He is astonished at your mastery of the detail, convener.

The Convener: We do not understand why it is proposed to use the negative procedure, rather than no procedure at all.

Bristow Muldoon: It is fair enough to ask that question, although it is not a major issue—it is just about the dissolution of the existing companies to establish the new Scottish Water. It makes sense that there should be flexibility in dissolving each authority, to take into account when they have completed their duties and final accounts. We can easily say that the committee is relaxed about there being no procedure, but it is not a major issue for the committee one way or the other.

The Convener: No, it is not.

Section 24(3) confers a power to make ancillary provisions in connection with the establishment of Scottish Water. Section 29(1) confers a power to fix maximum charges for services provided with the help of Scottish Water. Section 35(1) confers a power to determine whose water and sewerage charges local authorities shall collect. Section 37(1) confers a power to make regulations for reduced charges. Section 38(2) confers a power to set rates of return for Scottish Water. No points arise on those powers.

Section 38(5) confers a power to place Scottish Water under specific financial duties.

Colin Campbell: It is an existing power.

The Convener: So there is no change. No points arise on that power.

Section 54(1) confers a power to require local authorities and assessors to supply information to Scottish Water. This power is different, and we may wish to seek further clarification from the Executive, given that it is possible that Scottish Water will obtain commercially sensitive information from local authorities.

Colin Campbell: So we want more detail on the regulations?

The Convener: Yes.

Gordon Jackson: What is the extent of commercially sensitive information that can be obtained from local authorities?

The Convener: Some clue could be given to a company's performance if it was found that it had not paid its rates. Scottish Water will be able to ask for information, which inevitably will be financial information. We can seek further clarification from the Executive on the proposed content of the regulations. Is that agreed?

Members indicated agreement.

The Convener: Section 55 proposes inserting new section 37C after section 37B of the Sewerage (Scotland) Act 1968. New section 37C(7) confers a power to alter the period for the determination of whether information should be excluded from the register of trade effluents as commercially confidential. I presume that that is

important to business people. An instrument under that section would be subject to the negative procedure, despite amending a figure in primary legislation. Are we content that we should amend primary legislation by negative procedure?

Colin Campbell: Should we consider recommending the affirmative procedure?

The Convener: We are worried about setting a precedent. We do not like amending primary legislation by the negative procedure, but in this instance, it is okay. Should we draw the Executive's attention to that in an informal way? Do we let the Executive know that we have noticed that, or do we not even bother? We will let the Executive know informally.

Bristow Muldoon: The section does not confer a huge power; it is just about the period within which Scottish Water must determine such requests.

The Convener: So although the general principle is not one that we think is good, this power is specific, and does not really alter anything.

Section 59 confers a power to make ancillary provisions. Section 62(1) confers powers to commence the provisions of the bill. No points arise on those powers.

Paragraph 2(2) of schedule 4, which is introduced by section 35, confers a power in connection with certificates to accompany summary warrant applications. As that paragraph restates an existing power, no points arise.

Paragraph 2(6) of schedule 4, which also is introduced by section 35, confers a power to vary the surcharge percentage. Is the committee satisfied that the negative procedure is sufficient for the exercise of that power? I am assured that if anybody wanted to challenge that power, it could be done by judicial review, so there is a way to make sure that the surcharge does not become a hidden tax, rather than a surcharge to cover costs. Are we satisfied that the negative procedure is all right?

Members indicated agreement.

Fur Farming (Prohibition) (Scotland) Bill

The Convener: We move on to small furry animals.

Gordon Jackson: What?

The Convener: Small furry animals. Fur farming. There are a couple of points on the bill, which contains two subordinate legislation-making powers. Section 5(1) confers a power to establish a scheme to compensate affected businesses. Does anything jump out and bite members on that

power?

Colin Campbell: That was very subtle.

Bristow Muldoon: The convener worked on that all night.

The Convener: No, I was thinking about mink, which bite. No points arise on that power.

Section 6(1) confers a power to appoint a commencement date for the bill. This is one of those strange situations when we are allowed to be po-faced and say, "Why do you need delegated powers to have a commencement order when, after it gets royal assent, it should just be law?" It is nice and simple.

Gordon Jackson: But the reality is that, historically, a vast amount of our legislation has commenced on an appointed date, rather than just when it receives royal assent.

The Convener: Aye, I know that.

Gordon Jackson: That does not make it a good thing. In my field, there are many acts where some bits have come into force one year and other bits the next year. There are parts of acts that have been lying about since 19-canteen that have never come into force.

11:45

The Convener: The point is that this is easy-peasy—that is legal jargon. We are not making a big fuss—we are just asking why the Executive is bothering, why it is making work for itself.

Gordon Jackson: There might be a reason.

The Convener: Are you interested in finding out what it is?

Gordon Jackson: I could live without finding out, but if you want to then I am up for it. I could get through life without knowing.

The Convener: All the same, since you raised the matter we will find out. Will we just ask?

Gordon Jackson: I do not remember raising it.

The Convener: We will ask the Executive why it chose to opt for a commencement order.

Gordon Jackson: Never volunteer for anything.

Scottish Local Government (Elections) Bill

The Convener: There are a few things that members might wish to pick up. As far as I can work out, everything is okay until section 4. The bill appears to make appropriate use of delegated powers in section 2(1).

Section 4 is on pilot schemes for local elections. The pilot schemes are fine. Sections 5(1) and 5(2)—which follow on from section 4—are on

revision of procedures in the light of the pilot schemes. There might be a case for saying that ministers should not be empowered to change such a primary and fundamental piece of our democratic process through subordinate legislation. In other words, should primary legislation be required?

Think about it, Gordon.

Gordon Jackson: I recognise what you say. However, the more I read the bill, the less worried I am. There is a pilot scheme, which is thought to have worked well—perhaps the voting figures have gone way up. When the order to make that scheme permanent is made, not just the intention to do that is laid before Parliament, but the report produced on the pilot scheme that suggests that the scheme is a good thing. All members of the Parliament will receive that. The draft order and the report have to be laid before Parliament.

If the Parliament identified something that it was not happy with, it could deal with that. Alternatively, the pilot scheme might prove to be a brilliant idea that everyone is up for. Its implementation might meet with universal acclaim.

I genuinely take your point, convener. As you know, I am not a huge fan of doing important things by subordinate legislation. If we were talking about a provision that allowed the Executive to change elections off the top of its head—simpliciter—I would not be happy. However, the proposed order would follow on from a pilot scheme that everybody would have a report of.

The Convener: I will only be happy if we at least point the matter out to the lead committee.

Gordon Jackson: That is absolutely fair.

Colin Campbell: That is fair enough.

Bristow Muldoon: I have looked through the delegated powers in the bill and, on balance, I probably agree with Gordon Jackson. The powers seem to be about the mechanics of an election—how to persuade people to participate in the democratic process and how to count the votes, for example—not whether to have an election or what type of electoral system to use.

Given that the bill will move local government elections to the same day as Scottish parliamentary elections and that we have no power to alter the way in which Scottish parliamentary elections work, there is a possible complication—which is probably more of an issue for the lead committee than for the Subordinate Legislation Committee. There might be one system of casting and counting votes for local government elections and a different system for the Scottish parliamentary elections taking place on the same day. For example, if the scheme

introduced polling stations at supermarkets for local government elections, but not for Scottish parliamentary elections, that might be a complication that could damage turnout rather than improve it. That is the sort of issue that I hope the Local Government Committee considers.

The Convener: We will draw the attention of the lead committee to the mini-debate that we have had on the efficacy of handling the matter in this way.

Colin Campbell: We must also make sure that the kind of idiosyncrasy that Bristow Muldoon suggested does not occur.

Executive Responses

Processed Animal Protein (Scotland) Amendment Regulations 2001 (SSI 2001/383)

The Convener: We now move to Executive responses to questions that the committee raised. Does the committee want to draw the regulations to the attention of the lead committee and the Parliament on the ground that there appears to have been an unjustifiable delay in making, laying and bringing them into force?

There was much to-ing and fro-ing about holidays and weekends. The explanation that we received was not necessarily satisfactory—the regulations are important and they have not been treated with any great urgency.

Gordon Jackson: The explanation makes sense. Am I being too charitable? Probably.

The Convener: I will be advised by the clerk. What do we do in this circumstance? Do we send a polite letter in which we note the Executive's response, but say that we still think it was late in dealing with the regulations?

Alasdair Rankin (Clerk): That is for the committee to determine. An option might be to send a letter to the lead committee, but it would be more usual for the committee's view to be included in its report, if it decides on that now.

The Convener: Our view is that the Executive was still a bit late.

Abolition of the Intervention Board for Agricultural Produce (Consequential Provisions) (Scotland) Regulations 2001 (SSI 2001/390)

The Convener: We asked three questions on the regulations. The committee might think that the Executive has not fully addressed the concerns that we expressed and that we might need more clarification. However, if we ask the Executive for more of an explanation, we should request that it replies to the lead committee because of pressure of time.

Two powers were invoked during the discussion on the abolition of the cross-border body—in lay terms, the European power and the power under the Scotland Act 1998. We questioned why the European power has been used rather than the Scotland Act 1998. The issue will come up again and again.

Gordon Jackson: If we ask the Executive's position, it could just play with a straight bat and say that it is happy. The matter is a bit technical for the rest of us. I just do not know where we

could take the issue. If we ask the Executive why it decided to tackle the matter this way, it will simply reply, "Because we are satisfied that that is the right way".

The Convener: Apparently there is also a technical drafting problem with regulation 2.

Colin Campbell: It does not appear to correspond with regulation 5 of the UK regulations.

The Convener: Such technical drafting mistakes are definitely the committee's territory, and we should draw them to the Executive's attention. However, because of the pressure of time, we will ask the Executive to reply directly to the lead committee.

Instruments Subject to Approval

Budget (Scotland) Act 2001 (Amendment) Order 2001 (Draft)

The Convener: The order contains a minor typo in the explanatory note. I am assured that the Executive does not mind the committee drawing its attention to typos, because it is simply a belt-and-braces issue. No other points arise on the order.

Instruments Subject to Annulment

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No 2) Amendment (No 4) Regulations 2001 (SSI 2001/394)

The Convener: A few points arise on the regulations. I believe that Bristow Muldoon has an interest in the fact that regulation 2(4) does not contain an appeal provision.

Bristow Muldoon: I did not raise the matter in relation to these regulations. However, when the committee has discussed similar instruments at previous meetings, it has expressed the view that it would be desirable to have an appeals procedure other than judicial review for people who feel that they have been improperly treated in the course of the application of the regulations. As the Executive has consistently taken the view that judicial review is an appropriate means of appeal, the only course that we can take is to note our position again. If the lead committee wants to make it a substantive issue, it can raise the matter with the Executive.

The Convener: In relation to these regulations, do you want us to repeat to the Executive that, although we understand its position, we would prefer an appeals provision to be included?

Bristow Muldoon: I do not think that there is much point in raising the matter with the Executive, as we will simply get the same response that we have already received about similar instruments. Perhaps we should just draw the matter to the attention of the lead committee. If that committee then felt that the issue was substantive as far as these particular regulations were concerned, it could raise the matter with the Executive.

The Convener: That sounds acceptable.

The point about irrelevant footnote references that we raised last week and the week before has also been raised in relation to these regulations. We will simply mention in our report that we have spotted such references.

12:00

Housing (Scotland) Act 2001 (Transfer of Scottish Homes Property etc) Order 2001 (SSI 2001/396)

The Convener: A point has been noted in relation to article 2 of the order, which contains a definition of Scottish Homes. Although the Housing (Scotland) Act 2001 and the enabling

power mention Scottish Homes, the act does not contain any such definition.

Colin Campbell: Perhaps that definition should have been contained in the primary legislation.

The Convener: Probably.

Gordon Jackson: If that is a criticism of the primary legislation—and I would need to examine the Housing (Scotland) Act 2001 to know whether it is—it is not a criticism of the order itself. All the order says is that Scottish Homes is the same body that is referred to in the parent act. If Scottish Homes is not defined in that act then—tough. Do you follow what I mean?

The Convener: No. Would you say it again?

Gordon Jackson: All the order says is that the Scottish Homes referred to in the order is the same Scottish Homes that is found in the primary legislation. If it is not defined in the primary legislation, so be it. We should just leave the matter.

The Convener: Although that is probably not the neatest way of doing things, it does not materially affect the order.

Bristow Muldoon: The point is whether the subordinate legislation is adding to or amending the primary legislation. However, that is not a major issue in this case, because there is no argument about the definition of Scottish Homes. Everybody accepts what Scottish Homes is.

The Convener: That said, subordinate legislation should not introduce definitions. However, in this case, it is very clear what is meant by Scottish Homes.

**Import and Export Restrictions
(Foot-and-Mouth Disease) (Scotland)
(Recovery of Costs) Regulations 2001
(SSI 2001/401)**

The Convener: No points arise on the regulations. The fact that they breached the 21-day rule is acceptable, because they are dealing with a real emergency.

**Instruments Not Subject to
Parliamentary Control**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (Scotland) Partial Revocation Order
2001 (SSI 2001/395)**

The Convener: We move on to forgetful shellfish. No points arise on the order, although I should mention that even a partial revocation is good news. It does not say whether scallops are included, but one can only hope.

Colin Campbell: It is good news for fishing people, but presumably not such good news for the shellfish.

**Instruments Not Laid Before the
Parliament**

**Housing (Scotland) Act 2001
(Commencement No 2, Transitional
Provisions, Savings and Variation) Order
2001 (SSI 2001/397)**

The Convener: We need only comment in passing that it might have been of some help to the reader if the explanatory note had contained some indication of the content of the provisions commenced.

**Standards in Scotland's Schools etc Act
2000 (Commencement No 3 and
Transitional Provisions) Amendment
Order 2001 (SSI 2001/400)**

The Convener: One point arises on the order.

Colin Campbell: There has been a duplication of references in the footnotes.

The Convener: We will let the Executive know that in a friendly fashion.

I should point out that the item on the Executive response to our points on the Community Care and Health (Scotland) Bill has been carried over to next week's meeting. I thank committee members for their attendance.

Meeting closed at 12:04.

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