

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 March 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

10th Meeting 2002, 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 TO THE COMMITTEE

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 19 March 2002

(Morning)

[THE CONVENER *opened the meeting at 11:21*]

The Convener (Ms Margo MacDonald): I welcome everyone to the Subordinate Legislation Committee's 10th meeting in 2002. Members have received some extra papers today. I think that, as a matter of course, the Executive is going to give us first sight of statutory instruments that are to be produced. Members have copies of instruments that are to be made under the Education (Disability Strategies and Pupils' Records) (Scotland) Bill. That is just a good way to run a raffle.

Delegated Powers Scrutiny

Education (Disability Strategies and Pupils' Records) (Scotland) Bill (as amended at Stage 2)

The Convener: The Executive has given us a full and helpful explanation of the new powers, which seem sensible. It is obvious that our previous comments on consultation are bearing fruit. Does the committee want to quibble about whether the consultation requirement should be included in the bill? It never does any harm to have such a requirement in a bill.

Murdo Fraser (Mid Scotland and Fife) (Con): A comment on that would be in line with the position that we have taken on other bills when the Executive has signalled that it wishes to consult.

The Convener: Why not just say in the bill that it wishes to consult? We will make that point in our report to Parliament. Does anyone want to mention anything else?

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): No. The powers seem okay.

Executive Responses

Preserved Rights (Transfer to Responsible Authorities) (Scotland) Regulations 2002 (SSI 2002/76)

The Convener: There is a question about whether the regulations comply with proper drafting practice. We might want to draw that to the attention of the lead committee and the Parliament.

Colin Campbell (West of Scotland) (SNP): I think that we should.

The Convener: Okay.

Provision of School Education for Children under School Age (Prescribed Children) (Scotland) Order 2002 (SSI 2002/90)

The Convener: This is a sensitive matter, and we hear that the Education, Culture and Sport Committee was particularly concerned when it heard that this committee had commented on defective drafting. We would not want to get the Education, Culture and Sport Committee too upset. There are occasions when the drafting of statutory instruments is not exactly correct or as we would wish to see it, but that has no great adverse effect on the substance. We had commented in passing that the drafting of the order could have been better, while appreciating that there may have been pressure of work or whatever at the Executive.

On the order, there has been a failure to comply with proper legislative practice, but it is not a biggy. The Executive has said that it is an oversight that will be rectified anyway. Is that acceptable?

Members indicated agreement.

The Convener: There is a question as to what a starting point is given that the order refers to the school term. We have queried exactly what that means, as it is not clear. We would want to ask the Executive to explain it a bit better.

Ian Jenkins: The Executive has indicated that it was difficult for it to nominate specific starting dates, because local authorities have different times for their school holidays and terms.

The Convener: We understand that. The use of plain and basic English might help get through the difficulty.

Colin Campbell: We might suggest wording such as "at the start of the locally arranged term".

The Convener: That is possible—the Executive may even take that suggestion on board. The dates shown on school calendars will be also be different from year to year. [*Interruption.*] That mobile phone going off is a hanging offence.

Colin Campbell: I know it is. Do you want to do it now or later?

The Convener: We will inform the lead committee of our view.

A further point arises under the instrument: article 2(2)(i) mentions “31st December”, and it is a bit confusing in the context. It would have been clearer if the relevant date had been specified in full.

We will make those points in our report.

Non-Domestic Rates (Levying) (Scotland) Regulations 2002 (SSI 2002/91)

The Convener: Fortunately, these regulations are not going to the Education, Culture and Sport Committee, so we may say, “There is defective drafting.”

Colin Campbell: There is an unnecessary reference to “the 2000 Regulations”, but the Executive has acknowledged that.

The Convener: Yes, that is fine. The Executive put its hand up on the matter; it was refreshingly frank and admitted that the definition of “the 2000 Regulations” was a mistake. We take it that that will be rectified at some point.

Electricity from Non-Fossil Fuel Sources (Locational Flexibility) (Scotland) Order 2002 (SSI 2002/92)

The Convener: We were mystified as to when “Scotland” was not Scotland. The order deals with resources and the relationship between adjacent sea and land. Anyway, the Executive has explained its purpose clearly, and we should thank it for that clear explanation of when Scotland is Scotland—provided that it is not Bathgate, as we learned before the meeting started.

Bristow Muldoon (Livingston) (Lab): To explain: it was raised in *The Scotsman* this morning that there is some doubt about whether Bathgate is in Scotland.

The Convener: As we know, the question of fossil fuels used to be relevant around that part of the country. We will say no more about it, in case we open up a can of worms that we do not mean to open.

Bristow Muldoon: “Bathgate no more.”

Adults with Incapacity (Supervision of Welfare Guardians etc by Local Authorities) (Scotland) Regulations 2002 (SSI 2002/95)

11:30

The Convener: We had raised with the lead committee and with Parliament a question of vires with respect to regulation 4. The Executive has given us a full and courteous reply, and has explained that the regulations that are revoked under regulation 4 made provision for the supervision of guardians as appointed under the Mental Health (Scotland) Act 1984 and for the duties of those guardians, and that that provision is to continue under the new act, the Adults with Incapacity (Scotland) Act 2000. I think that I understand the regulations better now, and I hope that other committee members do also. Many thanks to the Executive.

Draft Instruments Subject to Approval

Police Act 1997 (Enhanced Criminal Record Certificates) (Protection of Vulnerable Adults) (Scotland) Regulations 2002 (draft)

The Convener: The commencement provision in the draft regulations does not follow the normal form. That is not a huge point, but we should perhaps mention it to the Executive.

Colin Campbell: In an informal letter?

The Convener: Yes, that is the way of doing it.

Instruments Subject to Annulment

National Health Service (General Dental Services and Dental Charges) (Scotland) Amendment Regulations 2002 (SSI 2002/99)

The Convener: There are lots and lots of regulations in this area, as members can work out from their papers. We have in the past asked for there to be a consolidation of the principal regulations in such areas. Notwithstanding anything else that we might wish to do, I think that we should again ask the Executive how progress on that consolidation is going.

The regulations amend other regulations to remove the distinction between the range of treatments available to non-registered patients and the range available to patients who are registered with a dentist elsewhere. It is a technical matter, but a sore one unless it is got right, so it is important.

National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2002 (SSI 2002/100)

The Convener: No particular points have been identified under the regulations, but I would like to make a point, with the committee's agreement. The regulations concern people's ability to get prostheses, wigs and so on at a time when they are feeling absolutely rotten, and when it can be difficult for them to cope with the bureaucracy. Anything that relates to such situations should be written in very plain English, and these regulations are not: I had a look at them, and they are quite dense.

I suggest that we make a general point, that the Executive write up such regulations—which are used by the people who are most concerned by them—in plain English. I do not think that anybody is going to disagree with that. I know that it might seem like asking, “How long is a piece of string?” but I think it worth while making the point.

Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2002 (SSI 2002/101)

Colin Campbell: No points.

The Convener: What do we say instead of that now?

Colin Campbell: I am not using the expression that we used last time—I admire small nations. I think that Bristow Muldoon is missing this.

Bristow Muldoon: No, I know what you are

talking about.

Council Tax (Dwellings and Part Residential Subjects) (Scotland) Amendment Regulations 2002 (SSI 2002/102)

The Convener: Nothing arises under the regulations.

NHS Education for Scotland Order 2002 (SSI 2002/103)

The Convener: There are a few small points to raise under the order. One of them appears just to be technical, but it is worth while doing this properly. The order revokes the instrument that constituted the council. What was its old name?

Murdo Fraser: The Scottish Council for Postgraduate Medical and Dental Education.

The Convener: Although the order revokes the instrument that constituted that council, it does not dissolve the council. That is a slight untidiness, which would not have made a huge difference, but it is worth writing an informal letter, in which we will say that we would like that to be dealt with in a slightly more businesslike fashion.

There are one or two other minor errors in the order, including a missing footnote.

Control of Noise (Codes of Practice for Construction and Open Sites) (Scotland) Order 2002 (SSI 2002/104)

The Convener: No points arise.

Scottish Council for Postgraduate Medical and Dental Education and NHS Education for Scotland (Transfer of Staff) Regulations 2002 (SSI 2002/105)

Bill Butler (Glasgow Anniesland) (Lab): No points arise.

The Convener: Thank you. The regulations refer to a public service, but I noticed that they have moved away from the enabling power's use of the term “servant”, which is replaced by the term “employee”. Is that really a mark of progress?

Bristow Muldoon: We have moved into the 21st century, Margo.

Bill Butler: That is the “Forward March of Labour”.

Colin Campbell: Three steps forward and two steps back.

The Convener: We will write informally to the Executive about the “Forward March of Labour”, and tell the Executive that Bill Butler said that.

Bill Butler: I was merely quoting, but I agree with the quotation.

Scottish Commission for the Regulation of Care (Appointments and Procedure) Regulations 2002 (SSI 2002/106)

Colin Campbell: It is a bit quaint that the schedule to the instrument identifies individuals by name. There might be good reason for doing so, but it seems to be a bit strange.

The Convener: That point applies to an instrument that we will deal with later.

Colin Campbell: I am sorry. I am on the wrong instrument.

The Convener: There are two instruments on the Scottish Commission for the Regulation of Care. The one with which we are dealing refers to appointments and procedure.

Colin Campbell: I was referring to the other instrument.

The Convener: We have not yet dealt with the order on the disposal of the commission's staff—or servants, as I think of them.

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2002 (SSI 2002/107)

The Convener: I think that the instrument is okay. Can any member tell me whether it is part of the "Forward March of Labour" to classify prisoners as requiring low, medium or high supervision, rather than as categories A to D? I think that that is sensible. I presume that a very bad prisoner needs high supervision.

A small point—we should always mention such points—is that the rules are not gender neutral. Anyone who watches television knows that there are female prison governors.

Murdo Fraser: And female prisoners.

The Convener: Aye, I suppose so.

Scottish Commission for the Regulation of Care (Staff Transfer Scheme) Order 2002 (SSI 2002/108)

The Convener: This is the order that Colin Campbell is worried about.

Colin Campbell: I will repeat what I said previously. The order refers to people by name and not by job designation, which is a bit quaint. Perhaps someone has an ambition to be named in statute.

The Convener: We can say that the committee thinks that in that regard the order is not consistent with other orders and statutes. When the clerk

speaks informally to the Executive about the matter, he will ask why people are named in the order. Perhaps there is a reason for that of which we are not aware.

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No 3) Revocation Regulations 2002 (SSI 2002/109)

The Convener: Nul points. The 21-day rule is breached by the instrument, but because the regulations concern foot-and-mouth disease we accept that there will be such breaches. *[Interruption.]* I am informed that we are being very understanding about that matter—The Joint Committee on Statutory Instruments at Westminster was censorious about the regulations' drafting and felt that it could have been much better. We will merely note that we are perhaps more understanding. However, the drafting matter should not be passed over lightly, as European Commission regulations are involved.

Dairy Produce Quotas (Scotland) Regulations 2002 (SSI 2002/110)

The Convener: We have three questions for the Executive. First, we could ask the Executive to explain the effect of the phrase "before 1st March" in regulation 8(1)(a)(i), which is the phrase's first occurrence. Secondly, we could ask the Executive to confirm that the "General Provisions" regulations to which regulation 2(1) refers have been made and will come into force at the same time as, or before, the regulations.

Ian Jenkins: There is also a problem in that it is difficult to trace the regulations to which the instrument refers—our legal advisers have said that they are unable to find them. The regulations must be somewhere, but if we cannot find them, how is anyone else supposed to do so?

The Convener: The instrument will affect incomes. Dairy produce quotas are important. Given that we could not check the instrument's regulations against the original regulations, because we could not find them—

Ian Jenkins: We presume that the original regulations are Great Britain regulations, but they still cannot be found.

The Convener: That is what we presume. We will write to the Executive asking it to explain where we should refer to, or to provide the source of the original regulations. We do not need to say anything else about the instrument at the moment, because we will be asking only where we can find the original regulations, so that we can check them.

Another important issue is that the instrument contains no provision for appeal. The Executive's usual view on that matter is that judicial review is a sufficient substitute for the right of appeal. However, the Subordinate Legislation Committee has always felt that that is not necessarily the case.

National Health Service (General Medical Services and Pharmaceutical Services) (Scotland) Amendment Regulations 2002 (SSI 2002/111)

The Convener: Again, we have questions for the Executive.

Ian Jenkins: As with the previous instrument, the regulations to which regulations 2(1) and 3(1) of the instrument refer cannot be found.

Colin Campbell: Perhaps the word "Scotland" should be in the titles of the regulations to which regulations 2(1) and 3(1) refer. That word might have been in the original regulations' titles, but subsequently disappeared.

Murdo Fraser: The drafting of the instrument appears to be sloppy.

The Convener: If we cannot find the original regulations, that is a good reason for sending a polite letter to the Executive asking it where we can find those regulations, because we want to check them. Until the Executive responds, there is not much sense in going into the other more detailed points on the instrument.

Murdo Fraser: We should also ask the Executive whether it is time that it introduced a consolidating instrument.

The Convener: Yes. We know that there are many existing regulations in this area, and this instrument introduces another lot. I agree, therefore, that we should ask the Executive about consolidation. However, perhaps other questions on the instrument can wait until the Executive responds about the source of the original regulations.

Regulation of Care (Fees) (Scotland) Order 2002 (SSI 2002/112)

Bill Butler: The order seems to be fine.

The Convener: Okay.

Regulation of Care (Applications and Provision of Advice) (Scotland) Order 2002 (SSI 2002/113)

Colin Campbell: No points arise.

The Convener: Nul points.

Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 (SSI 2002/114)

Ian Jenkins: This is another example of an instrument—we occasionally refer to such instruments—that uses terms that are embedded in English law and statute, but which will be used in Scottish regulations. That is a stylistic point that we like to flag up occasionally.

The Convener: We will do so by means of an informal letter.

Ian Jenkins: The phrase "personal representatives", which the instrument uses, is an English legal phrase.

Colin Campbell: The term should be "executor"—which we all understand.

The Convener: Okay. We will send an informal letter to the Executive to that effect.

Regulation of Care (Registration and Registers) (Scotland) Regulations 2002 (SSI 2002/115)

The Convener: We need only make a minor drafting point, which does not affect the substance of the order.

Police Grant (Scotland) Order 2002 (SSI 2002/116)

Colin Campbell: There is nothing to note.

The Convener: Right.

Plant Protection Products Amendment (Scotland) Regulations 2002 (SSI 2002/117)

The Convener: It so happened that I had a bit of time in hand last night, so I rummaged through the regulations. I am getting Bill Butler worried. The regulations are made under section 2(2) of the European Communities Act 1972 and they implement Commission directive 2001/87/EC, which inserts the active substances acibenzolar-S-methyl, cyclanilide, ferric phosphate, pymetrozine and pyraflufen-ethyl into annexe 1 of the directive.

11:45

Ian Jenkins: I am glad to hear that.

Colin Campbell: That is pretty life enriching—although perhaps not for the pests.

Bristow Muldoon: John Swinney will be delighted to hear that the convener is giving all her attention to this instrument.

The Convener: His dastardly plans are working.

No points of substance arise in relation to the instrument—everything has been done. However,

there is a minor point of form. Members will appreciate that there are many regulations of this sort, and we could ask the Executive whether it has any plans for consolidation. I do not know what it will say to that.

I was joking about the substances that I mentioned, but the layout of the instrument is superb. The subject matter of the regulations is very dense, but they are not difficult to understand. We thank the person who was responsible for the full and helpful Executive note that accompanies the regulations.

Restriction of Liberty Order (Scotland) Amendment Regulations 2002 (SSI 2002/119)

The Convener: The instrument raises more serious issues. Murdo Fraser knows a bit about the matter.

Murdo Fraser: I am rather concerned that the instrument might involve a breach of the European technical standards directive, because it prescribes the equipment that is to be used for tagging. I understand that a similar concern was expressed in relation to the equipment that is used to breathalyse people in drink-driving cases. We should ask the Executive to confirm that it has considered the matter and that the requirements of the technical standards directive have been fulfilled. Failure to fulfil those requirements would represent a breach of the internal market. That would not affect the question of liberty, but it would represent a breach of European Union rules.

Bristow Muldoon: That would distress the member greatly.

Murdo Fraser: Absolutely. I have great concern for the manufacturers of Italian tagging equipment.

Ian Jenkins: There are technical problems with the instrument.

Murdo Fraser: The advice that we have received suggests that failure to meet the requirements of the technical standards directive would not affect the question of someone's liberty. The instrument could not be challenged on that ground by someone who had been convicted of a crime. However, it could be challenged by equipment manufacturers in other EU countries, as a restraint of trade.

The Convener: That could trigger an interminable trade dispute that would involve the courts and so on. Although the instrument would not affect the liberty of the persons concerned—the subject of the regulations—it could cost a huge amount to defend or to challenge. For that reason, it is important that we get it right.

It is possible that earlier legislation should have been revoked, but that does not appear to have

happened. As well as bringing to the Executive's attention the instrument's implications for the technical standards directive, we must ask the Executive whether it will make an effort to clear the statute book of spent legislation in this area.

Murdo Fraser: There is also a question relating to enabling powers. Subsections (2) and (10) of section 245A of the Criminal Procedure (Scotland) Act 1995 have not been cited as enabling powers.

The Convener: That is important.

The Executive should explain why the definitions that are referred to in regulation 2(1), which appear to be relevant to the other provisions that are saved by regulation 5, have not also been saved by that regulation.

There are four points that we must raise with the Executive. This is a serious and important matter. We thank Christine Boch, the legal adviser to the European Committee, who was able to tell us whether Italian thumbscrews are better than Portuguese garrotes.

Colin Campbell: She is very thorough.

Regulation of Care (Excepted Services) (Scotland) Regulations 2002 (SSI 2002/120)

Colin Campbell: No points arise in relation to the instrument.

Animals and Animal Products (Import and Export) (Scotland) Amendment Regulations 2002 (SSI 2002/125)

Murdo Fraser: No points arise in relation to the instrument.

The Convener: The instrument breaches the 21-day rule, but that does not cause any problems.

Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2002 (SSI 2002/131)

The Convener: The instrument does not make it clear whether Scottish ministers or the public guardian are responsible for exercising the powers that are conferred by section 7(2) of the Adults with Incapacity (Scotland) Act 2000.

Murdo Fraser: There is a problem with the drafting of the parent act, which does not specify who is responsible for exercising the powers to which the convener referred. We should ask the Executive to explain the vires of the instrument.

The Convener: This is a very important matter, so we shall raise it in a formal letter.

Instruments Not Subject to Parliamentary Control

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 5) (Scotland) Revocation
Order 2002 (SSI 2002/126)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 8) (Scotland) Revocation
Order 2002 (SSI 2002/127)**

The Convener: Members will be glad to hear that the scallops are getting better in time for the tourist season. We will not comment on the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 5) (Scotland) Revocation Order 2002 (SSI 2002/126) or on the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 8) (Scotland) Revocation Order 2002 (SSI 2002/127), because everything is hunky-dory.

Instruments Not Laid Before the Parliament

**Water Industry (Scotland) Act 2002
(Commencement and Savings) Order 2002
(SSI 2002/118)**

The Convener: No points arise in relation to the instrument.

**Police Act 1997 (Commencement No 10)
(Scotland) Order 2002 (SSI 2002/124)**

Ian Jenkins: No important points arise in relation to the instrument, but it would have been more helpful if the explanatory note had given a general indication of the subject matter of the provisions that are to be commenced.

The Convener: That seems reasonable.

**Act of Sederunt (Ordinary Cause Rules)
Amendment (Applications under the
Protection from Abuse (Scotland) Act
2001) 2002 (SSI 2002/128)**

The Convener: The next instrument for consideration is the Act of Sederunt (Ordinary Cause Rules) Amendment (Applications under the Protection from Abuse (Scotland) Act 2001) 2002 (SSI 2002/128). How is "sederunt" pronounced?

Colin Campbell: It is pronounced "sedurunt".

Ian Jenkins: No, it is pronounced "sederunt", with the stress on the penultimate syllable.

Colin Campbell: No points arise in relation to the instrument.

**Act of Sederunt (Summary Applications,
Statutory Applications and Appeals etc
Rules) Amendment (Detention and
Forfeiture of Terrorist Cash) 2002
(SSI 2002/129)**

The Convener: The next instrument for consideration is the Act of Sederunt—

Ian Jenkins: It is pronounced "sederunt".

The Convener: You are all saying the word differently. I will pronounce it "sederunt", with the stress on the first syllable, because I will remember that.

The next instrument for consideration is the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Detention and Forfeiture of Terrorist Cash) 2002 (SSI 2002/129).

Murdo, how would you pronounce "sederunt"?

Murdo Fraser: I would stress the first syllable.

Colin Campbell: I would stress the second syllable.

Murdo Fraser: That is because you are a Latin scholar.

Colin Campbell: I would not call myself a Latin scholar.

The Convener: Would members like to vote on this issue?

Ian Jenkins: Margo MacDonald and Murdo Fraser are applying a rule of thumb that does not apply to the Latin word “sederunt”, which is pronounced with the stress on the middle syllable.

Colin Campbell: “Sederunt” means “they who are seated”.

Ian Jenkins: In a polysyllabic word, the accent should be on the antepenultimate syllable.

Colin Campbell: That should get in a column somewhere.

Murdo Fraser: So the word should be pronounced with the stress on the first syllable.

Ian Jenkins: No—because it is Latin, it should be pronounced with the stress on the second syllable.

The Convener: No points arise in relation to the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Detention and Forfeiture of Terrorist Cash) 2002 (SSI 2002/129).

Colin Campbell: After all that!

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (No 2) (Local Government (Scotland) Act 1973) 2002 (SSI 2002/130)

The Convener: No points arise in relation to the instrument.

Meeting closed at 11:55.

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