

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 26 March 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

11th Meeting 2002, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)

*Colin Campbell (West of Scotland) (SNP)

*Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Gordon Jackson (Glasgow Govan) (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 26 March 2002

(Morning)

[THE CONVENER *opened the meeting at 11:22*]

Interests

The Convener (Ms Margo MacDonald): I welcome everyone to the 11th meeting of the Subordinate Legislation Committee. I welcome also our new member, Brian Fitzpatrick, who has taken Bristow Muldoon's place.

I have received a letter of resignation from Bristow and I would not want to welcome Brian to the committee fully without first, on behalf of the committee, thanking Bristow for his work. He was a real asset. I hope that you will be good, Brian, because we do not want to miss Bristow too much—he was excellent. I am sure that you show promise of filling his shoes more than adequately.

Do you have any interests to declare?

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): I am delighted by the warmth of that welcome, convener. I refer to my entry in the register of interests, and in particular my declaration of membership of Amicus—formerly the Amalgamated Engineering and Electrical Union—and of the Faculty of Advocates.

The Convener: I am satisfied with that.

Delegated Powers Scrutiny

Freedom of Information (Scotland) Bill (as amended at Stage 2)

The Convener: The Freedom of Information (Scotland) Bill makes provision for the disclosure of information by Scottish public authorities. It has been referred to the committee for consideration of the stage 2 amendments made to the powers to make subordinate legislation which the bill confers.

There is a technical defect in section 69(2)(b), but the draftsman is aware of it and amendments will be lodged at stage 3.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Other than that, the amendments do not seem to give us any problems. We can welcome them.

The Convener: I suppose that it is heartwarming to see that, by and large, the Executive has followed the recommendations of the Subordinate Legislation Committee. It seems that we are working for our money.

Executive Responses

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

The Convener: On previous occasions we have told the Executive of the committee's view on the consolidation of regulations. We did so in the case of these regulations, but I am not entirely satisfied with the Executive's response. However, I have some sympathy for the Executive because of pressures on its time.

The Executive has responded that the instrument will be consolidated as soon as time and resources permit it to do so. That seems entirely reasonable. However, notwithstanding the question of time and resources, and because the regulations should be as user-friendly as possible, we might ask the Executive—gently, of course—to ensure that it prioritises the consolidation of the regulations. Does the committee agree with that proposal?

Gordon Jackson (Glasgow Govan) (Lab): There is a huge amount of work to be done on regulations such as these.

The Convener: I agree, but can we say to the Executive that the regulations are at the pointy end?

Members indicated agreement.

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

The Convener: The order represents an unexpected or unusual use of the powers that are conferred by a parent act. That is because individuals in the staff transfer scheme are named. The order acts to transfer people—or rather to transfer jobs—from one body to another. The order mentions by name the people who are to be transferred. On a previous occasion, we indicated disquiet about that.

The Executive response is that the drafting is unusual. We were told that the Executive could have adopted a different approach to the identification of the workers, but that the only practical way was to list them by name. I am not altogether satisfied with that response, although we can draw the matter to the lead committee's attention.

Bill Butler (Glasgow Anniesland) (Lab): The question is whether the workers and their trade unions prefer to have a list.

The Convener: There is doubt as to whether

the workers and the trade unions concerned were informed that their names would appear in the order that is to be laid before the Parliament.

Bill Butler: If there is doubt, we should refer the order.

The Convener: I have a doubt.

Bill Butler: Okay.

The Convener: Perhaps one of the legal eagles present would give an opinion as to whether article 8 of the European convention on human rights, which concerns the respect for private life, would be compromised by the naming of people in such a way.

Gordon Jackson: I do not profess to know everything about the convention, but it would be okay if the people concerned knew that that was to happen and were happy for their names to be published. Brian Fitzpatrick has pointed out to me that that safeguards their individual terms and conditions.

People can waive their right to privacy and if, in a given situation, people say that they are happy to be named, it would seem that their right to privacy would not be breached.

I do not fully understand the situation, but—as Brian Fitzpatrick has pointed out—there may be an advantage to those people if they are named. It would guarantee their—

The Convener: Their job.

Gordon Jackson: No, not their job, but their individual terms and conditions.

The Convener: Aye.

Colin Campbell (West of Scotland) (SNP): It is an unusual situation, is it not?

Gordon Jackson: Yes.

The Convener: The situation would depend on whether that had been spelt out in the consultation period. Should we query that point?

Members indicated agreement.

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

The Convener: We asked three questions of the Executive about the instrument. There is genuine doubt about the words:

“in the case of a transfer made by lease before 1st March, on or before 1st March in the quota year in which the transfer takes place”.

We are not certain whether the first occurrence of the words “before 1st March” is a typo. I suggest that our legal adviser makes contact with the Executive informally to check whether that is the case. If it is a typo, it can be fixed without much ado. If not, it is serious.

Another matter arises from the response to our second question, which concerned the regulations having been brought into force without the original legislation being made available to the committee. That makes it difficult for us to check the regulations. We need to ask the Executive how such situations can be avoided in future.

In the case of United Kingdom legislation, it is important for us to be able to compare it with existing legislation. If that is not possible, it is obvious that there must be a hole in the system somewhere. That point is now on the record.

11:30

Ian Jenkins: Our third question to the Executive related to the provision of appeals, including in those situations in which a penalty is imposed. The response acknowledged that there should be an appeal process and that one would shortly be put in place. That would mean that no affected person would be prejudiced by the current absence of an appeal procedure. However, it seems odd to proceed with legislation in the knowledge that an appeal process should be in place, but that it is not. We should draw that to people's attention.

The Convener: That point will also be made in our report of the meeting.

Ian Jenkins: The absence of an appeal procedure must raise the question of civil rights. Surely that affects people, even temporarily?

The Convener: That would be the case if an appeal procedure were not in place. Our report will include the committee's comments on that point.

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

The Convener: Three points arise. The Executive has acknowledged that the regulations contain defective drafting and that that has been corrected. We also pointed out that the regulations are not drafted in gender-neutral terms. The Executive has responded that that is because the original regulations were not drafted in that way. The need for consolidation arises again in respect of these regulations. Gender-neutral terminology can be introduced at that stage.

There was also an error in regulations 2(1) and 3(1), in which the word "Scotland" was omitted. The Executive has admitted the error and will lay a corrective instrument to amend it, which will come into force on 31 March 2002.

As members do not have any comments on the instrument, I will say again that it is important for the process of drafting legislation to be open and

transparent. People are very interested in subordinate legislation.

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

The Convener: Once again, the question of consolidation arises. The Executive has agreed that the instrument will be consolidated. We will draw that to the attention of the lead committee and the Parliament.

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

The Convener: This is an interesting instrument. We raised four points with the Executive because it has to comply with European Community law. Had the instrument not been drafted properly, breaches of European Community law might have arisen. However, those breaches might have arisen not with regard to the restriction of liberty, but with regard to trade.

However, we have a comprehensive explanation from the Executive. The conclusion that the committee will draw is that, following cases of which I have never heard—Lemmens, for example, which seemed to be about breathalyser equipment—the instrument would not transgress European legislation. That is because there would be no impact on trade. Presumably, therefore, we can still buy handcuffs and thumbscrews.

Murdo Fraser (Mid Scotland and Fife) (Con): We need to worry that Italian manufacturers of hanging equipment are on a level playing field. That is very important.

The Convener: I am glad that you mentioned that. In case anyone thinks that we have anything against the Italian hardware industry—

Murdo Fraser: I understand that the Italians have a long history of producing such things, particularly in the 1930s.

The Convener: I see.

Colin Campbell: I am not sure that it is politic to mention that now.

Brian Fitzpatrick: Certainly not from the right.

The Convener: However, there is one matter on which we might wish to comment lightly. In the past, we have expressed the view that statutory instruments that no longer have any life should be cleared from the statute books. Perhaps that would apply in this case.

I should also have said that there was defective drafting in the instrument. The committee asked why the definitions referred to in regulation 2(1), which appear relevant to the other provisions

saved by regulation 5, have not also been saved by that regulation. The committee suggests that, in failing to save a relevant definition, the regulations are drafted defectively. We should therefore draw that to the lead committee's attention.

We have had an informal discussion about the expression "defective drafting". It might be as well to say at this point that we are going to think about different classifications of "defective drafting" such as "seriously defectively drafted" or "not quite so seriously defectively drafted". Lead committees can sometimes over-emphasise the phrase in its application to regulations which might not be that adversely affected by the defective drafting.

Gordon Jackson: It is fair to say that we have discovered that the level of defective drafting is stunning. There is too much. We have discovered a huge amount of defective drafting.

That might cause the problem of the committee crying wolf too often. We constantly say that things are defectively drafted because they constantly are defectively drafted. Unless we have a definition of serious, or non-serious defective drafting, the lead committee is likely to think, "That is them at it again. Subordinate Legislation Committee? Ayeweys moaning about something."

The reality is that Executive drafting is not very clever. It is poor.

The Convener: You are absolutely right but, as we have said, we need to find another way of indicating the seriousness of the defect.

Gordon Jackson: There might be something in that because otherwise people will say that we are always objecting. However, that is what we are here for.

Brian Fitzpatrick: Is that intended to be an objective measure across the range of subordinate legislation? It strikes me that defective drafting of restriction of liberty orders might be more serious—even if the defect is minor—than, dare one say it, the plant protection products amendment order.

The Convener: You are allowed to say it, Brian.

Brian Fitzpatrick: I am sure that there are possibly many issues about the drafting of dairy produce quotas that are likely to have serious knock-on effects—

The Convener: Oh no, the dairy issue is serious. Although it is not necessarily the committee's job, we tend to separate sheep from goats. That is an old in-joke. As a steer to the lead committee, we try to say what it should pay particular attention to. We might need just to change our phraseology.

Colin Campbell: We could use the terms "major" and "minor".

Gordon Jackson: I feel strongly about defective drafting. We should not have to pick it up as often as we do. We do it constantly. I would not want to give out the signal that half of it does not matter. I agree with what we have said about serious stuff, but I am tired of the Executive getting its drafting wrong.

Brian Fitzpatrick: It might be lack of resources.

Gordon Jackson: I am not criticising individuals. It might be a system failure. Brian might be right—it might well be a resource problem. I am not suggesting that they are not able people—they might be fabulous people. I am just saying that the committee gets far too many instruments that are not right.

The Convener: When I first came on to the committee, I heard the same sort of discussion. Then I heard that there was going to be a training programme because so many people had been recruited at once. The advice that I now have is that the situation is improving. People are beginning to show the effects of having had a bit of training, but they need a bit more experience.

However, that does not mean that we can afford to wait until things get better because we cannot. As Brian has worked out—and you have fairly cottoned on quickly Brian; we are really pleased with you—some defective drafting could cost folk their money, jobs or liberties.

That is enough of that.

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

The Convener: There is doubt about the vires of the regulations.

Gordon Jackson: We do not need to make any further comment other than to draw that to the attention of the lead committee and the Parliament. We have asked the Executive about the issue and should now draw its answer to the lead committee's attention.

The Convener: Seemingly, the parent act is at fault and we cannot do anything about that.

Gordon Jackson: We must flag up the issue.

Instruments Not Laid Before the Parliament

Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002/132)

The Convener: There are no particularly serious points on the rules. There are just some small typos. We have had no details about substantial changes to the rules.

Brian Fitzpatrick: What about the sexist language?

The Convener: We will make sure that our report records that Brian Fitzpatrick says that there is sexist language in the rules.

Ian Jenkins: The rules are not gender neutral.

The Convener: Yes, sheriffs are always male according to the rules.

Brian Fitzpatrick: I know some female ones.

The Convener: Yes, but please do not tell us just now.

Act of Sederunt (Small Claim Rules) 2002 (SSI 2002/133)

The Convener: There are similar points to be made about this act of sederunt as were made about the previous one.

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Anti-Terrorism, Crime and Security Act 2001) 2002 (SSI 2002/136)

Colin Campbell: There is a missing footnote and we should draw that to the attention of the court by way of an informal letter.

The Convener: Very, very politely.

Colin Campbell: Politely, but not too deferentially.

Act of Adjournal (Criminal Procedure Rules Amendment) (Convention Rights (Compliance) (Scotland) Act 2001) 2002 (SSI 2002/137)

The Convener: This is the last item on the agenda.

Ian Jenkins: We need to write another respectful letter about a missing footnote.

The Convener: It should shade on the unctuous, I think.

Colin Campbell: Who is going to word it?

Brian Fitzpatrick: I wish to make a short point

about both the acts of sederunt. Perhaps we might get a briefing with a view on the scope of the committee's remit.

11:45

Both documents are essentially the same as the summary cause rules that I would have memorised 20-odd years ago as a baby solicitor. The small claim rules are just a bastardised version of the summary cause rules, and both are supposed to be the route map for ordinary litigants who find themselves in the sheriff court without legal representation. Both sets of rules are highly unintelligible for no good reason. Their English could do—at least—with a plain English check. It strikes me that the Subordinate Legislation Committee is the place to do that.

I can see already that there is a theme about consolidation, which is one of my hobby-horses. However, another theme is the unnecessarily contrived language of documents, particularly in the NHS regulations, as was mentioned earlier. People look up those regulations and expect to be able to read and understand them. My test is that a reasonably competent adult should be able to work their way through the small claim rules and summary cause rules and get a good jalouse of what is going on. That simply is not the case just now.

The Convener: Excellent, Brian: 10 out of 10. We are grateful for those critical comments on the language of documents and regulations, which is the sort of good work that the committee should be doing, although I do not know how much work that will cause other people. Thank you very much indeed.

Meeting closed at 11:46.

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