

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 17 September 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

25th 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)

COMMITTEE SUBSTITUTES

Mr Kenny MacAskill (Lothians) (SNP)

Mr Brian Monteith (Mid Scotland and Fife) (Con)

Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

*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 17 September 2002

(Morning)

[THE CONVENER opened the meeting at 11:22]

Delegated Powers Scrutiny

Public Appointments and Public Bodies etc (Scotland) Bill: Stage 1

The Convener (Ms Margo MacDonald): I welcome everyone present to the 25th meeting of the Subordinate Legislation Committee. We have no apologies, so I assume that Gordon Jackson and Brian Fitzpatrick will roll in when the Glasgow train does.

The first item on the agenda is scrutiny of the delegated powers in the Public Appointments and Public Bodies etc (Scotland) Bill. We raised several points with the Executive, one or two of which we may still want to consider. Is the committee happy that the Executive proposes using the negative procedure in section 3(2)(a)? Do we want to suggest that the affirmative procedure would be more appropriate for the abolition of bodies, changes of name of existing bodies or creation of new bodies? Should we say that we are not convinced by the Executive's answer, which justifies the use of the negative procedure by saying that the circumstances are likely to be technical and non-contentious?

Ian Jenkins (Tweeddale, Etrick and Lauderdale) (LD): We could possibly say that, although we understand where the Executive is coming from, we prefer the use of the affirmative procedure on principle. Without making a big fuss, we could say that we are easy-osy but, on balance, our preference is for the affirmative procedure.

The Convener: Yes, but I think that our letter should say quite strongly that doing away with public bodies could well be a contentious issue, which the Parliament should perhaps have the opportunity to debate. I am absolutely certain that there will be public bodies that this Executive or some future Executive will think have passed their sell-by date, but that others will think have not.

Bill Butler (Glasgow Anniesland) (Lab): We could say that, on balance, the proposed abolition of a body should be a matter for the use of the

affirmative procedure. The Executive says that on balance it should be the negative procedure; we say that on balance it should be the affirmative procedure. We can leave it at that.

The Convener: Yes, all right. We will send a nice letter to say that we still think that we are right. Sorry—that comment will go in the committee's report. We have passed the stage of exchanging correspondence.

There is a similar issue in section 3(2)(b), which refers to changes in the functions of the commissioner for public appointments. We asked the Executive to explain how it foresees that working. The Executive's response is that because this is a new situation—there will be a new commissioner, a new act and a new way of doing things—it is not certain how things will shake down. That seems reasonable. Is the committee happy with that?

Murdo Fraser (Mid Scotland and Fife) (Con): The Executive is proposing using the affirmative procedure. That is acceptable.

The Convener: Fine.

There is a similar issue with section 17(1), because it would enable ministers to confer on the national survey such additional functions as ministers consider appropriate. We asked the Executive what those functions might be and it responded with an example of how that might work out. I think that that is reasonable. Is the committee happy with that?

Members indicated agreement.

The Convener: Section 2 is on the code of practice. Members will remember that we endorsed the commitment to consult on the code of practice. However, the expression used in the section is "consult the Parliament." We wondered to whom that would refer and how the consultation would be done. Therefore, we asked for further explanation. I think—if I might be so bold—that the Executive is just a wee bit defensive on this matter because it has not worked out exactly what would happen. The Executive's response is that it imagines that the Parliament will set up a committee to consider the code. I am sure that the Parliament might do so, but I am not sure that the wording in section 2 represents the best drafting practice.

We can perhaps say in our report that we have total sympathy with the Executive's intentions, but are still not absolutely satisfied that the Executive has thought through how the consultation will be carried out. Is that all right?

Members indicated agreement.

Executive Responses

Food for Particular Nutritional Uses (Addition of Substances for Specific Nutritional Purposes) (Scotland) Regulations 2002 (SSI 2002/397)

The Convener: The regulations are called the “parnuts”, I believe. The committee feels that we might be required to draw the regulations to the attention of the lead committee and the Parliament on the grounds of failure to comply with proper drafting practice. There is a slight difference of opinion between the Executive and us as to whether it would be a better idea to follow the procedure used in the equivalent English regulations. Much as it might surprise some folk, I think that we are probably right and that the Executive is wrong. We will also draw the matter to the attention of the European Committee. Why should it go unscathed?

Colin Campbell (West of Scotland) (SNP): That could be good, because I am on that committee.

The Convener: You will know exactly what we are talking about.

Colin Campbell: Oh, yes. I will by the time that the matter comes up.

Road Traffic (Permitted Parking Area and Special Parking Area) (Perth and Kinross Council) Designation Order 2002 (SSI 2002/398)

The Convener: Here is another nice one. Members will remember discussing the order. Unfortunately, Murdo Fraser missed that discussion because he was saving Gibraltar for Queen and country.

Murdo Fraser: I was.

11:30

The Convener: Well, you missed this bit about Kinross and Perth, which we thought was much more important. We asked the Executive for an explanation of three matters. One was about the actual name of the area to which the order refers. Article 3 refers to the

“Perth and Kinross Council local government area.”

However, the name of the area prescribed by the Local Government etc (Scotland) Act 1994 is effectively the Perthshire and Kinross local government area—the council being Perth and Kinross Council. Obviously, we asked for an explanation. It turns out—are you all sitting up and listening to this story—that in 1995, I think, the council decided to change its name. The

Executive should have informed us of that in a footnote in the order because it cannot expect us to know of every name change.

Murdo Fraser: It is a bit like the Post Office.

The Convener: Is it?

Ian Jenkins: Consigned to history.

The Convener: At least we have an answer as to why there appears to be a discrepancy.

Murdo Fraser: But the Executive should have told us.

The Convener: Yes. A helpful footnote is absent. Bill Butler is pursing his lips. Do not worry, Bill, it gets better.

Colin Campbell: Only if it accelerates.

The Convener: We also queried why amendments made to the Road Traffic Regulation Act 1984 and the Road Traffic Act 1991 by the Greater London Authority Act 1999 have not been reflected in the order. That has caused odd results of doubtful competence. We queried whether it is true that the Greater London Authority can dictate the uniform that Perth and Kinross parking attendants must wear, because it matters whether jackets should be buttoned on the right or the left and whether there should be three or four buttons. I think that we were right.

Murdo Fraser: This is not a trivial point. The weather in London is considerably warmer than it is in Perth and Kinross. They could be designating shirt-sleeves in London and traffic wardens in Pitlochry could be freezing in mid-winter.

Colin Campbell: The traditional dress code may be different from one place to another and we want to keep little distinctions, do we not?

The Convener: With the committee's permission, I will interpret the Executive's answer. The Executive accepts that it may technically be the case that the Greater London Authority could dictate the uniform that Perth and Kinross parking attendants must wear. However, the Executive will consider making further modifications to make the position clear.

Bill Butler: That is appropriate.

The Convener: I feel that honour has been satisfied on both sides. The Executive's explanation was difficult to follow, but we got round it in the end.

Ian Jenkins: Am I alone in feeling that life is passing me by?

Colin Campbell: Is it of interest to you to know that in Namibia the equivalent of our traffic wardens wear a tabard with “car guard” written on it and carry a great big club?

The Convener: I do not think that we should instruct the clerk to write to Ken Livingstone to say that when he considers the matter of Perth and Kinross uniforms he should consider Colin Campbell's information.

We also asked for an explanation of the words in schedule 2:

"in each place where they occur."

The Executive accepts that that is misleading and unnecessary in the context of the provision, but thinks that the meaning is nevertheless clear. We think that enough has been said on that matter.

Road Traffic (Parking Adjudicators) (Perth and Kinross Council) Regulations 2002 (SSI 2002/400)

The Convener: This is a little more important. This is actually quite serious stuff. Oh, good—Gordon Jackson has arrived. I am glad about that because we have got to a serious bit.

Gordon Jackson (Glasgow Govan) (Lab): Sorry I am late.

The Convener: No, that is quite all right. We asked a couple of questions on the regulations.

Gordon Jackson: I remember.

The Convener: I will give you a second to look at the Executive's response and decide whether you want to comment. Our first query was on informing an appellant of the outcome of a request for an extension to the time limit on appealing.

The Executive accepted, at the time of the committee's consideration of the Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999 (SSI 1999/60), that it might have been better to include in those regulations express provision for informing an appellant of the outcome of a request for an extension to the time limit for appealing. However, it appears that, although the Executive agreed with us on that point, it did not amend the regulations that apply to Perth and Kinross. The Executive's reason for that is that the regulations for Glasgow and Edinburgh were not amended. The Executive asks why it should amend the regulations for Perth and Kinross when it has not received a request from Glasgow or Edinburgh councils to do so in their case.

Colin Campbell: They might not have reached the point at which they want to have the regulations amended.

The Convener: I do not know, but the Executive's response seems backside foremost to me.

Gordon Jackson: The Executive's logic seems to be wrong. I do not doubt that the councils are following the proper administrative practice.

However, if the Executive accepts that the provision should be included in the regulations, the fact that that did not happen in the case of Glasgow and Edinburgh is not a reason for not doing it right the next time. Even if the Executive decided that it could not be bothered to amend the regulations that apply to Glasgow and Edinburgh, why does it not do things properly in respect of the new regulations that apply to Perth and Kinross?

Colin Campbell: There could be a series of these regulations.

Gordon Jackson: I hate to use the word childish, but it sounds almost as if the Executive is saying, "We've not got it right, so you're not going to get it right." It seems to be saying that if Glasgow and Edinburgh have not got it right, why should anybody else get it right?

The Convener: I did not follow the Executive's explanation at all.

Gordon Jackson: There is no logic to it.

Colin Campbell: If the regulations are not right, they should be corrected.

Gordon Jackson: Better to have two wrong and all the rest right, than to say that if two are wrong we have to keep all of them wrong for the sake of consistency. There is no sense in that.

Ian Jenkins: Part of the principle of the way that we work is that, when we point out defective drafting and say that we will not make a fuss about it on that occasion, the objective is for the Executive to improve on future regulations.

Gordon Jackson: We could descend to the level of saying, "If we allow it to happen once, we will never allow it to happen again."

The Convener: We must draw the regulations to the attention of the lead committee and the Parliament. We should do that with a note to say that we realise that we draw attention to many examples of defective drafting, but that these regulations are a good example of why we do so. If examples of defective drafting are not picked up as early as possible, a series of consequential mistakes can be set in train.

We also asked the Executive to explain why, given the definition of "proper officer" in regulation 2, regulation 11(1)(a) makes reference to "administrative staff". Its answer was perfectly acceptable.

There was a misunderstanding about our letter to the Executive. The Executive pointed out that it had previously replied to a request for clarification on SSIs 2002/187 and 188, but those instruments were mentioned in respect of the clarification of the definition of "proper officer" and not the clarification of SSIs 2002/187 and 188.

Instruments Subject to Annulment

Housing (Scotland) Act 2001 (Registered Social Landlords) Order 2002 (SSI 2002/411)

The Convener: The order is an interim measure. However, in order for it to take effect, landlords should have received notification no later than October 2001. We are not sure whether the Executive complied with that notification requirement. The matter would have been cleared up if the preamble had included that information. We should ask the Executive for confirmation that things happened according to the order and why the preamble did not include a statement that landlords had been notified by October 2001. Let us hope that the Executive did so.

Colin Campbell: It may not have done so.

Murdo Fraser: The order may also be ultra vires.

The Convener: The points are important. We must just hope that there has been an oversight.

Homeless Persons Interim Accommodation (Scotland) Regulations 2002 (SSI 2002/412)

The Convener: Yet again, we must ask why definitions of terms that are used in the parent act need to appear in the regulations. The point is not a biggie, although I should be careful about saying that after the Perth and Kinross query.

Housing (Scotland) Act 2001 (Appointment of Arbiter) Order 2002 (SSI 2002/413)

The Convener: No points arise on the order.

Homeless Persons Advice and Assistance (Scotland) Regulations 2002 (SSI 2002/414)

Colin Campbell: A question arises as to the vires of regulation 4(d).

The Convener: Yes.

Colin Campbell: Should we ask the Executive about that?

The Convener: We should do so. On first reading, it appears that the advice that the council is obliged to offer in connection with housing, homelessness or threatened homelessness might not be properly prescribed in the regulations. It is conceivable that a local authority could be obliged to provide legal advice to an applicant on matters completely unrelated to their housing situation. We

will ask for an explanation of that. There are also some typos, but that is a small point.

Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc) Amendment Order 2002 (SSI 2002/415)

The Convener: We have one point to raise that relates to expression. We can do so by way of an informal letter to query the point.

Ian Jenkins: The order is an amending instrument. It is good that the Executive has introduced it. We should not be too snippy about its provisions.

The Convener: No.

Housing (Scotland) Act 2001 (Registration of Tenant Organisations) Order 2002 (SSI 2002/416)

The Convener: The instrument sets out the procedures that are to be followed by bodies that seek registration or removal from the register of tenant organisations. The question of vires arises again. The main difficulty with the order is the power that it gives to the Scottish ministers to remove associations from the register.

Section 53(4) of the Housing (Scotland) Act 2001 states:

“Scottish Ministers may by order make provision as to—

(a) the criteria to be satisfied by a body seeking registration in the register or removal from the register,

(b) the procedure to be followed in relation to applications for registration and removal from the register.”

However, at one point the order refers to removing bodies from the register.

11:45

Murdo Fraser: We should write to the Executive to clarify whether article 6 is intra vires.

The Convener: Okay. We could also ask for an explanation on some other minor points, although they are not as serious as the vires question.

Ian Jenkins: We always ask whether the phrase “in writing” is intended to include electronic means, so we should ask that again. There is a lack of clarity about the definition of the term “served” in article 7, so we should also ask about that.

The Convener: All right.

Gordon Jackson: Hold on.

The Convener: What are you worried about?

Gordon Jackson: I want us to slow down for a moment, in case we ask a question to which the answer is clear. Our complaint is that landlords are

being given the power simply to remove organisations from the register. Paragraph 2 of part II of the schedule states:

“The organisation must apply to a landlord to remove it from the register”.

Although article 6 says that the landlord can remove the organisation, they can do so only in terms of part II of the schedule, which says that the organisation must apply to be removed. If we read article 6 with part II of the schedule, the order does not give landlords the power to strike off organisations, unless they request that. Do you follow me, Murdo?

Murdo Fraser: Article 6(1) states that if

“a body that is a registered tenant organisation satisfies any of the criteria in Part II of the Schedule”,

the landlord may remove it from the register. Any one of the three criteria in part II of the schedule can apply, which is the problem.

Gordon Jackson: We should ask the Executive about the matter. It is odd to say “the organisation must apply”, if that is only one of the criteria. The criterion should be that the organisation has applied to the landlord. The matter is not clear.

The Convener: We will ask about that.

Ian Jenkins: Also, paragraph 3 of part II of the schedule states:

“It must appear to the landlord that the organisation has ceased to exist, or to operate.”

If the organisation has ceased to exist or operate, it cannot apply to be removed.

Gordon Jackson: Murdo is correct; any one of the criteria in part II of the schedule can be used. However, the phrase “must apply” does not fit as part of one criterion among many.

The Convener: Thank you, Gordon. That is much more precise and it means that the Executive will understand exactly what our query is.

Conservation of Salmon (Prohibition of Sale) (Scotland) Regulations 2002 (SSI 2002/418)

Bill Butler: The regulations seem fine.

The Convener: You can eat salmon or sea trout, but you cannot sell them.

Gordon Jackson: Are you saying that one cannot sell salmon, even at the back door of a hotel?

The Convener: Not if they are caught with a rod and a line. We have discussed the matter before.

Colin Campbell: Some people do not sell them, they just serve them. Is that selling?

The Convener: People cannot take salmon for sale. There is logic to the regulations. People are not allowed to take amnesic or diarrhetic shellfish either.

Road Humps and Traffic Calming (Scotland) Amendment Regulations 2002 (SSI 2002/419)

The Convener: We will not go into road humps. There is logic to that, too.

Instruments Not Laid Before the Parliament

Police Reform Act 2002 (Commencement No 2) (Scotland) Order 2002 (SSI 2002/420)

The Convener: No points arise on the order, which relates to the wrongful acts of constables and assaults on constables. Gosh.

I see that Brian Fitzpatrick has arrived. He has missed all the really good bits, especially the traffic humps.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): I am sure that I have.

Committee Correspondence

TSE (Scotland) Regulations 2002 (SSI 2002/255)

The Convener: You will enjoy this, Brian. Do you want to pronounce “TSE” in full this week?

Brian Fitzpatrick: Maybe when I have recovered my breath.

The Convener: Do you want to say it, Colin? Transmissible spongiform—

Colin Campbell: Encephalitis?

Brian Fitzpatrick: Bovine spongiform encephalitis. Will that serve as penance?

The Convener: That will do. We talked about the regulations before the summer recess and, because we had umpteen questions, we took evidence from Executive officials. The Executive has written to us—

Colin Campbell: Very positively.

The Convener: Yes. We did a good job and the Executive has acknowledged that.

Adults with Incapacity (Specified Medical Treatments) (Scotland) Regulations 2002 (SSI 2002/275)

The Convener: We took evidence on the regulations. We have received a full response from the Executive, but I do not think that it progresses matters much.

Ian Jenkins: The issues are difficult and some of them might be affected by the Mental Health (Scotland) Bill. As the Parliament will explore the issues further, we should just leave the matter at that.

Members *indicated agreement.*

The Convener: Okay. We have reached the end of the agenda. I thank members for their attendance. See you again next week.

Meeting closed at 11:53.

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