

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 24 September 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

26th 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)

*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

ACTING CLERK TO THE COMMITTEE

Ken Hughes

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 24 September 2002

(Morning)

[THE CONVENER *opened the meeting at 11:38*]

The Convener (Ms Margo MacDonald): I welcome everyone to the 26th meeting this year of the Subordinate Legislation Committee. We have received apologies from Gordon Jackson, who is sorting out the former colonies at the red-tape conference in Canada.

Colin Campbell (West of Scotland) (SNP): The dominions.

The Convener: Yes, the dominions.

I spoke to Gordon Jackson before he went to Canada and we agreed the sort of thing that we might hear from his report. I am looking forward to that and I hope that everybody else is.

I do not know where the other naughty boys are. I have not heard from them, so I assume that Murdo Fraser—no, Murdo was away last week. I am not sure whether Murdo Fraser and Bill Butler will be joining us.

I am informed that we have received apologies from both members. Well, I apologise to them too.

Bill Butler (Glasgow Anniesland) (Lab): I am here.

The Convener: Oh, sorry. Of course you are.

Bill Butler: That is all right—no problem.

The Convener: It is that one who sits next to you who is never here: Brian Fitzpatrick. However, he sometimes has travel difficulties on Tuesday mornings.

Bill Butler: Just for the record.

The Convener: Oh, yes. I am just pleased to see Brian Fitzpatrick when he is here because I know that the guy finds it difficult to get to this committee.

Delegated Powers Scrutiny

Water Environment and Water Services (Scotland) Bill: Stage 1

The Convener: The Water Environment and Water Services (Scotland) Bill has been introduced to transpose the EU water framework directive 2000/60/EC into domestic law. Part 1 of the bill provides for the establishment of a river basin planning system and contains a number of regulation-making powers that will enable new regulatory controls to be introduced over activities that can affect the water environment. That includes the introduction of controls, which are new to Scotland, over water abstraction.

The bill is big and has far-reaching consequences, and the directive is still being worked out at European level. Therefore, the Executive must take powers and perhaps do things in an order that it might not have wanted, but it has no option because there is an implementation date of 22 December 2003.

The Executive might appear to be premature in seeking to take relevant powers, but I do not think that it had any other choice. Is that okay?

Members indicated agreement.

The Convener: Right. That forms the basis of anything that we might say about the matter. We understand the difficulties.

The bill is enabling in nature and confers powers on Scottish ministers to make orders and regulations on matters that the bill specifies. Part 1 is on the protection of the water environment. The Executive cannot be expected to know what will ultimately be required under the European directive. None of the powers appears to merit any procedure more onerous than annulment, which seems reasonable.

Members indicated agreement.

The Convener: Ian Jenkins will comment on section 4(1), on the designation of river basin districts.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): We have questions on the designation of river basin districts. We should ask the Executive how the ministers would exercise their designating powers. We are not clear about how Scotland would be divided into districts. Therefore, there is a question about where the boundaries would be drawn. There is also a question about whether the ministers have a statutory duty to send a copy of the designation order to the Scottish Environment Protection Agency.

There is a series of questions about the boundaries, the drawing of maps and the designation of river basin districts. We should take our legal adviser's advice and consider whether we should also include a requirement for consultation on orders made under section 4(1).

Colin Campbell: And affirmative legislation.

11:45

The Convener: It might be argued that because the bill originates from a European measure there will have been lots of opportunity for prior consultation in the build-up to that level. However, experience has shown—for example, with our domestic legislation on national parks—that it is a good idea to let people have their say on local decisions.

There are two ways of doing that. Either Scotland can be one river basin area or we can have a series of river basin districts inside Scotland. I do not pretend to understand it all, but I can see where it would be important. I therefore think that we could ask the Executive the questions that Ian Jenkins posed.

Section 5 is headed "Characterisation of river basin districts". Some people might find that a little bit obscure. It means an environmental assessment and inventory of all the important factors in any given river basin district. I know that this is pedantic, but we are trying to make governance and government clearer to people, so perhaps we should start by using words that folk understand.

Colin Campbell: Plain English.

The Convener: Yes. I just mention that in the passing.

Section 5 raises once again the question of prior consultation. We can wrap up this section together with section 4(1) when we ask the Executive if it is thinking about prior consultation.

Brian Fitzpatrick is here; I am pleased to see him. Brian, I took your name in vain.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): Surely not.

The Convener: I did.

Brian Fitzpatrick: Did you really? I would never do that to you.

The Convener: I know. I heard.

Brian Fitzpatrick: Your name is always gilt to my lips.

The Convener: We have reached section 6(1) of the Water Environment and Water Services (Scotland) Bill.

Brian Fitzpatrick: It is fascinating, is it not?

The Convener: Section 6(1) is unexceptional.

Ian Jenkins: Unexceptionable.

Colin Campbell: Section 7(1) is the same.

The Convener: Section 7(5) is also okay.

Bill Butler: It seems to be appropriate.

The Convener: Section 8(3) is about monitoring methodology and monitoring strategy.

Colin Campbell: That section is okay.

The Convener: Section 9(3) is about determining and achieving the environmental objectives.

Colin Campbell: There might be a case for prior consultation.

Ian Jenkins: However, there is a sense in which such issues are driven by EC directives and consultation might raise false expectations of change. We should not make a fuss about it in this case.

The Convener: No, but there is a different ethos surrounding the production of legislation or subordinate legislation when it derives from a European directive. There is nothing wrong with saying that the Executive has no other choice in the circumstances but, given the sensitive nature of what we are dealing with, it should be aware of the need for prior consultation. We are supposed to feed into the process as well as accepting it.

Bill Butler: Wherever appropriate or practicable. I take Ian Jenkins's point, but I also take the convener's point about the point of principle. We could make that clear.

Colin Campbell: Legislation from Europe could also be ill defined.

The Convener: We will not allow that to pass without comment, do not worry.

Section 10(2) is about the content of river basin management plans.

Brian Fitzpatrick: There is a discrepancy. Schedule 1 lists the various hallmarks of a management plan. I have concerns about the issue and we should ask the Executive what the position is.

The Convener: Because there are some controversial items in the list, there is a possibility that some of the conditions have been omitted. That is a point of principle—we either have to take the lot or not. We will ask.

Brian Fitzpatrick: Where appropriate.

The Convener: Section 19(1) is about general regulation-making powers in relation to river basin management planning.

Colin Campbell: That section is okay.

The Convener: Section 20(1) is about the regulation of controlled activities. It enables Scottish ministers to make regulations for or in connection with regulating any activity for the purposes of protecting the water environment.

Ian Jenkins: It has been suggested that there is a slightly odd provision in paragraph 17 of schedule 2, where there are regulations specifying rules. It might be simpler to have a rule-making power. It is no big deal, but we could ask the Executive to clarify the matter.

The Convener: It will not change the essence of the provision. We can ask the Executive why it chose to go that way.

Subparagraph 20(2) of schedule 2 limits the fine that can be imposed to a maximum of £20,000. Customarily, any monetary amounts in primary legislation can be amended to reflect changes in the value of money. That seems obvious. However, it is not clear whether it is intended to use either of the ancillary powers in section 31 or 32 for that purpose.

Brian Fitzpatrick: I did not quite follow that. Is the concern that it would just be a form of Scottish statutory instrument that would be brought in to upgrade the legislation?

The Convener: Yes. That is a power, but it is not mentioned in the bill.

Brian Fitzpatrick: I might be wrong, but if the test is necessity or expediency it might be a proper recognition of the offence to do the upgrade.

The Convener: Will we ask for clarification? There is up to £20,000 involved, so it is reasonable to ask for clarification, is it not?

Bill Butler: In that case, there is no harm in asking.

Brian Fitzpatrick: If the fine needs to be more to make people abide by the law, that is all well and good.

The Convener: There is no specific power in the bill and that is why we are asking.

Other than that, section 20(1) is fine.

Section 22 is about remedial and restoration measures. This might be another section on which we could ask for clarification. The policy memorandum seems to indicate that the power will be exercisable by negative procedure except where it is used to amend primary legislation. That might be different from the terms of the bill, which appears to specify only negative procedure for the exercise of powers under section 22. It is not clear how the power in section 22 could be used to amend primary legislation.

Bill Butler: We could write to the Executive to ask for clarification on that point.

The Convener: Okay, we will ask for clarification.

Section 23(1) is about charges for water services. That is what everybody will be interested in, so we have to get it right.

Colin Campbell: Again, I think that we have to have prior consultation on water charges.

The Convener: The member states have been allowed to use their discretion in the matter, for obvious reasons. Should there be a statutory requirement for prior consultation before the subordinate powers are exercised? What do members think? Perhaps that is one—

Brian Fitzpatrick: For the report.

The Convener: Should that go into the report?

Members indicated agreement.

The Convener: Section 24(1) deals with the power to give effect to Community obligations. There is a possibility that this wide power might be applicable to matters other than the management of water. Nobody suggests that any future Executive would use it to undermine the European Communities Act 1972, but it is perhaps incumbent on the committee to ask the Executive to tell us why it chose to include the power when it is open to such interpretation.

Brian Fitzpatrick: Is not such a power part of our reciprocal obligations if we find that, by our actings, the United Kingdom is in breach of Community law?

The Convener: I do not know. Let us ask the Executive. If that is the case, it will say, "This is why we did that".

Brian Fitzpatrick: Could we tease out from the Executive whether more onerous provisions on related rights might be anticipated?

The Convener: Yes. I am really glad that you are here this morning, Brian.

Brian Fitzpatrick: So am I.

The Convener: Section 26(2) inserts subsection (3B) into section 1 of the Sewerage (Scotland) Act 1968 and deals with the power to make regulations regarding reasonable cost.

Colin Campbell: That seems okay.

The Convener: Next is section 26(7), which inserts subsection (2C) into section 6 of the Water (Scotland) Act 1980.

Colin Campbell: That is the same as the previous section.

The Convener: Sections 26(2) and 26(7) are similar to section 27(3), which inserts new section 14A(1) into the 1968 act. The new section deals with the power to make regulations specifying construction standards.

Colin Campbell: It is good to see a statutory requirement for consultation before the regulations are made.

The Convener: Section 27(3) inserts new section 14B(3) into the 1968 act. The new section deals with the power to make regulations providing for takeover conditions and connection agreements.

Colin Campbell: I seem to have gone on ahead of you, convener; sorry.

Bill Butler: Our convener is always ahead of the rest of the committee.

Ian Jenkins: That section seems okay.

The Convener: There seems to be no need for a statutory consultation requirement on new section 14B(3).

Section 28 inserts new section 23B(1) into the 1980 act and deals with the same powers as section 27(3).

Section 28 inserts new section 23C(2) into the 1980 act and deals with the power to make regulations providing for vesting conditions.

Ian Jenkins: That seems fair.

The Convener: Section 32 deals with ancillary provision. In the circumstances, we cannot argue with it.

Section 33(1) deals with commencement. There is a wee question about that. Once again, the Executive should know that it has our sympathies because of the timetabling of the European water framework directive. It is arguable that the bill ought to provide a cut-off date for the exercise of the power—in other words, when the bill is to be commenced.

Ian Jenkins: We might ask the Executive to comment on whether it intends to implement the provisions bit by bit, or whether it will follow the big bang theory. We could ask for an indication of Executive thinking on that matter.

The Convener: Okay. I am glad I am not on the subject committee because I would be asking much more searching questions.

Brian Fitzpatrick: Could you not even get on to that committee this week of all weeks?

The Convener: No. There are other things for me to do. I am being called to arms on other matters.

Executive Responses

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

12:00

The Convener: We move to consider the Executive's responses to our questions.

Colin Campbell: There has been a failure to comply with the notification requirement in the enabling act. Does that make the order ultra vires?

The Convener: That is a possibility. We should refer the order to the lead committee, pointing out our original question and the Executive's answer. The Executive admits that the bodies named in the order were not notified in accordance with the requirements. It seems to be game, set and match, but we are not going to press the advantage. We will only draw the order to the attention of the lead committee. Just to keep things nice and tidy, however, I am advised there is a way to get round the problem. We can point out that alternative way to the lead committee. Is that acceptable?

Members indicated agreement.

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

The Convener: There was a question of whether correct drafting practice was applied to the regulations. Should we draw the regulations to the attention of the lead committee and the Parliament?

Ian Jenkins: The Executive accepted that it did not need to define the terms, but felt that it might be helpful to do so. We can draw the regulations to the lead committee's attention without making a meal of it.

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

The Convener: When we discussed the regulations before, we talked about whether the way in which they were worded implied that the legal advice that could be had by an applicant could apply to more than their homelessness needs. The Executive sensibly explained to us that homelessness might well have a legal dimension, such as housing or other debts, and a landlord may have obtained or be obtaining a decree of eviction in respect of that homeless applicant. The Executive is to be thanked for its explanation.

Perhaps other folk on the committee disagree with me and think that that was not an adequate response. What did anybody else think?

Bill Butler: It was entirely reasonable and the Executive is to be commended, as you said.

The Convener: I did not say that exactly, did I?

Bill Butler: It had the same import.

The Convener: All that I said was that the Executive should be thanked.

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

The Convener: We raised many points on the order. First, we asked the Executive to explain the vires for article 6, which authorises the landlord to remove a body from the register without prior application by that body. The Executive considers that the vires provided by section 53(4) of the Housing (Scotland) Act 2001 are wide enough to empower the provision in article 6. Although section 53(4)(b) refers to the procedure to be followed in relation to applications for removal, it does not provide that those applications need to be made by the body itself. As a result, the Executive does not think that section 53(4) only contemplates removal where there is a prior application by that body. For example, that will not be possible where the body ceases to exist.

Brian Fitzpatrick: It is not difficult to envisage circumstances in which a tenants' organisation winds itself up or is taken over by the Trots and falls into desuetude. Convener, you should be aware of such circumstances.

The Convener: I am familiar with them. How many Trots do I know again?

Brian Fitzpatrick: More important, some tenants' organisations have suffered tremendous fatigue and have simply disappeared. I am reasonably content with the explanation if it refers to such a situation. I could foresee circumstances in which some housekeeping might need to be carried out.

The Convener: We are talking about the practicality of voluntary or community organisations. One of your colleagues has found that out to his cost.

Brian Fitzpatrick: Of that, more anon.

The Convener: However, does understanding the human dimension to the dilemma mean that we agree that the subordinate legislation itself is correct?

Brian Fitzpatrick: Given what the Executive has said about section 53(4), I think that its explanation of article 6 is reasonable enough. Any

one of us would be able to envisage circumstances in which the body that made the application does not exist, has become defunct or has fallen into desuetude.

Colin Campbell: These things have happened.

Brian Fitzpatrick: Indeed.

Colin Campbell: And they might well happen again, because people are slow to learn.

The Convener: We will draw the matter to the lead committee's attention, because it concerns the interface between policy and subordinate legislation. We are considering the matter from a policy perspective, which we should not be doing.

We also pointed out that article 6(1) gives the landlord the power to act of its own accord without application being made by anyone. However, the Housing (Scotland) Act 2001 does not appear to contain any authority for such a power. We will also draw that to the lead committee's attention.

At several points, the order refers to applications and notices being "in writing", and the committee asked whether that included electronic communications. Apparently, it does.

Ian Jenkins: We could make that clear to the lead committee.

The Convener: Right.

Article 5(3) of the order refers to the

"criteria referred to in article 3"

which, in turn, refers to the criteria in part I of the schedule. However, article 6(1) refers to the

"criteria in Part II of the Schedule".

The committee asked whether that approach was inconsistent. Although the Executive acknowledges that there might be an inconsistency, it says that the provision is still quite clear and that no one should be misled by it. However, this is another case where we have had to point out that an instrument might confuse people who read it. We would prefer the Executive to avoid such a practice if it can.

Brian Fitzpatrick: Why does it not just do the obvious thing?

The Convener: The committee also requested clarification about what will constitute "service" for the purposes of article 7. The Executive considers that service could be effected by delivery by post or hand to the address of the organisation. We have received additional information about legal precedents in relation to this matter. For example, in the case of *Clyde Shopping Hall v Canning* in 1990, the court held that the phrase "by notice in writing served on that person" meant that service by post was not competent and that personal service was required. I do not think that, in this

case, the Executive wants to involve sheriff officers in serving notices.

Colin Campbell: The order could be better drafted to make things clearer. Perhaps we should let the lead committee know.

The Convener: Okay.

Brian Fitzpatrick: I am not satisfied that Clyde Shopping Hall v Canning or Keane v Jackson—which is the other case cited in the legal briefing—can be characterised as precedents.

Colin Campbell: That is just because you are an expert in your field.

Brian Fitzpatrick: It is not for that reason. I do not give legal advice.

The Convener: Oh, go on. Just this once.

Brian Fitzpatrick: I do not think that they can be characterised as precedents because of the nature of the decisions.

Bill Butler: However, it all seems remarkably consistent as far as the casework is concerned.

Brian Fitzpatrick: That is a very brave thing to say.

Bill Butler: I can say it because I am not a lawyer.

The Convener: However, we are agreed that there is dubiety about the serving of notices.

Brian Fitzpatrick: I am all for seeking some clarity on that point.

The Convener: Okay.

Our final questions focused on matters of grammar or syntax. We asked the Executive to explain why, if paragraph 1 of part II of the schedule is meant to be a criterion for removal, it refers to a body “removed” from the register. The Executive has agreed that the criterion would have been more clearly stated by putting the words “to be” before “removed”. As I say, nitpickers are us.

Bill Butler: “To be” or not “to be”, convener.

The Convener: Our report will make it clear that the Executive has graciously acknowledged our point.

Instruments Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 12) (Scotland) Order 2002 (SSI 2002/430)

12:15

Colin Campbell: No points arise on the order.

Instruments Subject to Annulment

Nursing and Midwifery Student Allowances (Scotland) Amendment Regulations 2002 (SSI 2002/423)

Colin Campbell: No points arise on the regulations.

Brian Fitzpatrick: Apart from the typos. However, given our typos, we should be polite about the Executive's. Therefore, I agree with what is proposed.

The Convener: Thank you for that polite interjection, Brian—which typo?

Brian Fitzpatrick: We have gone through a bundle of documents that have “harges” and various other typos.

Colin Campbell: And “emedial orders”.

The Convener: Oh, yes. They were so obvious.

Brian Fitzpatrick: We are all sinners.

Colin Campbell: Or “inners”.

Food (Figs, Hazelnuts and Pistachios from Turkey) (Emergency Control) (Scotland) (No 2) Regulations 2002 (SSI 2002/424)

Bill Butler: The regulations seem entirely appropriate, convener.

Food (Peanuts from China) (Emergency Control) (Scotland) (No 2) Regulations 2002 (SSI 2002/425)

Brian Fitzpatrick: The regulations are okay.

The Convener: You cannot go until we are done, Brian.

Instruments Not Subject to Parliamentary Control

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 10) (Scotland) Partial
Revocation Order 2002 (SSI 2002/421)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 7) (Scotland) Order 2002
Revocation Order 2002 (SSI 2002/422)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning)
(West Coast) (No 5) (Scotland) Revocation
Order 2002 (SSI 2002/431)**

The Convener: No points arise on the orders.

Bill Butler: Great.

Colin Campbell: Good for fishermen, but bad for shellfish.

The Convener: Aye. That is everything on the agenda. You will be relieved that we have fixed out the peanuts from China.

Brian Fitzpatrick: And the figs from Turkey and the amnesic shellfish.

The Convener: And water basins. That is some morning's work. Thank you for your attendance.

Meeting closed at 12:17.

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