

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 5 November 2002  
*(Morning)*

Session 1

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## SUBORDINATE LEGISLATION COMMITTEE

**30<sup>th</sup> 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

Jackie Baillie (Dumbarton) (Lab)

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 5 November 2002*

*(Morning)*

[THE CONVENER *opened the meeting at 11:27*]

**The Convener (Ms Margo MacDonald):** I welcome everyone to the 30<sup>th</sup> meeting of the Subordinate Legislation Committee. I have received apologies from Bill Butler. Moreover, Gordon Jackson intimated to me during the week that he might find it difficult to make today's meeting. However, he assured me that he would definitely be here next week, when we will consider the Mental Health (Scotland) Bill. Members will recall that we decided that it would be better to defer our discussion on the bill.

**Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab):** How are we going to discuss lines of questioning on the bill?

**The Convener:** If you have any questions, please put them in writing.

I should also intimate my abject apologies to Murdo Fraser. Last week, I said that he was not at the meeting because he was soaking up to someone in his constituency. That was not the case. Instead, he was about God's work on a boundary inquiry. I am very glad that he has been able to rejoin us.

**Brian Fitzpatrick:** So he was sucking up to someone in a potential constituency. [*Laughter.*]

**Colin Campbell (West of Scotland) (SNP):** You are the soul of tact as ever, Brian.

**Brian Fitzpatrick:** It will not do you any good anyway, Murdo. Let us move on.

**The Convener:** We should not talk about who is going to do whom next year.

## Delegated Powers Scrutiny

### Building (Scotland) Bill: Stage 1

**The Convener:** The first item on the agenda is delegated powers scrutiny of the Building (Scotland) Bill at stage 1. The bill, which modernises the Building (Scotland) Act 1959, must comply with European Union directives. Although it retains the general framework of the 1959 act, it will hopefully introduce a degree of flexibility into the system by providing for the setting of only minimum functional standards, with other standards having the status of guidance. The changes are intended to free the construction sector from excessive prescription. Of course, we all say "Hooray" to that. However, on the other hand, we must examine the bill closely and seriously to find out whether protection is built into it. After all, it does concern the building industry.

Section 1(1) sets out the power to

"make regulations ... with respect to the design, construction, demolition and conversion of buildings and the provision of services, fittings and equipment in or in connection with buildings".

As is appropriate for a building bill, this is the foundation provision.

**Brian Fitzpatrick:** Convener, can we decide now to cut out the building analogies? It would make life a lot easier at this time of the morning.

11:30

**The Convener:** We will keep having to come back to section 1 as we go through the bill.

The power set out in this section also applies to ancillary powers made under sections 2(1), 2(4), 8(6), 46 and 51(1) and to paragraphs 2, 3 and 4 of schedule 1. I apologise for not following our usual procedure for considering legislation, but this is how sections have been grouped in the explanatory notes. Personally, I found this approach helpful in following the bill.

I should point out that paragraph 3 of schedule 1, which deals with limited life buildings, marks a change from previous legislation. The Building (Scotland) Act 1959 defines limited life as 10 years; however, the bill simply refers to the phrase "limited life". That said, the committee does not feel that it is worth while taking the matter up with the Executive. I should also add that the negative procedure that has been suggested for powers specified in paragraph 4 of schedule 1, which refers to exemptions from building regulations, also appears to be okay.

Sections 3 and 4 are not mentioned in what I have described as the Executive's very helpful policy memorandum. However, they confer quite

extensive powers on the Scottish ministers. For example, section 3 provides for ministers, by direction, to relax building regulations for either a single building or a class of buildings. The Building (Scotland) Act 1959 contains the safeguard that direction cannot be given where building regulations are amended in such a way. As a result, it would be worth while asking the Executive why such a change has not been mentioned in the policy memorandum. Perhaps it could also outline the circumstances in which such a power would be used.

**Brian Fitzpatrick:** Murdo Fraser knows of a circumstance.

**Murdo Fraser (Mid Scotland and Fife) (Con):** What is that?

**Brian Fitzpatrick:** Were you not banging on about some listed building?

**Murdo Fraser:** Oh, you mean historic buildings.

If this is a policy change, we should ask the Executive whether it is intended and is not an oversight. Assuming that it is intended, I think that the Executive should provide an explanation for such a change.

**The Convener:** To be quite honest, I think that it might be an oversight. The policy memorandum does not mention it at all.

**Colin Campbell:** Let us assume that there is such a thing as an evil Executive.

**The Convener:** No. Until the Executive is shown and proven by this committee to be utterly evil, it shall remain blameless.

**Colin Campbell:** I was not suggesting this particular Executive. I would not do that, because that is not how I play the game. However, it is possible that there might be such an Executive sometime in the future.

**Brian Fitzpatrick:** Under an Alex Neil leadership, perhaps. [*Laughter.*] What a terrible thing to say. Disloyalty in the ranks!

**The Convener:** Well, we are asking the Executive anyway; there is no way it is getting off the hook.

Section 4 provides for the issuing of guidance by the Scottish ministers. However, under section 5, such guidance has some evidential effect in criminal proceedings. We might set some sort of precedent if we simply said, "That provision's okay."

**Brian Fitzpatrick:** Is that not a saving provision? Whatever charges have been brought against someone under construction or working place regulations, he or she could say "I am just a wee chap—I complied with the guidance and

followed best practice".

**The Convener:** So it gets them off the hook. In that case—

**Brian Fitzpatrick:** It might not necessarily get them off the hook, but it might add weight to their claim that they took all reasonable practical steps.

**The Convener:** However, if guidance can affect the course of a criminal trial, is that not the very reason why it should be laid before and considered by Parliament?

**Brian Fitzpatrick:** Yes, I suppose that it is.

**The Convener:** We will ask the Executive about the matter.

We have no comment to make on the power to make "procedure regulations" in section 30(1) or on the use of statutory instruments that are subject to annulment in section 35, which deals with fees and charges.

Section 1(4) sets out the power to modify paragraph 5(2) of schedule 1. The procedure proposed for the exercise of the power, which can amend primary legislation, is annulment. In such circumstances, the committee always considers whether it is happy about the use of the negative procedure.

**Murdo Fraser:** We should ask the Executive whether it has considered using the affirmative rather than the negative procedure in this respect, and see what its explanation is.

**The Convener:** That is fair, because there is no provision for prior consultation. As the power allows ministers either to add to or to subtract from a list in the schedule, either a provision for prior consultation should be included or the affirmative procedure should be used. We cannot do without both. We will ask the Executive to explain its approach.

We have no problem with section 21(2), which deals with building standards registers. The provision in section 28(3), which sets up the building standards advisory committee, marks a slight difference from provisions in the Building (Scotland) Act 1959. The 1959 act specifies that the intervals for submitting reports by the committee are to be not more than five years apart. Presumably the provision in the bill is another means for getting rid of excessive red tape.

Do members have any comments on section 33(1), which deals with regulations as to the form and content of applications, warrants and certificates?

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** It seems fair enough.

**The Convener:** We now move on to consequential, ancillary and commencement provisions. We will need to take a bit of time over section 1(5), which provides that any enactment may be modified by order

“if it appears ... that the enactment is inconsistent with, or is unnecessary or requires alteration in consequence of, any provision of building regulations”.

Although the Executive claims that that power is similar to the existing power in section 3(7) of the Building (Scotland) Act 1959, that might not be the case. That subsection was added by the Health and Safety at Work etc Act 1974, from which the 1959 act was specifically excepted.

**Colin Campbell:** So you think that someone has made a mistake.

**The Convener:** I do not know whether it is a mistake.

**Ian Jenkins:** There seems to be a suggestion that if future legislation wanted to provide for special standards for hospitals, for example, someone could use the provision to say, “Wait a minute—we’re grounded on the building regulations and don’t need to do anything more than that.” Any attempt to get more protection or special regulations for particular buildings could be challenged and perhaps fall on the basis of the provision. The Executive should be made aware that that is possible and asked if that is what it wants.

**The Convener:** I agree, although we may be straying into policy areas and trying to work out how it would work in practice. Personally, I think that because we have such imaginative means of building public works—

**Colin Campbell:** Do you mean technically?

**The Convener:** I was thinking of both financial and technical means, and because of them, I can see why we would want to ensure that standards are watertight. The provision as it stands leaves a bit of leeway that I would not welcome if I thought that it could be exploited. I apologise if that appears too close to the mark on policy, but it is difficult to separate the policy from the mechanical means of applying the policy. The two are practically one and the same.

Brian Fitzpatrick, have you any thoughts on the matter? Is it okay if we ask the Executive about the provision?

**Brian Fitzpatrick:** Yes, I am absolutely content.

**The Convener:** Good.

Section 49 provides for the general provisions of orders and regulations.

**Ian Jenkins:** That section is about delegating powers, and the problem is that, as it stands, it

would appear to allow the delegation of legislative functions. That does not sound like a good idea. It should be only ministers and the Parliament that have powers of legislation. We should ask whether that is what the Executive intended.

**The Convener:** If they did intend that, it is not a particularly clever way of formulating subordinate legislation.

Section 52 is an order making ancillary provision for purposes or in consequence of the bill, which seems to mean that the Executive can say, “If things don’t work out, we’ll change them.” We are not clear how it relates to section 1(5), which we have already discussed, but presumably we can include our query on how the two parts relate in our inquiry on section 1(5). Is that okay?

**Members indicated agreement.**

**The Convener:** Fine, and everything is hunky-dory with the standard commencement provision in section 54(1).

## Executive responses

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2002 (SSI 2002/465)

**The Convener:** Last week, Colin Campbell was concerned because he could not recall without the map, which we normally get, exactly what location the order referred to. We asked for a map, and the Executive apologised and assured us that we would get one next time.

**Colin Campbell:** Good.

### Scottish Local Government Elections Rules 2002 (SSI 2002/457)

**The Convener:** This is straightforward. The Executive has admitted that there was an example of defective drafting, as "inability to read" appears as "an ability to read". It has given us a gracious response confirming the error.

**Brian Fitzpatrick:** Did we look at how that happened? I wonder how "inability" becomes "ability". [Interruption.]

**The Convener:** Come in Gordon Jackson, you are welcome.

**Brian Fitzpatrick:** I cannot imagine that it was spell-checked from "inability" to "ability".

**The Convener:** I am sure that it has nothing to do with the spelling; we have sometimes received Friday afternoon instruments. However, the rules are fine, and we draw them to the attention of the lead committee and the Parliament because the Executive says that it will fix the error.

## Instruments Subject to Approval

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 14) (Scotland) Order 2002 (SSI 2002/482)

**The Convener:** No points arise on the order, and I am sure that it will be accompanied by the relevant map.

## Instruments Subject to Annulment

### Discontinuance of Legalised Police Cells (Ayr) Rules 2002 (SSI 2002/472)

**The Convener:** No relevant points have been identified. The rules just mean that you can no longer be banged up in Ayr. You are sent to Kilmarnock instead, where I am told that they have a good class of place; it was provided by private finance initiative or something.

**Murdo Fraser:** Very good value for money.

**The Convener:** Unfortunately that is about policy.

**Brian Fitzpatrick:** We could always go on a visit. It used to be a women's prison, did it not?

**The Convener:** No, that was Greenock.

**Brian Fitzpatrick:** No, I think it was Ayr.

**Gordon Jackson (Glasgow Govan) (Lab):** There is no prison in Ayr.

**The Convener:** There are just police cells, or used to be.

**Brian Fitzpatrick:** You obviously have not read your papers, convener. It says that in 1927 the Secretary of State did

"hereby direct that the twenty-six cells and one hospital room, constituting the female block of the buildings situated in the County of Ayr and Burgh of Ayr, discontinued as a Prison".

**The Convener:** I have to be honest. I did not read that bit, as I was just glad to hear that they were all going to Kilmarnock, because I hear that it is such a nice place.

**Ian Jenkins:** All the men are honest and all the women bonny.

**The Convener:** Now that that is sorted out, we can move on.

### Water Customer Consultation Panels (Scotland) Order 2002 (SSI 2002/473)

**The Convener:** No points arise on the order.

### Plant Health (*Phytophthora ramorum*) (Scotland) (No 2) Order 2002 (SSI 2002/483)

11:45

**The Convener:** This order is one for the lawyers.

**Murdo Fraser:** Aren't they all?



**The Convener:** This one is in particular. There are no points of substance on the order. It replaces an emergency order that was made earlier in the year to control imports of plants susceptible to an infection of the fungus that attacks, amongst other plants, rhododendrons and viburnum. The order breached the 21-day rule, but we can understand why.

There is a technical legal point that does not matter at the moment because we have already decided that there is no point of substance on the order to which we could take exception. However, the technical point harks back to the Interpretation Act of 1889, which probably should have been revoked or amended in 1978 but was not. The Interpretation Act 1978 did not contain a provision regarding an implied power to revoke orders. It conferred such a power only on rules, regulations and byelaws. Accordingly, when an act passed before 1978 confers power to make an order, unless that act contains a specific power to revoke such an order, there is no power to do so. The Plant Health Act 1967, under which the order is made, does not contain such a power.

We only mention this problem in passing, because although it is not important for the rhododendron or viburnum, it might have implications for the transition orders for this Parliament, which could well come before the committee.

**Ian Jenkins:** In order to avoid that confusion, it might have been possible for the Executive to make regulations under section 2(2) of the European Communities Act 1972. It might be worth asking why it did not.

**The Convener:** We should ask that, but if the Executive had done that, it would have been because this piece of legislation had not been picked up first. The normal rule of thumb is to use domestic legislation.

Are you wilting, Mr Jackson?

**Gordon Jackson:** No, I am fascinated.

**The Convener:** I thought you might be.

I thank everyone for their attendance and remind them that any questions on the Mental Health (Scotland) Bill should be passed to the clerk.

*Meeting closed at 11:48*



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