

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 12 November 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

31st 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

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

WITNESSES

James T Brown (Scottish Executive Health Department)

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 12 November 2002

(Morning)

[THE CONVENER opened the meeting at 11:50]

Delegated Powers Scrutiny

Mental Health (Scotland) Bill: Stage 1

The Convener (Ms Margo MacDonald): I welcome everyone to the 31st meeting in 2002 of the Subordinate Legislation Committee. We have no apologies this morning and all members are present.

We expected that today's meeting might be a mammoth one because we had informed the Executive that we wanted to hear from witnesses on the Mental Health (Scotland) Bill. Mr Brown from the Executive has joined us. Good morning, Mr Brown.

James T Brown (Scottish Executive Health Department): Good morning.

The Convener: I must apologise for dragging you all this way. We believe that considerable changes to the bill are expected. Also, in its initial response on the issue, the Executive agreed with some of our points. To cut a long story short, it might be better to agree or disagree at a more suitable time on the points that are likely to arise from the changes to the bill. We will defer further consideration of the bill until then. I am sorry that we kept you waiting.

James T Brown: Not at all. Thank you, convener.

Debt Arrangement and Attachment (Scotland) Bill (as amended at Stage 2)

The Convener: That was item 3 on the agenda. We now come to item 1, which is the Debt Arrangement and Attachment (Scotland) Bill, as amended at stage 2. This is where we turn into quite a fierce committee—no more Mrs and Mr Nice Guy. The Executive's second memorandum on the bill was not delivered to the committee until last night, which was too late for it to be practical for the committee to consider the response and to produce a report, which would have gone to the lead committee, before the bill is discussed at stage 3 in Parliament tomorrow. *[Interruption.]* I

am informed that the report would have gone straight to the Parliament, but that does not negate anything else that I have said. We were not given enough time.

We have raised similar issues before. If we are to do our job properly and if the Parliament is to be properly informed before it takes final decisions on bills, sufficient time for scrutiny must be allowed. As that has not happened in this case, there is little that we can say in our report.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): Have we been given an explanation or an attempt at explanation or mitigation for the delay?

The Convener: The timetable for the bill dictates everything. We are not responsible for that but, as far as I can work out, the changes to the bill have not come out of the ether.

Brian Fitzpatrick: Our remit covers the proposals for what is to be done by dint of subordinate legislation. Regardless of the arguments about what should be capable of being poinded or not poinded, or what should be capable of being seized or not seized, the Executive should have a pretty clear notion of what it intends to deal with through subordinate legislation.

The Convener: The problem is that there have been substantial amendments to the bill since we considered it previously. We had to consider the bill further.

Brian Fitzpatrick: Sorry, perhaps I am not explaining myself very well. I am not saying that we should not consider the bill or that the bill should not be amended. My complaint is that the bill team must get through those aspects of the bill that relate to the committee's remit. What has caused the delay on those aspects?

The Convener: I do not know. Perhaps that is one of the points about which we can inquire. I think that it is just assumed that we are the tail-end Charlies in the process, although I sincerely hope that that is not true. I think that I express the committee's view when I say that I am feeling a bit raw over the matter. In our strong letter to the Executive, we should ask why we appear to have been given so little consideration. Is that agreed?

Members indicated agreement.

The Convener: Are there any other points?

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): In paragraphs 14, 18 and 30 of the Executive's memorandum, our recommendations are dismissed without much explanation. The Executive says that it considered the matters but decided not to proceed in the way that we suggested. It would have been good if we had had a chance to think about those points and to comment on them before the stage 3 debate.

The Convener: Apart from no reason being given for the dismissal of our comments, it is also possible that paragraph 23 of the memorandum contains an inaccuracy because it claims that something that is yet to be done has already been done. We could have drawn that to the Executive's attention before the stage 3 debate. The whole business is unsatisfactory and we will write to the Executive in those terms.

Building (Scotland) Bill: Stage 1

The Convener: Item 2 on the agenda is the Building (Scotland) Bill at stage 1. We raised four questions with the Executive on the delegated powers in the bill. The first question concerned the relaxation of building regulations. The Executive has apologised for the way in which it dealt with the issue in the original memorandum. Is the committee content with that?

Ian Jenkins: The Executive says that if we recommend a provision similar to section 4(3) of the Building (Scotland) Act 1959, it will be happy to lodge an amendment to that effect.

The Convener: Is that satisfactory?

Murdo Fraser (Mid Scotland and Fife) (Con): We should welcome that. As the Executive has made the offer, we should take it up.

The Convener: Our second question concerned guidance documents for the purposes of building regulation. We asked for the Executive's comments on whether the guidance that is provided for in section 4 of the bill should be subject to some form of parliamentary procedure.

Ian Jenkins: In earlier discussions on the matter, we felt that we had a point, but that we did not wish to push it because of the technical nature of possible amendments to the guidance. Parliamentary scrutiny of such amendments might be a superficial exercise because we might not understand the technicalities. Perhaps we should not push the point.

12:00

The Convener: It is worth while to note that we are not shuffling off Parliament's responsibility for the quality of legislation and for the effect of subordinate legislation on rules, regulations, guidance and codes of practice, which are at the pointy end. We are being honest by saying that there is no sense in a procedure that cannot properly benefit the consumer or the industry because it requires more expert scrutiny than a parliamentary committee can provide.

Our third question to the Executive was on section 1(4), which gives ministers the power to modify paragraph 5(2) of schedule 1. We asked the Executive whether it had considered using the

affirmative procedure for the power in section 1(4) and why there is no provision for prior consultation for orders that are made under that power.

The Executive says that it has a long history of consultation in the building standards environment and that that will continue. Well, that is comforting, but I did not expect the Executive to say that it would no longer consult. Does anyone have strong feelings on this matter? I have strong feelings about it. I feel that there should be consultation. Are members willing to press that point with the Executive?

Bill Butler (Glasgow Anniesland) (Lab): I do not see why not. We might as well.

The Convener: Thank you.

Section 1(5) gives ministers the power to modify any enactment by order if they feel, for example, that the enactment is inconsistent with building regulations. Last week, we expressed concern about whether section 1(5) was acceptable as drafted. We asked the Executive to comment and to explain how the provision relates to the general provision in section 52.

The Executive accepts our view that the power in section 1(5) is wider than the existing power in section 3(7) of the Building (Scotland) Act 1959. However, the Executive probably does not agree with us on how wide a Henry VIII power the provision is in section 1(5). Would anyone like to comment?

Colin Campbell (West of Scotland) (SNP): The provision seems to allow the Executive to amend by subordinate legislation any provision in any act or any piece of subordinate legislation whenever those are passed or made. That would include the enactment of the Building (Scotland) Bill. That power seems a bit over the top.

The Convener: So you are happy that we should simply report to the lead committee that we are unhappy with the provision and think that its powers are too wide.

Brian Fitzpatrick: The provision is an exorbitant use of power.

Colin Campbell: What did he say?

Gordon Jackson (Glasgow Govan) (Lab): A lot.

The Convener: Okay. Section 49 is "Orders and regulations". The issue here is the delegation powers in section 49(2)(c). Do we want to press the Executive on the issue?

Ian Jenkins: I think that the power in paragraph (c) is unlikely to be used in practice and is just a theoretical possibility. I would let paragraph (c) rest as drafted.

The Convener: Is the committee content with that?

Members *indicated agreement.*

The Convener: We asked the Executive why section 52, on “Ancillary provision”, was needed, given the provisions of section 49. However, the Executive has given us no reason for both sections being in the bill. Therefore, our report to the lead committee will simply say that we do not think that both sections are needed.

Ian Jenkins: We suspect that one of the sections is redundant.

The Convener: Yes. That would be section 52.

Executive Responses

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

The Convener: Members have a separate legal briefing on the order on phytophthora ramorum. On this matter, the chair recognises the man from Govan.

Gordon Jackson: The legal adviser raised a genuinely interesting interpretation point about the vires of the order, which we asked the Executive to answer. I do not think that anyone could be 100 per cent sure of the answer to the question of the order's vires. We suggested that the order might be ultra vires. The Executive has given a detailed explanation of why the order is not ultra vires.

There are two issues to consider. One is that the Executive is probably right. A court would probably allow the Executive to use the order in the way that it proposes just to make the order workable in practice, although I have no doubt that someone could be paid a lot of money to put up an argument against the Executive's view. We came across a similar situation previously.

If the Subordinate Legislation Committee makes a point about an aspect of legislation being ultra vires, but the Executive says that it is happy with the legislation's legality, that is the end of the matter as far as the committee is concerned. We cannot do much if the Executive is happy with its decision and runs with it. If the Executive ultimately falls foul of somebody who challenges its decision in court, that is the Executive's problem at that stage. That kind of situation happens to every Government and Governments occasionally lose court cases. However, when we flag up an issue and the Executive's response is that it is happy that what it is doing is legally right, our response can only be that that is fine—if it works out.

The Convener: So our report to the lead committee will record that the Subordinate Legislation Committee regards the order as workable but thinks that a small legal doubt must remain.

Gordon Jackson: We have previously told Executive witnesses to the committee that they cannot be 100 per cent sure of a legislative provision surviving a legal challenge. They have often agreed that a court might successfully challenge a provision. That is what courts are for. Every so often Governments lose in court. However, the committee cannot do much about provisions that might be ultra vires. If the Executive is happy with a provision, it must run with the ball.

Draft Instruments Subject to Approval

Genetically Modified Organisms (Deliberate Release) (Scotland) Regulations 2002 (draft)

The Convener: Let us see how good members are on the draft regulations. We can query a couple of drafting points. However, there might be a mistake in the draft regulations because regulation 37 purports to amend SI 2002/800, which is an order in council made under section 93 of the Scotland Act 1998. A question of devolved competence arises in regulation 37. We must ask for further explanation from the Executive on that matter.

Members *indicated agreement.*

The Convener: In addition, the regulations implement directive 2001/18/EC of the European Parliament and the European Council. The Executive points out that the directive should have been incorporated into domestic law by 17 October 2002. Therefore, implementation is more than a month late. The European Committee took up the issue of the delay with the Executive and noted that the directive was made in March 2001. The Executive said that implementation has been delayed because it had to consult. Given the apparent length of time for the consultation, I presume that the Executive consulted in many tongues.

The regulations are subject to the affirmative procedure, which seems reasonable.

Budget (Scotland) Act 2002 Amendment Order (draft)

Brian Fitzpatrick: We should make known to the Executive all the points noted by the legal adviser.

The Convener: Yes. For example, there is a stray bracket before the word "Amendment" in article 1 and in article 2(3)(b)(v) a comma is missing after "5" in the first sum quoted. We are not letting the Executive away with that sort of thing.

Gordon Jackson: The Subordinate Legislation Committee does not stand for any nonsense.

Colin Campbell: We scrutinise the instruments properly.

Brian Fitzpatrick: Someone does.

Instruments Subject to Annulment

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuff) (Scotland) Amendment (No 2) Regulations 2002 (SSI 2002/489)

Colin Campbell: No points arise.

The Convener: However, the Executive might usefully have supplied a bit more information on the regulations.

Large Combustion Plants (Scotland) Regulations 2002 (SSI 2002/493)

Bill Butler: The regulations seem fine.

Civil Legal Aid (Scotland) Regulations 2002 (SSI 2002/494)

Brian Fitzpatrick: We are on to the perennial question of when is a wean not a wean.

The Convener: When it is no a bairn, ken?

Colin Campbell: When do you think that you ceased to be a wean, Brian? Or are you still working on that?

Brian Fitzpatrick: When you have three weans, I think that you can define yourself as no longer being a wean—but not always.

The Convener: Are they all like you?

Brian Fitzpatrick: Committed new unionists? Yes.

Colin Campbell: What a terrible thing to dump on your children.

The Convener: We must ask the Executive a straight question about the definition of "child" in regulation 2(1).

Bill Butler: When is a child not a child?

The Convener: Yes. When does a child stop being a child? On what date?

Is there a mistake in regulation 6(2)? Regulation 6(2) provides that

"an application ... shall be determined in terms of Part III below."

However, Part III is on the assessment of resources, which is a different issue from the determination of applications. We should ask the Executive to clarify that matter.

Brian Fitzpatrick: Do we just tiptoe round paragraph 76 of the legal briefing?

The Convener: Would you like to talk to the issue in paragraph 76, Brian? The issue is whether all couples have the same rights or whether some couples—

Colin Campbell: Do not have the same rights.

Bill Butler: Are more equal than others.

The Convener: Yes.

Colin Campbell: Thank you, George Orwell.

Brian Fitzpatrick: I presume that the issue in regulation 11 is the assessment of resources.

Gordon Jackson: Sorry—what does regulation 11 mean?

The Convener: At face value, it seems to mean that single-sex couples have more rights than mixed-gender couples.

Brian Fitzpatrick: Is that in relation to assessment of resources? I have not seen the printed regulations.

Gordon Jackson: Does the issue of gender come into the assessment of someone's eligibility for legal aid?

The Convener: Yes.

Gordon Jackson: Really? Well, I suppose it is worth asking the Executive about that. I did not notice that point.

The Convener: We can ask, "Did you mean this?" However, we should say to the Executive that we think that regulation 11 could do with redrafting because it is ambiguous.

Bill Butler: It lacks sufficient clarity.

The Convener: There you are—"lacks sufficient clarity" is much better. Regulation 11 could be misconstrued. We could find the Executive on the front page of the *Daily Record* again.

Brian Fitzpatrick: Again?

The Convener: Is there anything else?

Gordon Jackson: No.

Advice and Assistance (Scotland) Amendment Regulations 2002 (SSI 2002/495)

The Convener: Nul points.

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2002 (SSI 2002/496)

Colin Campbell: No points arise.

The Convener: The Executive said that it will consolidate the regulations. We thank it for that.

Instruments Not Laid Before the Parliament

Pollution Prevention and Control (Designation of Council Directives on Large Combustion Plants and National Emission Ceilings) (Scotland) Order 2002 (SSI 2002/488)

Colin Campbell: The order is okay.

The Convener: Just as well. I thank members for their attendance and I will see you again next week.

Meeting closed at 12:13.

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