

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 26 November 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

33rd 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

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 November 2002

(Morning)

[THE CONVENER *opened the meeting at 11:26*]

Delegated Powers Scrutiny

The Convener (Ms Margo MacDonald): I welcome everyone to the 33rd meeting of the Subordinate Legislation Committee in 2002. We sure do pack 'em in.

We have a couple of things to get rid of this week—no, not to get rid of, but to dispose of in the time-honoured fashion: the Dog Fouling (Scotland) Bill and the Agricultural Holdings (Scotland) Bill, both at stage 1.

Dog Fouling (Scotland) Bill: Stage 1

The Convener: We have had a letter from Keith Harding, the sponsor of the bill, answering some of the questions that we had raised. He has been very co-operative in dealing with our concerns.

On the form of fixed-penalty notices in section 6(3), Mr Harding has said that he obviously has no experience of operating fixed-penalty schemes, nor could he predict the operational issues that might arise when the scheme is finally implemented. He is therefore pleased that the committee recognises that there may be further matters that need to be set out on the form. We were querying whether or not they could be removed. However, Mr Harding has agreed to amend the procedure for any order under the powers of the bill to be subject to the affirmative procedure. We may agree that that is a reasonable compromise.

Murdo Fraser (Mid Scotland and Fife) (Con): We should welcome that concession from Mr Harding.

The Convener: Section 9(2) concerns the amount of the fixed penalty and allows Scottish ministers to alter that amount and therefore increase or decrease the relative seriousness of the offence. We also queried the fact that that power was to be subject to the negative procedure, because it impacts on the policy intention. Mr Harding has replied that there is a difference between amending a sum to take account of changes in the value of money and

amending a percentage of another figure, because the latter has more far-reaching consequences. He says that, where the negative procedure is prescribed, it tends to be prescribed because the limits of the exercise of the power are set out or implied in the power. However, he has agreed to amend the procedure. Once again, it is up to the committee to decide whether that is a reasonable amendment on Mr Harding's part.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): We should go with that compromise.

The Convener: Right. The next question relates to the Criminal Procedure (Scotland) Act 1995. The committee asked whether Mr Harding had considered including a provision to the effect that an order made under section 9(2) would not affect the penalty for an offence that was committed before the order came into force.

Obviously, Scottish ministers are bound to act in a manner that is compatible with the European convention on human rights. Mr Harding intends to lodge an amendment providing for orders under section 9(2) to be subject to the affirmative procedure. Therefore, he thinks that it is unnecessary to include a provision specifying that an order under that section will not affect the punishment of an offence committed before the order comes into force. Do members accept Mr Harding's explanation?

Members indicated agreement.

Agricultural Holdings (Scotland) Bill: Stage 1

11:30

The Convener: The committee raised a number of points on the bill with the Executive and may be satisfied with the Executive's answers.

Section 26 concerns transfers not requiring notice. The section lists those transfers of land, notice of which does not require to be given to a landlord and that do not trigger the right to buy. Section 26(6) allows the Scottish ministers to alter those provisions by order. As the provision is important, we asked the Executive to provide further justification of the power to amend the primary legislation, which we normally frown upon, as members know.

The department is sensitive to our concerns, but points out that the power mirrors a similar power in section 39 of the Land Reform (Scotland) Bill.

The Executive's response explains the interrelationship between the order making powers in sections 26(6) and 27(6) of the Agricultural Holdings (Scotland) Bill and that in section 39 of the Land Reform (Scotland) Bill and why the

trigger mechanisms in sections 26 and 27 of the bill mirror those in section 37 of the Land Reform (Scotland) Bill, as introduced. The response made sense to me.

Ian Jenkins: We should approve the power, which will be subject to the affirmative procedure anyway, so there will be scrutiny. We should not delay matters when that safeguard exists.

The Convener: Section 27 of the bill is on the right to buy. The section confers the right to buy on the tenant and sets out the circumstances that trigger the right. Section 27 is linked to section 26, which we have just discussed. In view of the pivotal importance of section 27(6), which allows the Scottish ministers to amend the list of circumstances by order, subject to the affirmative procedure, we asked the Executive to provide further justification of that power.

The Executive's response draws our attention to what it said about section 26(6) and the equivalent power in the Land Reform (Scotland) Bill.

Murdo Fraser: We accepted the point that was made on section 26(6). The same point applies, so we should accept what the Executive has said.

The Convener: Okay.

Section 32 is entitled "Valuation etc.: further provision". Sections 30 and 31 make detailed provisions as to the valuation of land for the purposes of sale to the tenant and section 32(7) allows ministers to make further provision by order in connection with such matters. Because of the drafting, we were not sure whether the Executive would get into the business of judging particular cases. The Executive has reassured the committee that there is no question of the bill's seeking to create a hybrid instrument—I did not realise what a hybrid instrument is, but now I know.

The Executive assumes that the committee's concern relates to the words

"or in a particular case",

in section 31(5), which was the phrase that made us think that the guidance might deal with individuals. The Executive says that those words are designed to indicate that the guidance can be issued either at a general level or for a specific set of circumstances. However, the reference to a particular case is not intended to mean that the guidance should be directed at a particular outstanding valuation that is as yet unresolved by the two parties.

If the committee still thinks that the wording gives rise to concern as to its interpretation, the Executive will consider whether it is necessary to amend the wording of section 31(5).

Ian Jenkins: The Executive should reconsider the drafting to make the position clear, as the meaning is slightly hazy at the moment. Although the Executive has given us an explanation, section 31(5) may not be clear to people who read the bill without having heard our deliberations or seen the submission that we received from the Executive. It is worth asking the Executive to think again about the matter before the bill goes through.

The Convener: I agree. The issue is at the very kernel of the bill.

Section 55(2)(b) will insert proposed new subsection 24(5) into the Agricultural Holdings (Scotland) Act 1991. Section 55 of the bill will further restrict the right of a landlord to issue notices to quit. Section 55(2)(b) provides that certain expressions that are not defined are to be defined in regulations made by the Scottish ministers. We asked the Executive to comment further on whether it was appropriate that a delegated power should determine the terms "economic and social benefits" and "community". We also asked for further comment on the appropriateness of using the negative procedure.

We would normally think that the affirmative procedure would be needed for this sort of thing. Do members agree? The Executive says that an alternative would be to provide guidance rather than legislation.

Murdo Fraser: The Executive also says that it might lodge amendments at stage 2, so that the definition of the terms would appear in the bill. If the Executive either did that or made the power subject to the affirmative procedure, that would be a positive step.

The Convener: Does anyone have a preference?

Ian Jenkins: We should raise the issue with the Executive and let it consider the matter. Either of those two procedures would be an improvement on the current proposal. We will see what we think when the Executive responds.

The Convener: Okay.

Section 58 deals with the rights of certain persons where the tenant is a partnership. The section is intended to ensure that no one can thwart a tenant's right to buy. Does anyone have any comments on the Executive's response on section 58(9)? The Executive does not seem to share the serious concern that the committee raised.

Ian Jenkins: The wee problem with all of this is that it is thought that, during the passage of the bill, amendments might be made that would change the perspective.

The Convener: Will we draw the issue to the attention of the lead committee?

Ian Jenkins: Is that what we should do?

The Convener: Does Murdo Fraser have any thoughts on the matter?

Murdo Fraser: The question that arises is whether ministers should be given the power to amend lists. In the past, we have taken rather a cautious attitude on such things.

Bill Butler (Glasgow Anniesland) (Lab): Perhaps we should draw it to the attention of the lead committee, because there are doubts as to whether section 58(9) is proper procedure.

The Convener: Okay. We will say that we note the Executive's reply, but that we remain concerned that, although the matter is certainly one for delegated powers, there is broad scope to affect the impact of the legislation if ministers have a list to which they can add or from which they can subtract.

Section 77(4) is entitled "Meaning of 'family'". Do we want that to be in the bill? Is the Executive going to keep that in the bill, because there is already a broad definition? Perhaps that is one thing that has yet to be decided. As a committee, perhaps we should wait to see what comes back to us.

Ian Jenkins: That is right. Other legislation that is related to the bill is going through the Parliament, and there is no doubt that when this bill comes back to us at a later stage it will have been changed.

Bill Butler: I agree with Ian. It is better to wait and see.

The Convener: Okay, we will do that.

Ian Jenkins: What the Executive said has been helpful in setting the scene, but there is a strong implication that—

The Convener:—the section will not appear like that when the bill comes back.

Homelessness etc (Scotland) Bill: Stage 1

The Convener: The bill contains a number of proposals that are intended to prevent homelessness and provide for a more effective response to homelessness. There are proposals relating to the various tests that are applied by local authorities to homeless persons to establish whether they are entitled to accommodation: the priority need test, the intentionally homeless test and the local connection test. In addition, there are proposals in respect of possession proceedings taken by landlords and mortgage lenders. There is also a question of Henry VIII powers.

Section 2 is on the abolition of the priority need test. It gives Scottish ministers the power to appoint a day from which local authorities will no longer take account of whether a homeless applicant is in priority need when assessing their duties towards that applicant. As the committee will appreciate, that is very important.

Ian Jenkins: It looks to me as if the use of the negative procedure for the timing of the implementation is okay. If the act were being amended, the affirmative procedure would be necessary and it looks as if that is also in order, and that we will have the appropriate level of parliamentary scrutiny.

The Convener: The change to the priority need test is a big measure. At the very least, it should be subject to the affirmative procedure.

I am informed that orders made under this section regarding when it comes into force will be subject to the negative procedure, which seems all right. Where an order that is made amends the Housing (Scotland) Act 1987, it will be subject to the draft affirmative procedure, as specified in section 2(5). That concern would appear to have been met.

Section 7 amends the Housing (Scotland) Act 1987 to introduce two powers, one to modify section 33 of the act and one to issue a statement on the exercise of the power to modify that section.

11:45

Murdo Fraser: The same issue arises in section 7 as arose in section 2. We need a provision in new section 33A of the 1987 act to say that orders that amend the 1987 act must be subject to the affirmative procedure, although other orders can be subject to the negative procedure.

The Convener: Right. We will inform the Executive of that. I am surprised that the Executive has not done that.

Section 10 gives notice to local authorities of proceedings for possession and the enforcement of standard securities. That is okay. Just as a passing comment, could a local authority be required to give notice to itself under section 10? We are not sure. I am not going to go to the wall on that one, but it is an interesting question.

Section 13 sets out the commencement and short title. A query is raised over commencement orders including transitional provisions, but I think that it is of no import.

Executive Responses

Scottish Local Government Elections Regulations 2002 (draft)

The Convener: We raised four points. The Executive has stated its intention to bring forward an amending instrument at the next available opportunity. That is pretty civil of the Executive, but as it is a draft order, the Executive could simply have relayed that fact. Why does it need to bother to amend it? We can ask the Executive that.

Ian Jenkins: The Executive has been quite handsome in its recognition of the points that we raised throughout the process.

The Convener: We will write, "Dear Executive"—

Colin Campbell (West of Scotland) (SNP): We can tell the lead committee about it too.

Murdo Fraser: We can put that in our report.

Cairngorms National Park Elections (Scotland) Order 2003 (draft)

The Convener: This is another draft order, which is similar to the order for the Loch Lomond and the Trossachs national park. We want the Executive to take another serious look at the order.

There is defective drafting, which makes an unusual use of the powers. The order was based on electoral legislation, which allows for sanctions if people do not keep to the rules. However, the order does not contain such sanctions. Because of that, we question the basis of the order.

Bill Butler: The position seems anomalous.

Colin Campbell: The Executive said that it was trying to keep the order simple and that it intentionally missed out sanctions, which seems a bit quaint.

The Convener: It is odd that the order says that candidates can spend only £250 on their election, but does not say what happens if they spend £255.

Colin Campbell: Perhaps they get elected.

Bill Butler: We should note our concern.

The Convener: We will draw that to the attention of the lead committee and the Parliament. Clarification could be supplied. Do I need to go into detail? We have said what concerns us about the measure.

Murdo Fraser: Our report to the lead committee should reflect the comments that were made at our previous meeting.

The Convener: Okay. Is that agreed?

Members *indicated agreement.*

Plastic Materials and Articles in Contact with Food (Amendment) (Scotland) Regulations 2002 (SSI 2002/498)

The Convener: The regulations are another of those clever measures from the European Union. We asked the Executive about defective drafting of the preamble and to explain some other drafting.

Murdo Fraser: The Executive said that it saw no need to refer to the consultation in the preamble.

The Convener: We are at variance with other UK legislatures on that. We consult on our domestic legislation on the subject. [*Interruption.*] I say hi to Brian Fitzpatrick, who has just entered the room. It is good form to consult on European legislation, too. We are the odd ones out in not doing that. It is reasonable to let the lead committee know that we have noticed that. Is that agreed?

Members *indicated agreement.*

Taxi Drivers' Licences (Carrying of Guide Dogs and Hearing Dogs) (Scotland) Regulations 2002 (SSI 2002/500)

The Convener: The Executive agreed with some of the six points that we raised with it. We asked why the regulations do not prescribe the category or the disability as the enabling power requires, but rely solely on a definition in regulation 1(4). We might not have made ourselves clear to the Executive, because it appears to have misunderstood the point of that question. We were not questioning the Executive's power.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): That is a generous interpretation.

The Convener: If you want to be less generous, on you go.

Brian Fitzpatrick: Not at all. Is not Advent about to start? We should all try to be generous at least until the new year.

The Convener: I would love to hear you being less generous than me. On you go.

Bill Butler: Brian Fitzpatrick is overcome with generosity.

Brian Fitzpatrick: Were you waiting for me?

The Convener: Yes.

Colin Campbell: We have been waiting for the past three quarters of an hour.

Brian Fitzpatrick: I was dealing with constituency business, Colin. You would not know about that.

Colin Campbell: Mine's bigger than yours—my constituency, that is.

The Convener: The regulations rely solely on a definition to introduce a category of dog not covered in the enabling power. As we have pointed out before, that can have serious consequences. In producing delegated legislation, drafters must adhere closely to the terms of the delegation, including the wording of the enabling power, to be certain of being within the terms of the delegation. In the order, the assistance dog is not properly prescribed as another category of dog, which is required by the enabling power. For those reasons, we believe that the regulations appear to be defective.

Another, perhaps less serious, drafting error concerns the definitions of hearing and guide dogs in regulation 1(4).

Ian Jenkins: The Executive has accepted that one.

The Convener: Yes, so we will draw that to the attention of the lead committee and the Parliament.

We questioned a discrepancy in the dates that the regulations come into force. The Executive has accepted that there is an inconsistency and thanked the committee for pointing it out. The regulations would come into force on 2 December, but the prescribed condition would apply only to licence applications made on or after 3 March 2003. The Executive explained that that is to give applicants due notice of the change in the licensing condition.

Bill Butler: That seems reasonable.

The Convener: The Executive will introduce an amending instrument to remove the discrepancy and issue it free of charge. As I told you all, this is a lovely Executive.

There was a point about whether the dog would be wearing the right jacket.

Bill Butler: Who could forget it?

The Convener: The provision is still ambiguous and therefore constitutes imprecise drafting. We should point that out to the lead committee.

Instruments Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 15) (Scotland) Order 2002 (SSI 2002/511)

The Convener: Are there any points?

Bill Butler: The order seems absolutely fine.

The Convener: Excellent.

Instruments not Subject to Parliamentary Control

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 10) (Scotland) Revocation Order 2002 (SSI 2002/510)

The Convener: Are there any points?

Bill Butler: The order is the same as the previous one.

The Convener: No, it is a revocation order. You did not notice that.

No points arise on the order.

Instruments not Laid Before the Parliament

Tobacco Advertising and Promotion Act 2002 (Commencement) (Scotland) Order 2002 (SSI 2002/512)

The Convener: There is a technical query, the source of which lies in the fact that the matter is reserved, but depends on Scottish ministers to trigger it. That seems odd to me, although others may disagree. However, we should find out why and how that comes about, considering that it might happen again.

Bill Butler: I do not see any harm in asking.

Colin Campbell: We should also ask why it has been made as a statutory instrument. The relevant enabling provision was not in force when the order was made.

The Convener: That would appear to be a reasonable question to ask. The enabling power was not in place when the order was made.

Ian Jenkins: The Executive is just getting ahead of itself. The problem is just a kink in the regulations that we should point out. The other point was whether the matter is reserved, but it is clear that the legislation allows Scottish ministers to introduce such orders. However, there are difficulties about the timing.

The Convener: I am just curious, that is all. We will ask those questions.

That is all for this morning. Thank you for your attendance, and I will see you next week.

Meeting closed at 12:00.

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