

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 17 December 2002  
*(Morning)*

Session 1

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## SUBORDINATE LEGISLATION COMMITTEE

36<sup>th</sup> 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 17 December 2002

(Morning)

[THE DEPUTY CONVENER *opened the meeting at 11:20*]

**The Deputy Convener (Ian Jenkins):** Welcome to the 36<sup>th</sup> meeting of the Subordinate Legislation Committee this year. We have received apologies from Margo MacDonald. She is attending this morning's meeting of the Finance Committee, and may join us later. Bill Butler is en route, but it appears that he is stuck on a train.

### Delegated Powers Scrutiny

**The Deputy Convener:** The first item is scrutiny of delegated powers, starting with the Prostitution Tolerance Zones (Scotland) Bill, which is at stage 1. As I suggested informally to the committee prior to the meeting, we might delay our consideration of that item until Margo MacDonald turns up—not that our task is particularly onerous. We will return to that bill later. Is that okay?

**Members indicated agreement.**

### Commissioner for Children and Young People (Scotland) Bill: Stage 1

**The Deputy Convener:** There is only one piece of subordinate legislation associated with the Commissioner for Children and Young People (Scotland) Bill. It relates to the services for which the commissioner may charge. Our legal advice is that the provisions are unexceptionable; there does not seem to be anything in them to trouble us. Is that fair enough?

**Members indicated agreement.**

### Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill: Stage 1

**The Deputy Convener:** The next bill to consider is the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill. We only got the legal brief about the bill this morning. It is a rather complex piece of legislation. We may, if we wish, postpone consideration of the bill until our next meeting, which is just after new year. I think that we should do that. Is that okay?

**Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab):** The first meeting of the Salmon and

Freshwater Fisheries (Consolidation) (Scotland) Bill Committee is tomorrow, but it deals just with housekeeping matters, I think.

**The Deputy Convener:** I think that we need more time to consider the bill. There are reasons why the legal advisers would also like extra time in which to consult others. Is that okay with the committee?

**Members indicated agreement.**

### Local Government in Scotland Bill: Stage 2 (as amended)

**The Deputy Convener:** A large number of new subordinate legislation provisions were introduced into the Local Government in Scotland Bill by amendment at stage 2. We should put it on record that the legal advisers received an analysis of the new delegated powers rather late. There was a considerable delay on the part of the Executive in producing the memorandum on the new powers. That hampered our advisers greatly, and consequently our legal brief was late and our work has been hampered.

Further, there are problems with the quality of the memorandum and the fact that it omits some amendments. Also, some undertakings that were given to the committee were disregarded. Perhaps the committee should put it on record that we are not too happy that the memorandum was so long in arriving, which gave us some difficulties.

The bill contains several delegated powers. The first is in section 11A(2), which makes special provision for local authority contracts for the construction of buildings or works and was added by amendment. The section deals with the agreements that local authorities enter into with other persons for the construction or maintenance of any buildings and works. Do we agree that the use of delegated powers is suitable and that the negative procedure is appropriate?

**Members indicated agreement.**

**The Deputy Convener:** Section 13 deals with the disposal of land by local authorities for less than full value. We considered that provision at stage 1 and accepted that the matter was suitable for subordinate legislation. Amendments were made at stage 2 to make the regulations subject to the negative procedure and to include a consultation requirement in the bill, which we like. We welcome those improvements.

Sections 19A(1) and 19A(2)(e), which deal with the establishment of corporate bodies to co-ordinate and further community planning and other matters, contain delegated powers. Section 19A was inserted at stage 2. We note the Executive's undertaking to amend the procedure to which the order-making power in section 19A(1) is subject,

which would help to clarify the issues about which we had some worries. It is appropriate to make the powers subject only to the affirmative procedure. I am sure that the committee welcomes the Executive's undertaking to lodge an amendment at stage 3. The negative procedure for section 19A(2)(e) is what we wish to have.

Section 23 concerns limits on the power under section 21. Subject to members' approval, the use of delegated powers seems suitable. The proposed negative procedure seems appropriate. Is that agreed?

**Members indicated agreement.**

**The Deputy Convener:** Part 4B of the bill deals with rating. Section 25A provides for rate relief on former agricultural premises and will introduce a new time-limited rate relief scheme for former agricultural lands and buildings that are now used for non-agricultural purposes. We have no comment on the background to that.

New paragraph 3A(2)(a) of schedule 2 to the Local Government and Rating Act 1997 deals with the maximum rateable value, and the use of delegated powers for purposes such as that proposed is well precedented. We can approve that power. Is that fair enough?

**Members indicated agreement.**

**The Deputy Convener:** New paragraph 3A(8) of schedule 2 to the 1997 act restricts the period of the scheme to five years and new paragraph 3A(9) gives the Scottish ministers a power to extend or further extend the life of the new scheme beyond five years. The scheme is intended to be a transitional measure to help farmers to move into new types of business and is not supposed to provide long-term subsidy. The power in new paragraph 3A(9) gives the Parliament and ministers the option to continue the scheme at the end of five years, if that is considered appropriate. Does anybody want to ask the Executive about any aspect of that power?

**Murdo Fraser (Mid Scotland and Fife) (Con):** The Executive proposes that the power be subject to the negative procedure; we should ask whether that is appropriate. Given the circumstances, we should ask the Executive if it would not have been better to use the affirmative procedure.

11:30

**The Deputy Convener:** Okay. We can ask the Executive.

I move on to new paragraph 4(2B)(c), which deals with stud farms. As far as we can see, it seems reasonable to include those powers in the bill. Is that agreed?

**Members indicated agreement.**

**The Deputy Convener:** Section 25E sets out the power to combine lands and heritages that are situated in more than one valuation area. The issue is complex, but in legislative terms it would appear that no points arise with regard to the powers. It looks as if the annulment procedure that is proposed provides a sufficient degree of scrutiny for the exercise of the powers.

We move on to part 4D, which relates to capital expenditure and grants. Section 25G, which was added to the bill by amendment at stage 2, places local authorities under a duty to manage their own capital expenditure. The new section also requires them to comply with regulations that are made by Scottish ministers. Sections 25(3) and 25(4) provide that the regulations may require authorities to determine, report on and publish information about their capital expenditure plans, but they may require local authorities to comply with a code of practice that governs how determinations and plans should be calculated and kept under review.

In line with our thinking in the past on such provisions, I suggest that we agree that it is appropriate for detailed and technical provisions relating to capital expenditure to be contained in subordinate legislation. The committee may, however, wish to consider whether the power should be exercisable by negative instrument or whether the greater degree of scrutiny that is afforded by the affirmative procedure is required. Will we ask the Executive about that?

**Ms Margo MacDonald (Lothians) (SNP):** Yes.

**The Deputy Convener:** Thanks, Margo.

Section 25H relates to the imposition of capital expenditure limits. The provision allows the Scottish ministers to set by order the maximum amounts that local authorities in general may allocate to capital expenditure. Section 25H also allows ministers to set by direction the maximum amounts that a particular local authority may allocate to such expenditure. Section 25H(4) provides that after an order or direction has been made, the Scottish ministers must lay a report before the Parliament containing information about the order or direction and the reasons for making it.

I return to the point that I made at the beginning of our discussion about the quality of the Executive's memorandum, as it applies to section 25. The Executive has not referred to this new power in its memorandum to the committee. We should ask the Executive for an explanation for this omission. Even if information on the provision had been included in the memorandum, we need to look at the legislation, as the order-making power does not appear to be subject to any procedure. I suggest that we seek the Executive's explanation for that.

**Ms MacDonald:** It is a big power.

**The Deputy Convener:** Yes.

**Ms MacDonald:** We should ask the Executive about that, although I am sure that it is an omission.

**The Deputy Convener:** I agree. Someone has made a mistake in leaving it out, but it is an important point to have missed out. We should give the Executive a wee rap over the knuckles for that.

**Brian Fitzpatrick:** Is that not on the dividing line between the responsibilities of ministers and the powers conferred on them? Although the omission is bizarre, surely the power is nothing other than a function of ministers, whether they exercise it explicitly or by turning off the tap.

**Ms MacDonald:** Does that mean explicitly that they will exercise a power over local authorities?

**Brian Fitzpatrick:** They do anyway.

**Ms MacDonald:** The process of turning off the tap is well understood. To take an arbitrary decision on a limit to capital expenditure—

**Brian Fitzpatrick:** In what way will the decision be arbitrary? Ministers will take the decision.

**The Deputy Convener:** We can seek an explanation.

**Ms MacDonald:** Are you saying that we do not need to bother asking because they control the money anyway?

**Brian Fitzpatrick:** It is their money and it sounds as if they are responsible for it. There are other routes for exercising that responsibility. I am not particularly fussed.

**Ms MacDonald:** It is an interesting question.

**The Deputy Convener:** I do not think that we are taking a view. We are asking why the power is not mentioned and explained in the memo. There might be a satisfactory explanation; in any event, we should ask for an explanation.

We will now deal with section 25J(4), which relates to the power to apply sections 25G to 25I. The power extends the capital expenditure and grants provisions of the Local Government (Scotland) Act 1973 to other bodies. Those provisions can be extended only to

“persons having functions appearing to ... Ministers to be similar to those of local authorities”.

The committee will be pleased to note that the Executive has said that it will lodge an amendment at stage 3 to include consultation provisions in the bill.

**Colin Campbell (West of Scotland) (SNP):** That is quite important.

**The Deputy Convener:** We welcome that commitment.

We will move on to section 29(2). Section 29 is entitled

“Suspension of requirement to advertise principal teacher posts”.

At stage 1, the Executive undertook to lodge amendments at stage 2 that would make an order under section 29(2) subject to negative procedure. No such amendments were lodged and the memorandum gives no explanation for the omission. We might wish to ask the Executive about that.

**Brian Fitzpatrick:** We should ask why that was the case.

**The Deputy Convener:** We move on to part 5, which is the miscellaneous part of the bill. Section 30B, on the investment powers of local authorities, is complex. I hope that members have prepared thoroughly. Section 30B was added to the bill by amendment at stage 2. It provides that local authorities may invest money, in accordance with regulations that Scottish ministers make. In those regulations, Scottish ministers can specify the kinds of investments that local authorities may make.

Section 30B(2)(c) states that the regulations may provide

“for the amendment, disapplication or repeal of any enactment relating to the subject matter of the regulations.”

The fact that the phrase “any enactment” includes previous Westminster legislation turns the section’s provisions into Henry VIII provisions. Such provisions are usually subject to the affirmative procedure. The use of delegated powers is not objectionable, but there is a question about the Henry VIII provisions coming under more scrutiny. Is it agreed that we ask the Executive to consider that issue?

**Members indicated agreement.**

**The Deputy Convener:** Section 30C relates to grants for water supplies. There is a bit of legislative twisting and turning, whereby the suspension of one provision can blottoer the rest of the legislation. The issue is complicated, as the provisions appear to be circuitous.

**Colin Campbell:** In that case, should such a power not be subject to the affirmative procedure?

**The Deputy Convener:** We can certainly ask that question, and find out how the effect of this section could be suspended given that the power to make regulations would itself be suspended when the power is exercised. In any event, whatever power it is should be subject to the affirmative procedure.

Finally, I am advised that there are no important points to raise on the power contained in section 30D, which concerns the establishment of local authority funds other than the general fund, or on the negative procedure to which it is subject.

As the *Official Report* will show, our esteemed convener returned from the Finance Committee in the course of the previous fascinating discussion.

**Ms MacDonald:** Aye, the wilds of the Finance Committee. It is not like our dear committee, deputy convener.

**Gordon Jackson (Glasgow Govan) (Lab):** It is full of bad people.

### **Prostitution Tolerance Zones (Scotland) Bill: Stage 1**

**The Deputy Convener:** We return to item 1 on the agenda, which is consideration of the Prostitution Tolerance Zones (Scotland) Bill, now that we are lucky to have the expert to aid us in our consideration thereof.

The bill confers only one power on Scottish ministers. The power to designate prostitution tolerance zones is contained in section 5(8) and is exercisable by statutory instrument. I should point out that the zones are to be designated by local authorities, not ministers, which is something that I am sure no member would argue with.

**Colin Campbell:** I am sure that they would not.

**The Deputy Convener:** I think that it should be left to local authorities myself.

As far as the appeals procedure set out in section 5 is concerned, it has been drawn to our attention that there is a question about the interrelation between sections 5(7) and 5(8). Section 5(7) might be interpreted as including the power to make an order under section 5(8) within the delegation conferred by the former subsection, although it is doubtful whether that is what is intended. In other words, the Scottish ministers have passed on powers to other people, and one of the subsections in section 5 suggests that those other people might be able to make regulations.

**Ms MacDonald:** That is certainly not the intention. I would obviously undertake to improve the syntax to make things clearer when we reach the stage of lodging amendments to the bill. I am really sorry if the committee feels that I have to do so. I have brought shame on all of you.

**Brian Fitzpatrick:** I know that we should not get into policy issues around the bill; however, I have some concerns. I acknowledge that there are policy reasons why the local police, local communities and local ward councillors are thought best placed to operate designations. That said, the member's proposal is an innovation as

far as the existing common law of Scotland is concerned, and I am concerned about the bill's more general impact. I suppose that I am saying that it is the thin end of the wedge. Although it seems that the majority favours the provision, I want to put it on record that I do not subscribe to the view that the matter is simply for local decision making. There are wider issues to consider.

**The Deputy Convener:** I bow to your superior knowledge about the procedures and I am happy to put that on the record.

**Ms MacDonald:** I am not absolutely certain that it is such a departure because, as regards road traffic legislation, local authorities have considerable subsidiarity or devolutionary powers.

**Brian Fitzpatrick:** I am not happy to align the two.

**Ms MacDonald:** No, they are not the same, but we are questioning whether it is good legislative practice for local authorities to have that amount of empowerment. Like Brian Fitzpatrick, I am a great believer in the devolution of power. Given that fact, I would have thought that that was an excellent, textbook example of where power is devolved to local authorities to deal with a situation for the management of which they obviously have the most qualifications.

11:45

**Brian Fitzpatrick:** My concern is that there are wider issues than that. It is not just about designating a zone. Designating a zone as an area within which prostitution will be tolerated will restrict the rights, or otherwise, of the police to stop and interview. It will also restrict the right of the fiscal or the Lord Advocate in relation to who they may or may not prosecute.

**Ms MacDonald:** I have received legal advice from the fiscal service, advocates, sheriffs and so on. I assure Brian Fitzpatrick that as the only offence that will be tolerated within a designated zone is that of soliciting or loitering, any other offence will be treated in exactly the same way as if it were committed anywhere else. That, in fact, will not restrict the ability of police to interview or whatever.

**The Deputy Convener:** This is an interesting discussion that should be on the record. It will form part of the record that will be forwarded to the lead committee that will consider the issue in further detail. The discussion has raised important points.

**Ms MacDonald:** Is it all right if I tidy up the grammar to make sure that nobody thinks that section 5(8) could be triggered by anyone other than a minister?



**The Deputy Convener:** The committee would be grateful if you could do that. Does that conclude our discussion on the bill?

**Members** *indicated agreement.*

**The Deputy Convener:** I welcome Bill Butler, whose travel arrangements have produced a satisfactory conclusion.

**Colin Campbell:** Was he detained?

**The Deputy Convener:** I did not notice your arrival, Bill, otherwise I would have welcomed you earlier.

**Bill Butler (Glasgow Anniesland) (Lab):** That is very kind of you, convener.

**The Deputy Convener:** Do you want to take over now, Margo?

**Ms MacDonald:** Not really. There is not much to do apart from the instruments, and you are doing a grand job, Ian. Oh, there is an instrument on amnesic shellfish. I have been too generous.

## Executive Response

### Scottish Parliament (Disqualification) Order 2003 (draft)

**The Deputy Convener:** We asked the Executive a question about the reference to a tribunal that appeared to have been split into three separate tribunals. The references in the legislation therefore seemed imperfect to the committee. The Executive has acknowledged that the entry could have been worded slightly differently, although it takes a somewhat legalistic view about whether it is actually inaccurate. We could perhaps draw this instrument to the attention of the lead committee and the Parliament on the grounds that its form or meaning could be clearer. It is not a great disaster.

**Ms MacDonald:** It could be sent to the Plain English Campaign for assessment. It seemed to me that plain English would have sorted it out.

**The Deputy Convener:** Given the fact that you have got to change the English in your bill—

**The Convener:** Does anyone else agree that that was an abuse of the chair?

**Colin Campbell:** No.

## Draft Instrument Subject to Approval

### Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2003 (draft)

**The Deputy Convener:** Item 6 is a draft instrument subject to approval.

**Colin Campbell:** The order seems okay. No points arise from it.

## Instrument Subject to Approval

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 16) (Scotland) Order 2002 (SSI 2002/544)

**The Deputy Convener:** Item 7 is the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 16) (Scotland) Order 2002 (SSI 2002/544). It takes longer to read the title of the instrument than it does to consider it.

**Colin Campbell:** No points arise on the order.

**Instrument Subject  
to Annulment**

**Designation of Nitrate Vulnerable Zones  
(Scotland) (No 2) Regulations 2002  
(SSI 2002/546)**

**Bill Butler:** The regulations seem fine.

**Instrument not Subject  
to Parliamentary Control**

**The Food Protection (Emergency  
Prohibitions) (Amnesic Shellfish  
Poisoning) (West Coast) (No 11) (Scotland)  
Partial Revocation Order 2002  
(SSI 2002/545)**

**The Deputy Convener:** The legal adviser's recommendation is that no points arise on the order.

That brings us to the end of the agenda. We will consider the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill when we next meet.

**Ms MacDonald:** I invite everyone to stay and partake of a cup of seasonal cheer.

**The Deputy Convener:** Certainly, but we will formally close the meeting before we do.

*Meeting closed at 11:51.*

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