

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 14 January 2003
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting 2003, 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 14 January 2003

(Morning)

[THE CONVENER *opened the meeting at 11:25*]

Delegated Powers Scrutiny

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

The Convener (Ms Margo MacDonald): I welcome everyone to the second meeting of the Subordinate Legislation Committee in 2003 and intimate that Gordon Jackson—poor soul—is in bed with food poisoning. We will probably miss his presence; however, Murdo Fraser knows all about the first item on the agenda, so we will proceed without further ado.

In our previous discussion on the bill, we felt that a number of points would be resolved by the Salmon and Freshwater Fisheries (Consolidation) Bill Committee and hung back to find out what it had to say on certain aspects. First, we were concerned about section 4, which deals with the meaning of “rod and line”. Although we appreciated the underlying intention behind this Henry VIII power, we were concerned that the exercise of the power was to be subject only to the negative procedure.

With regard to the procedure for making regulations, the Executive has replied that any statutory instrument made under the power in section 4(3) will be subject to the negative procedure. It observes that the power to make subordinate legislation under section 33(1) in relation to baits and lures is not subject to either the negative or the affirmative procedure, because the power derives from section 8(1) of the Salmon Act 1986, which similarly did not require any parliamentary procedure. The Executive has adopted such an approach because the power in what is now section 33(1) can be used only after an application has been made to the Scottish ministers by a district salmon fishery board, using the procedures set out in schedule 1 to the bill. *[Interruption.]* Good morning, Brian.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): How are you, convener?

The Convener: I am extremely well. I am up to my neck in rods and lines.

Brian Fitzpatrick: This matter has been chasing Murdo Fraser and me around the building.

The Convener: Well, we have got to get the thing done, because we are all going on our holidays in a few weeks’ time.

Murdo Fraser (Mid Scotland and Fife) (Con): Temporarily, convener.

Brian Fitzpatrick: Convener, were you thinking of folk in assisted places, or anyone else in particular?

The Convener: No, I had no one in mind.

Further on in the saga of the Executive’s response to our comments on the bill, it says that the power conferred by section 4(3) does not have a potentially wide effect on the operation of the legislation and would be exercised only after consultation. The procedure imposed by the bill in relation to the power is the same as that in the current legislation in relation to the power to define fishing for salmon by net and coble—whatever that is. We have not come up against “coble” before. The Executive’s view is that the negative procedure is appropriate in this case.

The consolidation bill committee might have its own opinions on such matters. Perhaps at this point we should simply register that we are still a little unhappy with the procedure and cannot quite see how it will work.

Brian Fitzpatrick: The Subordinate Legislation Committee also includes the convener of the consolidation bill committee—God must really love him.

This particular point has caused some serious interest in the consolidation bill committee. I think that the phrase “lively interest” would be wrong in this respect. I should point out that I was not whispering sweet nothings into Murdo Fraser’s ear earlier, convener; I was actually interested in finding out whether he had managed to read the Scottish Law Commission’s submission. It would be useful for the clerk and the legal adviser to see that document. It is sitting on my screen, but I have not got round to reading it—I will look at it tonight.

However, I was wondering whether, instead of having two committees examine the issue in tandem, the consolidation bill committee should simply note your point, convener. After all, I think that it will be quite a substantial issue for us to examine. If it is any help, I suspect that Gordon Jackson, Murdo Fraser and I are of one mind on the issue. We really want to get to the bottom of the matter. As a result, I am not minded to accept the Executive’s response at the moment. Obviously, I cannot speak for anyone else on this serious issue.

11:30

The Convener: The committee has a general overarching comment on the Executive's response. The Executive appears to be arguing that because a particular procedure in relation to subordinate legislation already exists throughout the acts that are being consolidated it will simply apply the same procedure to any other legislation. However, as some of the legislation predates 1992 and the setting up of scrutiny mechanisms in Westminster, I do not think that that argument holds water.

Brian Fitzpatrick: That pertinent observation has been repeated by members of the consolidation bill committee, not least because its membership is predominantly made up of members of this committee. It is just such a shame that you are not a member, convener.

Murdo Fraser: Of course there is nothing to stop you attending voluntarily, if you so wish.

Brian Fitzpatrick: I am sure that Murdo would be prepared to stand down as convener.

Murdo Fraser: Yes.

The Convener: I wonder whether the committee can make any comments at this stage that would be within its own bailiwick. After all, we have reached the stage where we will simply have to wait and see what the consolidation bill committee says.

Brian Fitzpatrick: Well, we could take away what is said here for the consolidation bill committee's consideration.

Colin Campbell (West of Scotland) (SNP): Without this committee having to write letters to you.

Brian Fitzpatrick: That is right.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): In essence, the committee always considers areas where definitions come into question and takes the line that anything that tampers with definitions in primary legislation should be subject to the affirmative procedure, especially in relation to anything controversial. Indeed, that is what the committee is for. We consider whether any additional scrutiny is required to ensure that the powers that are taken are appropriate and are subject to proper scrutiny.

Brian Fitzpatrick: If it is of any assistance, I thought that there was a tension within the argument that was urged on the consolidation bill committee that the legislation would be all right on the day because, after all, it had to go through Parliament. I trust that we had that conversation in public. I suppose that the theology behind that view might be true; however, as far as the real politics of the matter is concerned, I do not expect that too many of our colleagues in the chamber

will expend some substantial amounts of time on scrutiny in the absence of any comparable stage 1 or stage 2 consideration. I except shining lights like yourself from that statement, convener; indeed, Murdo Fraser and I will book ourselves in for a wee discussion with you on the bill.

As I have said, the consolidation bill committee has firmly grasped this very important issue. To be honest, the issue has sparked some activity in the committee—I am again trying to find a diluted form of “enlivened”. The committee has done well to raise such a moot point.

The Convener: Do you want to talk about haaf nets now, Brian?

Brian Fitzpatrick: No, not again.

The Convener: The general comments that Ian Jenkins and I have made cover our points about section 31(4)(c), which deals with the power to make general regulations.

I wonder whether the same applies to section 31(5), about which we asked the straight question of whether a day can be defined as a period. I suppose that we are dealing with definitions again. The proposal from the consolidation bill committee is that it should be period, singular. Elsewhere, in previous legislation, I think that it has been periods, plural. Is that right? I think that it might be.

Murdo Fraser: Yes.

The Convener: The consolidation bill committee has to examine the matter and work out whether that definition could be interpreted, or could be made.

Ian Jenkins: I understand that the draftsman thinks that the provision as it is drafted is not a change from the existing law. That is a debatable point.

The Convener: I am sure that the intention is not to change the existing law.

Ian Jenkins: If there is a change in the law, technically we should be able to examine that, but the consolidation bill committee will do that in any case.

The Convener: Okay. It is a point for the consolidation bill committee.

Section 33 is on regulations as to bait and lures for salmon fishing. The Executive has undertaken, because of our previous comments, to introduce an amendment.

Murdo Fraser: We should welcome that.

The Convener: Of course we do. We like the Executive.

Section 33(7) is another one on which the Executive has said “Okay” to our previous comments.

Brian Fitzpatrick has raised an issue on section 34, on salmon fishery districts. We will wait until we hear from him.

Brian Fitzpatrick: Yes. Thanks for the corroboration.

The Convener: The same point arises in section 34(4), does it not?

Murdo Fraser: The consolidation bill committee has raised that point as a query. It should perhaps be left to that committee to deal with the matter.

The Convener: It is a matter that is more for the consolidation bill committee than for the Subordinate Legislation Committee.

Reference to the provision in section 35 on designation orders was omitted from the memorandum. We were uncertain about how the section interacted with sections 31 and 37. We asked for an explanation and the Executive apologised. That is still a matter for the consolidation committee to note.

Section 38 is on salmon conservation orders. We asked whether a different procedure should perhaps be followed. It might be thought that an order is the correct form of instrument, but it is believed that that might have unexpected consequences by throwing doubt on whether existing regulation will continue in force by virtue of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379). I confess that I am not au fait with the matter. I am advised that whether the transitional interpretation order will affect orders made under section 38 is an interesting point. Will the consolidation bill committee also examine that, Murdo?

Murdo Fraser: Yes.

The Convener: Great.

Ian Jenkins: There is a point about whether orders and regulations are one and the same thing and can be considered interchangeable and whether, if certain provisions are put in to the consolidation bill, that supersedes and knocks out some other provisions that it was not intended to knock out. A question might be raised about that.

Bill Butler (Glasgow Anniesland) (Lab): Thankfully, we can leave that to the consolidation bill committee.

Brian Fitzpatrick: On the basis that you can run but you cannot hide.

The Convener: Section 48(1) is on freshwater fishing. We thought that the section might have been made redundant. Section 48(9) is a consolidation of section 1(10) of the Freshwater and Salmon Fisheries (Scotland) Act 1976. Since

the provision does more than simply provide for the variation and revocation of orders, it was thought appropriate to leave it untouched. Is that right?

Ian Jenkins: That should be, "does no more".

Brian Fitzpatrick: Yes.

The Convener: Yes. Okay.

Brian Fitzpatrick: Was Ian Jenkins a conveyancer in a previous life?

The Convener: There has been a slight slip up in section 72(2) on commencement. We commented on that and the Executive acknowledged it and apologised.

Land Reform (Scotland) Bill: as amended at Stage 2

The Convener: The Executive has not supplied the Subordinate Legislation Committee with a memorandum on the changes to the bill, but it has written to us to draw our attention to two of the subordinate powers that will have the effect of reducing the effect of ministerial discretion.

Section 24A may be a new delegated power. The Executive has supplied, as promised, drafts of the regulations that it intends to make under the powers that will be conferred by sections 59(4) and 86(4).

Section 24A is about guidance. Ian Jenkins knows all about the difference between guidance and guidelines.

Ian Jenkins: In relation to some of the matters that arise in the Education, Culture and Sport Committee, such as health education and sex education—

Brian Fitzpatrick: Do not go there.

Ian Jenkins: In relation to such matters, guidelines give you some indication of what to do and guidance is stronger. You have to pay regard to guidance. It is stronger than stating that this is the kind of thing that we would like you to do.

The Convener: The fact that guidance is stronger underlines our concern.

Ian Jenkins: Guidance is becoming almost like subordinate legislation. It does not quite have that force, but it is becoming similar.

The Convener: How is it revoked?

Ian Jenkins: I do not know.

Brian Fitzpatrick: This has echoes of the themes of the Local Government in Scotland Bill, when such a situation can arise if a local authority is shown not to be demonstrating continuous improvement in relation to access. I presume that that is why the guidance comes before the

Parliament. We will say that if you cannot show that that has been done, then enforcement procedures can go ahead.

Ian Jenkins: Yes. It is good that it comes before Parliament, because it is getting into territory where you are almost legislating.

The Convener: If you are doing that, the drafting must be correct. There are suspicions that the drafting is not exactly accurate. The big question, as guidance nearly has the power or effect of subordinate legislation, is how is it revoked? It does not say how that should happen.

Murdo Fraser: It also does not say how it would be amended and what procedure would be used to do that. We should ask the Executive what its intention is.

The Convener: There is an omission in section 24A(6), in that it refers only to the recess and not to dissolution. If guidance was in the form of an SSI, that issue would be dealt with under articles 13 and 14 of the relevant transitional order. It may be that subsection (6) ought to be amended to include a reference to dissolution, as otherwise there must be doubt as to whether the guidance would have to be relaid if the 40 days had not expired before dissolution. That is a drafting point. We should definitely ask for an explanation of that.

Do members have any points about section 48(5) on ballot procedure?

Ian Jenkins: The amendments have improved the section.

11:45

The Convener: Regulations made under sections 59 and 86 concern compensation, so we must be clear about this. There may be some ambiguity in the drafting because it does not appear that the powers are sufficient to support the regulations made under them—unless it is for the calculation of compensation. That is important.

Ian Jenkins: We should ask the Executive for comments on that.

The Convener: Section 95, which relates to general and supplementary provisions, has been amended and now seems to be fine. Good on the Executive.

Water Environment and Water Services (Scotland) Bill: as amended at Stage 2

The Convener: We considered the Water Environment and Water Services (Scotland) Bill a while ago and raised several issues with the Executive. It is to be welcomed that the amendments, which the Executive said that it would incorporate at stage 2, incorporate several

shifts from the negative to the affirmative procedure. That pleases us no end.

Murdo Fraser: There is a point about the memorandum, which, I understand, is inaccurate in parts. We should note our concern that it creates extra work for our advisers if the memorandum is not accurate.

The Convener: Obviously. There is a later case where there was no mention in the memorandum at all, which creates even more work, but we will deal with that when we come to it.

The amendment to schedule 2 concerned the penalties that would be paid. Once again, it was about money. Penalties were to be increased by subordinate legislation, but no provision was made for any procedure.

Brian Fitzpatrick: What do you suggest that we do? Do we just go back to the Executive?

The Convener: We should ask the Executive to explain the rationale behind the decision. Are we all agreed?

Members indicated agreement.

The Convener: Section 7(1) deals with the form and content of the register of protected areas. There are no points to raise.

Section 8(3) deals with monitoring methodology and monitoring strategy. It provides Scottish ministers with the discretion to subject the regulations to either the negative or the affirmative procedure. That was quite interesting, and it is worthwhile asking the Executive why that approach has been adopted. Is it in order to line up with European legislation—the European Communities Act 1972—because that is how it operates there? We should ask the Executive why it has done that and the circumstances in which the Executive could see itself using either the affirmative or the negative procedure. Are we all agreed?

Members indicated agreement.

Section 9(3) concerns determining and achieving the environmental objectives.

Ian Jenkins: That is where the memorandum is not accurate. It suggests that section 9(3) is unamended, but it seems to us that the section has definitely been amended.

The Convener: The Executive claims that section 9(3) is unamended, but we think that it has been amended.

Is it enough for us to ask that the procedure be changed from the negative to the affirmative?

Ian Jenkins: We should ask the Executive for its comments on the issue anyway.

The Convener: Section 19(1) is a general regulation-making power—

Brian Fitzpatrick: Are you just going to pass over the “za-za” question? Are there really paragraphs that are lettered “za”?

The Convener: Yes.

Brian Fitzpatrick: Do you have the prospect of a sub-paragraph labelled “za-za”?

Colin Campbell: Followed by “g-a-b-o-r”, possibly.

Brian Fitzpatrick: Can we not say that the Subordinate Legislation Committee thinks that it is a very bad idea to have “za-za” sub-paragraphs?

Colin Campbell: I have never seen that before.

Brian Fitzpatrick: It strikes me that there is a consolidation bill in here somewhere, 10 years down the road. Sorry.

The Convener: How would you get around that?

Brian Fitzpatrick: Za-za-boom? I thought that you were an old jazz fan, Margo—as in “old jazz”, rather than “old jazz fan”.

The Convener: I know what you meant.

Brian Fitzpatrick: You know what I meant. Not Swedish jazz. *[Laughter.]*

Bill Butler: Stop digging, Brian.

The Convener: The committee should note Brian Fitzpatrick’s concern about “za-za”.

Section 19(1) is a general regulation-making power in relation to river basin management planning.

Colin Campbell: Those are just tidying-up amendments.

Ian Jenkins: As we are dealing with water, it is quite interesting to note that the legal adviser’s brief has a typo that talks about “tiding up”.

The Convener: Section 20 concerns the regulation of controlled activities and introduces schedule 2. Once again, penalties or fines are involved. No procedure to upgrade the maximum penalty was included. The Executive said that it would include a provision to that effect, but it has not told us whether that has been done—that information is not in the memorandum. Should that be done under negative procedure? I do not know.

Brian Fitzpatrick: Does paragraph 98 compare horses with horses? I suppose that it does.

The Convener: Yes, I think so.

Brian Fitzpatrick: We should go back to the Executive on that point.

The Convener: We will.

Section 22(1) deals with remedial and restoration measures. The Executive has amended section 31. That is fine.

Section 23(1) concerns the fixing of charges for water services. Amendments have been lodged to the effect that negative procedure will not apply in all cases, which we thought was the case at stage 1. Further, consultation provisions have been included.

Colin Campbell: We welcome that.

The Convener: Yes. Everything is hunky-dory.

Section 24(1) covers the power to give effect to community obligations.

Ian Jenkins: The Executive has taken our views on board.

The Convener: That is fine.

Section 26(2) inserts new subsection (3B) into section 1 of the Sewerage (Scotland) Act 1968. That subsection covers the power to make regulations regarding reasonable cost.

Ian Jenkins: I do not think that we have any objections in principle to those changes.

The Convener: The Executive says that the power has not been amended. However, we are not arguing the principle of the matter.

Section 26(7) inserts new subsection (2C) into section 6 of the Water (Scotland) Act 1980 and concerns the power to make regulations determining reasonable cost. We have no objections to this provision for the same reasons that we gave earlier.

Section 27(3) inserts new section 14A into the 1968 act. Subsection (1) of new section 14A deals with the power to make regulations specifying construction standards.

Brian Fitzpatrick: Only consequential amendments have been made.

The Convener: Fine.

Section 27(3) also inserts new section 14B into the 1968 act. Subsection (3) of new section 14B concerns the power to make regulations for providing for takeover conditions, vesting conditions and connection agreements.

Colin Campbell: The amendment does not affect the substance of the power.

The Convener: Section 28 inserts new section 23C into the 1980 act. Subsection (3)(b) of new section 23C concerns the power to make regulations for determining liability for mains and so on vesting in Scottish Water.

Ian Jenkins: There was a question about the amendment’s reference to “the communication

pipe” without any mention of the “other waterworks” that are referred to in other parts of the bill. Perhaps we should simply make the Executive aware of that.

The Convener: We should informally tell the Executive that we have noticed a difference between the two expressions.

Ian Jenkins: The provision might be all right, but it has been pointed out to us that it looks a wee bit odd.

The Convener: It is a question of definition, is it not?

Ian Jenkins: Apart from that, I do not think that the amendment need bother us.

The Convener: Schedule 2 concerns the particular purposes of controlled activities regulations. We are glad that the Executive has amended the provisions; however, the amendments are not mentioned in the memorandum.

Brian Fitzpatrick: I presume that the Executive will amend the memorandum.

The Convener: That raises a general point that we are considering bringing to the attention of the relevant officials. At this time in a Parliament’s life, there will always be a backlog of work. If our advisers and the people on this committee who scrutinise legislation do not have the relevant information from the Executive—for example, in the form of memorandums—it creates a great deal of work at this end. I am not nit-picking; it is all about smooth running and the best use of resources.

Colin Campbell: Absolutely. We are interested in sufficiency.

Brian Fitzpatrick: Was there any mention of the power to authorise regulators to make determinations?

The Convener: No. That is a quite important point.

Brian Fitzpatrick: Yes, it is.

The Convener: Do you want us to incorporate that in a letter?

Brian Fitzpatrick: As you said, it is an important point. I could resist the temptation to nit-pick if there was an amending change of tack to something that was already outlined in the memorandum. It would be unusual if the memorandum did not include a statement that the Executive was going to do X. However, there is a qualitative difference if one innovates without mentioning such innovations in the memorandum.

The Convener: We will query the matter.

Executive Responses

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No 4) 2002 (SSI 2002/568)

The Convener: We asked the Executive to comment on a couple of points that we raised and have received a very nice letter. However, we do not really understand the explanation. Do any of the lawyers who are present know anything more about this issue?

Murdo Fraser: Although there was a breach of the rule, it was important that the SSI was made as quickly as possible. As a result, we should simply note the Executive’s response and include it in our report to the lead committee.

The Convener: The Executive has put it on record that SSI 2002/568 is not intended to have any retrospective effect. As that is the policy intention, we will draw the matter to the attention of the lead committee and the Parliament.

Instruments not laid before the Parliament

Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injuries Actions) 2002 (SSI 2002/570)

The Convener: No points arise on this instrument.

Toronto Conference Report 2002

12:00

The Convener: As members know, Gordon Jackson is not present today because he has food poisoning. As a result, we will need to hold over the next item on the agenda, which is the draft report on the Toronto conference. I have been told that the people at the conference spoke very dense lawyer.

Brian Fitzpatrick: Did Gordon Jackson speak very dense lawyer?

The Convener: Everyone did.

Brian Fitzpatrick: Not Gordon. Anyway, I suggest that you should not call one of Her Majesty's counsel in Scotland a dense lawyer, and certainly not in the *Official Report*.

The Convener: I was referring to the language that they all speak.

Brian Fitzpatrick: I presume that the only reason why people were invited was that they could speak densely, although why anyone would want to go to Toronto is beyond me.

The Convener: The oral report that I have received was that the conference was very good.

Brian Fitzpatrick: Viewed from the heights of the CN tower?

The Convener: No. However, one needed a fair experience and knowledge of the subject.

Brian Fitzpatrick: It would be a surprise if that were not the case, would it not?

The Convener: How many other people turn round and discover that there is a subordinate legislation committee, just like we did? Members who come on to the committee have done none of this work before in their lives. However, I am advised that the conference was not at that level.

Colin Campbell: Was it held at a specialised professional level?

The Convener: From what I have heard, it was pretty specialised. However, Gordon Jackson did us proud.

Brian Fitzpatrick: Who else went along to the conference?

Alasdair Rankin (Clerk): I did.

Brian Fitzpatrick: Good. Will we get any feedback on it?

The Convener: As I said, we have a report on the conference. However, we will have to hold over discussion of it until next week.

Brian Fitzpatrick: I should pop round to Gordon's with a bowl of soup, although that will be the last thing he will want if he has food poisoning.

The Convener: Is there anything else on today's agenda apart from Gordon Jackson's health?

Ian Jenkins: One of the matters that we might deal with is the Tasmanian conference. Although we might receive the papers from the conference, I suspect that we will not send anyone to it.

Brian Fitzpatrick: It depends if the conference is in Tashkent.

The Convener: No, Brian, you are not going to Tashkent.

Brian Fitzpatrick: I have taken a pledge not to go to any subordinate legislation conferences.

The Convener: Well, a conference is being held next month in Tasmania.

Brian Fitzpatrick: It is all very exciting: Toronto and Hobart. Wow!

The Convener: People in such places know about subordinate legislation. Anyway, we will not be going to Tasmania, although we will thank the organisers for their invitation, ask to see the papers and generally keep in with them, because there is always the possibility that we will go at some point—although perhaps not you, Brian.

Brian Fitzpatrick: Keeping with the T theme, I suggest that Twechar in my constituency of Strathkelvin and Bearsden is obviously a possible venue for the Scottish Parliament to host its own subordinate legislation conference—

Colin Campbell: Which would compete with Toronto and Tasmania—

Brian Fitzpatrick: And would excel those two places on every front, including the welcome, as Colin Campbell knows.

The Convener: I close the meeting now, before we have any more commercials. I thank members for their attendance.

Meeting closed at 12:03.

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