

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 January 2003
(Morning)

Session 1

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SUBORDINATE LEGISLATION

COMMITTEE

3rd Meeting 2003, 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 21 January 2003

(Morning)

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

The Convener (Ms Margo MacDonald): I welcome everyone to the third meeting of the Subordinate Legislation Committee in this year of our Lord 2003.

I notify the committee that apologies have been received from Brian Fitzpatrick, Murdo Fraser and Bill Butler. I welcome Jackie Baillie, who is substituting for Brian. You will get your pills on the way out.

Jackie Baillie (Dumbarton) (Lab): Can I not get them before we start?

Delegated Powers Scrutiny

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

The Convener: We raised a couple of points about changes that were made at stage 2 to the subordinate legislation powers under the bill. One related to section 24A, on guidance. We noted that the new provision does not provide for the amendment, variation or revocation of guidance made under the bill. We take a different view from the Executive on how the matter has been dealt with. We think that there is quite a difference between the power to make an order and the power to amend an order. If the powers under the bill were the same as the powers under the Agriculture (Miscellaneous Provisions) Act 1968, that would bridge the gap between the Executive and us.

We must report on the bill tomorrow, so I recommend that we put on record our feelings on the matter. We should thank the Executive for its response, but point out that it has not answered the questions that we posed. We should suggest that there is another way of dealing with the matter.

Furthermore, we should say that we think that the Executive's amending the bill in the way that was outlined should not be precluded simply because of a suspicion that a similar question might arise in relation to existing legislation. We think that bad practice should not be continued; it

should be eradicated wherever it is spotted.

Does that summarise the committee's views?

Members indicated agreement.

The Convener: There was one point on which the Executive agreed with us: that section 24A(6) requires to be amended. We thank the Executive for that.

There was a question about sub-delegation in relation to regulations made under sections 59 and 86, and whether the powers under the bill provide for that. We should mention that in our report to the Executive.

The Executive appears to have accepted the committee's point that it might be a good idea to look again at the design of the enabling powers while there is still time to fine-tune them, which would help to avoid difficulties in the future. That seems self-evident, but we thank the Executive for that all the same.

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

11:30

The Convener: We have slightly longer to produce our report on this bill. It needs to be produced for 29 January.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): We could probably deal with the item today.

The Convener: Excellent. I invite members' comments. We raised with the Executive three matters concerning amendments to the delegated powers under the bill. There was a question about the memorandum to the committee.

Ian Jenkins: We were worried about its accuracy. The Executive has now supplied the missing information and we accept that the matters concerned are appropriate for delegated legislation. The Executive has moved forward on the matter.

We welcome the Executive's positive response: it agrees that the exercise of the power at paragraph 20(4) of schedule 2, to uprate the amount of the maximum penalty in line with changes in the value of money, should be subject to the negative procedure. It has agreed to introduce an amendment at stage 3 to that effect. The Executive seems to have complied with our wishes in that regard.

The Convener: We raised the business of the so-called open powers in relation to section 31. We queried the matter, not necessarily because we opposed the Executive's intention but because we wanted to understand the Executive's point of

view and to find out why it wanted to use open powers. I think that members would agree that the bill is a one-off in that respect. The matter has come to us in connection with section 2(2) of the European Communities Act 1972, so it is perhaps sensible to align our procedures with European procedures.

How nice it is to see Bill Butler arrive—I had said that you would not be here this morning.

Bill Butler (Glasgow Anniesland) (Lab): Well, I made it. Thank you, convener.

The Convener: That is really very good—and very touching.

Bill Butler: I am glad that you are touched.

The Convener: Right, we are okay with our scrutiny for that bill.

Public Appointments and Public Bodies etc (Scotland) Bill: as amended at Stage 2

The Convener: I draw members' attention to new section 3(3), which will ensure that the remit of the commissioner for public appointments in Scotland covers bodies whose establishment is still under contemplation and which do not yet exist in law. That seems sensible—one might say that it is joined-up governance.

Section 21 is on orders and regulations. The response seems to be okay. We suggested that the provision in section 3(2) should be subject to the affirmative procedure. That is all right.

There has also been an amendment to powers under sections 16 and 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Colin Campbell (West of Scotland) (SNP): Those are just drafting changes and seem to be quite sensible to boot.

The Convener: Is everyone content with that?

Members indicated agreement.

Draft Instruments Subject to Approval

Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Order 2003 (draft)

The Convener: The Executive has not said when the enabling powers in relation to the order will come into force, so we have to ask when that will happen. Is that correct?

Ian Jenkins: Yes. We have to do the same with the next statutory instrument.

Proceeds of Crime Act 2002 (Investigations: Code of Practice) (Scotland) Order 2003 (draft)

Ian Jenkins: Again, we have to ask the Executive what arrangements are in place to bring the enabling powers into force.

The Convener: This is perhaps a question of style or of drafting consistency, but there is no reference to human rights obligations. I think that, in the past, the Executive has taken the view that those obligations are implicit in legislation such as this. Perhaps we should ask the Executive. Is that agreed?

Members indicated agreement.

Ian Jenkins: Did you mention the possibility that there is some text missing from the last sentence on page 6 of the order?

The Convener: I did not, but I am glad that you were eagle eyed enough to spot that. We will ask informally whether there is text missing. We do not need to make a big deal out of it.

Instruments subject to Annulment

Plastic Materials and Articles in Contact with Food (Amendment) (Scotland) Regulations 2003 (SSI 2003/9)

The Convener: Does anyone want to go back to the Executive on these regulations again?

Colin Campbell: We could ask why there is no reference to article 9 of EC regulation 178/2002.

The Convener: The practice seems to be followed in English legislation but we in Scotland do not follow it because, in the past, the Executive has taken the view that the style should mirror our domestic legislation. Do we want to go back to the Executive on that?

Colin Campbell: No. I think that we should mirror our domestic legislation.

The Convener: Is Mr Jackson desperate to say something about this?

Gordon Jackson (Glasgow Govan) (Lab): No.

The Convener: Mr Jackson, he say no.

Colin Campbell: He is not worried about eating plastic with his food.

The Convener: He is quite clever. He went to university. He knows that you do not eat the plastic bit.

Education (Disability Strategies) (Scotland) Amendment Regulations 2003 (SSI 2003/10)

The Convener: We wondered whether there might be an intra vires issue, but that doubt has now been dissipated.

National Health Service (General Medical Services) (Scotland) Amendment Regulations 2003 (SSI 2003/11)

Colin Campbell: The regulations are okay.

Intercountry Adoption (Hague Convention) (Scotland) Regulations 2003 (SSI 2003/19)

Gordon Jackson: It could be a Freudian slip, but my copy of the briefing says "cotland".

The Convener: I told you that he was clever. No one else spotted that.

Colin Campbell: That is the natural wit that comes from a higher education.

Bill Butler: Or something else.

Jackie Baillie: I think that he is touched, too.

The Convener: Did the official report get that? Ms Baillie, who is visiting the committee and knows that she will not be here next week said, "I think that he is touched, too."

Colin Campbell: The "too" refers to herself.

Gordon Jackson: This is published.

The Convener: The SSI is an important piece of legislation. I have questions, but they might be more relevant to the policy committee. An aspect of this has come up before: whether legislation should refer specifically to all the different jurisdictions in the British isles, such as the Isle of Man and the Channel Islands. The regulations do not refer to all the jurisdictions.

Colin Campbell: They refer only to England and Wales and Northern Ireland.

The Convener: Yes. We should raise the matter with the Executive. Does the committee agree?

Members indicated agreement.

The Convener: Also, throughout the regulations, there are references to correspondence "in writing". We have asked and will ask again what the Executive means by that. Does the term include electronic communication?

There are also some typos, but those can be dealt with informally.

Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2003 (SSI 2003/20)

Ian Jenkins: The date does not appear to be on our copy of the order, so we should draw that to the Executive's attention.

The Convener: The relevant policy committee should consider the order and find out who can sign surveillance orders and why. I realise that the issue is not for the Subordinate Legislation Committee to discuss, but the policy committee might be interested. I do not want to feel that any old passing person can sign those orders.

Do you have something to say, Mr Jackson?

Gordon Jackson: I am very interested in the subject, but I had not quite picked up on what you were saying. Which body is being changed?

The Convener: The order amends the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 to reflect a change in the name of one of the bodies that the order refers to.

The important issue is that the order will enable officers of a lower rank in that body to authorise

directed surveillance or the conduct or use of covert intelligence sources as detailed in sections 6 and 7 of the parent act, the Regulation of Investigatory Powers (Scotland) Act 2000. Previously, only persons holding the rank of head of unit and above could grant such authorisations. That is why I would like to hear what the policy committee has to say.

Jackie Baillie: The order does not detail the appropriate rank.

The Convener: That is right.

Colin Campbell: It mentions human intelligence sources, so it is really quite important.

The Convener: It is real, low-down, sneaky stuff.

Colin Campbell: We really want to know whose signature is good enough.

Gordon Jackson: It might be that the rank authorised to sign is at the same level as before, but that the order refers to a different organisation.

The Convener: It might be, but we are unsure. That is why it is worth asking. This committee would not ask the question, because the subordinate legislation is in order. However, the policy committee might be interested in the matter. The Executive note says:

"This Order is necessary to reflect the fact that surveillance for the Common Services Agency under the RIP(S) Act is to be carried out by NHSScotland Counter Fraud Services."

Gordon Jackson: Perhaps we should find out the answer, although the issue is a policy matter. I have a little understanding of the matter. It seems that the head of the Common Services Agency fraud investigation unit was the person who signed the orders. Those powers are now being moved to NHS Scotland's counter fraud services. The senior investigator there may well be the same person as the head of the unit in the old Common Services Agency. I am not sure about the downgrading of surveillance. The same person may be in the new organisation, but I do not know.

11:45

The Convener: A bell is ringing in the back of my mind. I think that it is worth while to ask.

Gordon Jackson: If the order is lowering the rank of officers who can sign authorisations, the issue is serious.

The Convener: That is for the policy committee to decide.

Gordon Jackson: Absolutely, but it should be made clear whether the order is doing that.

Jackie Baillie: The reason for suspecting that

the order may be lowering the rank is the need to designate additional officers—the Executive is clear that we are talking about additional officers. I cannot imagine that more officers of the same rank will be created. It is reasonable to assume that we are talking about a lowering of the rank, but we should refer the matter to the policy committee.

The Convener: Now you see why we are a very important committee.

Jackie Baillie: I have always thought that you were a very important convener of a terribly important committee and I have enjoyed my time here tremendously.

The Convener: I am only as important as the boys around the table are.

Jackie Baillie: Boys? I will have a sex change.

The Convener: You are an honorary boy for today.

Jackie Baillie: Yuck. I am leaving.

Instruments not subject to Parliamentary Control

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 6) (Scotland) Order 2002 Revocation Order 2003 (SSI 2003/17)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 15) (Scotland) Order 2002 Revocation Order 2003 (SSI 2003/18)

The Convener: The orders are standard revocation orders and everything is A-okay with them.

Colin Campbell: Except for the shellfish in those areas that are now up for grabs.

The Convener: Yes, but they have had a holiday, so they have nothing to complain about. The matter need not trouble the relevant policy committee.

Toronto Conference

The Convener: Gordon Jackson has something to tell us. It is show and tell.

Gordon Jackson: Last week when I was ill, the report from the red tape conference that I attended on behalf of the committee in Toronto was on the agenda. I do not want to say much about the report. I am conscious that it is not exactly bedtime reading. Alasdair Rankin has helped to make it as readable as possible, but I am not sure how successful that process has been.

The conference was very technical. I found it extremely useful, but I had one concern. Although I was there from the committee, no one was there from the Executive and I came away with a strong feeling that, on balance, it would have been better the other way around.

The conference was about how to reduce, modify or lessen the burden of the red tape of statutory instruments, or regulatory instruments, which is a huge issue across the world. The Americans, for example—through all Administrations, not necessarily in right-wing Administrations—have been doing huge amounts of work to ensure that any regulation is as helpful and useful as possible. The Canadians are doing that big time.

There is a slight sense that that agenda tends to be right wing, as it is about reducing the burden of red tape on the business community. I have no doubt that there is some truth in that. However, the longer I was at the conference, the more I thought that the issue was about more than that. Every small business in this country is concerned about form filling and regulation. Indeed, that does not just apply to business. Nurses tell us that they cannot do their job because they are filling in forms and head teachers tell us that they cannot teach any longer because they are constantly filling in forms.

Bill Butler: It is teachers who tell us that. Head teachers do not teach.

Gordon Jackson: I take that point. We are constantly having debates about the number of police officers on the street. Police officers tell us that half their problem is that, every time they do something on the street, they have to spend about three days—I exaggerate a little—in the police station filling out forms. The whole business of regulation is important, but the idea that we can just abolish it does not work either, because there would not be proper accountability and proper systems would not be in place.

Most Governments from Europe and America were represented. Perhaps oddly, there was

interesting stuff from Mexico. The chap said that there is a huge amount of bureaucracy in Mexico, but that attempts are being made to streamline regulations and to take the burden off people while watching out for public safety and public standards.

We discovered that a huge amount of work is being done all over the world on how to deal with statutory instruments and what is known as red tape. The trouble is that, by the time this committee considers statutory instruments, that issue is past. I think that Alasdair Rankin would agree that the issue should be dealt with long before the committee has to deal with instruments. It is extremely interesting that Ontario has a Red Tape Commission. Every SI must go to that commission to be scrutinised rigorously and those who want the legislation must justify why it is needed before it gets on to the SI statute book.

Our Executive could learn a huge amount from the conference. Although I am not an expert, I think that the Westminster Government is quite into the issue. A man from Westminster took one of the conference sessions. Alasdair Rankin will remind me of his name.

Alasdair Rankin (Clerk): Phil Wynn Owen.

Gordon Jackson: It is clear that Westminster is serious about the issue, but it is not entirely clear how much the Executive is up to speed on the matter. It might be that work is being done really well and we do not know about it, but I do not think that the Executive is nearly serious enough about the business of red tape and regulation. I believe that when we suggested that someone from the Executive should attend the conference, the answer was: "Somebody from Westminster is going and they will tell us what we need to know."

There are many lessons to be learned on regulation and red tape. I hope that that comes across in the conference report, although I suspect that one had to be there—it is difficult to get an idea of it simply from reading the report. The Executive should apply its mind to the subject. Although it is a bit late for this Executive, I would like to be satisfied that the structure that is put in place does not simply churn out SIs and red tape—which is perhaps a pejorative term—before checking that it is needed in the first place.

The Convener: I thank Gordon Jackson and the clerk for the report, which is excellent. Mind you, I started out by thinking that the measures discussed at the conference had Reaganesque origins.

Gordon Jackson: There is always a danger of people thinking that.

The Convener: Exactly. I read through your report, which makes a good case. Obviously, it is

for the Executive to make policy decisions. The committee's job is to test whether, by the time the tape reaches us, it is truly red or merely pinkish.

I have an idea. As well as drawing the Executive's attention to the report, the committee could ask for a debate on the matter. It might do the Parliament's soul some good to learn about the sort of work that we do and about our opinion on whether some of that work is necessary.

Gordon Jackson: We might be too late in the day.

The Convener: Perhaps we are too late for this session of Parliament.

Gordon Jackson: I suspect that the issue is for those members who will still be here and interested in the matter in the next session of Parliament. There is a lot of legislation to get through and, given that we have only nine weeks remaining, perhaps a debate is not realistic.

The Convener: The issue would be a good subject for a members' business debate.

Gordon Jackson: It might be hard to raise interest. We would have to engage the Executive.

The Convener: You could get the interest.

Colin Campbell: The debate would have to be about red tape.

The Convener: Accessibility is also an issue.

Gordon Jackson: If I am still here, I would like to raise the issue in the next session, but I have doubts about what can be done at this late stage in the session.

The matter is certainly not just Reaganesque. Issues arise about the regulation of business. The subject has become subtler because people realise that we cannot simply deregulate, as that might end up with power stations blowing up.

The Convener: The issue has two distinct legs, from my reading of the report: one is that we cannot deregulate business and services; the other is the effect that red tape has on service delivery.

Jackie Baillie: It strikes me that the committee is running out of time and that initiating a debate on the matter, rather than simply issuing the conference report, would take a bit of considered thinking. I am not sure what the committee's precise remit is and whether it has any powers to initiate an inquiry or to appoint a reporter specifically to consider the matter. If it does not, perhaps the way in is for an individual member to investigate the matter—I am not sure which subject committee could do that, as the interest extends beyond business.

Because the draft report is about the

conference, it does not include the views of people from different walks of life in Scotland who experience the operation of regulations in their daily tasks. To include such views would provide a fuller picture and would give more weight to the suggestions that are made.

The Convener: For the committee's information, we have a general responsibility in all matters pertaining to subordinate legislation. However, my colleagues would probably behead me if I suggested that we investigate red tape as well as get through the work load that we have now grown used to.

Gordon Jackson: However, as Jackie Baillie makes out, there is a case for a committee—it is hard to know which one—eventually to address the issue. That committee should perhaps initiate an inquiry into our regulatory structures that involves the stakeholders, such as the police and the schoolteachers, who say that there is far too much regulation and form filling. Interestingly, although the subject seems rather dull—and it is—once we get the message across, it becomes a populist subject.

The Convener: Exactly. It is the very essence of what people expect from us.

Gordon Jackson: We had a good presentation from the Florida people. We heard that, eventually, the subject becomes extremely popular among the voters. If people, whether they are small businessmen or policemen, see the burden of regulation being cut, they say, "Hey—this is useful."

Jackie Baillie: If the committee puts the matter in a legacy paper, a successor committee can consider how best it or another committee could address the issue, perhaps by appointing a reporter from among its number to do something about it.

Gordon Jackson: That is a good idea. Perhaps we should leave the issue to be considered by the successor committee.

The Convener: I agree. That is why I was anxious to pursue the matter. Politically speaking, Gordon Jackson's last points are highly relevant. If the public understand better what the Parliament does, they will perhaps learn to love it a little more.

We thank Gordon Jackson and the clerk for the report. It is excellent. We will leave a legacy paper. *[Interruption.]* I have just been reminded that the report contains a recommendation in paragraph 35 and one in paragraph 41.

Ian Jenkins: While we are looking for those, I will make a comment. I agree totally with the drift of the conversation. Can we, when we send the report to the Executive, draw ministers' attention to the *Official Report* of our discussion? Gordon

Jackson said that the conference report may appear to be a rather dull account of various speakers, but the discussion that we have had shows its relevance and the Executive ought to be made aware of it now.

The Convener: As part of that, we will incorporate the suggestion in paragraph 35, which is that the Canadian Red Tape Commission's work

"be brought to the attention of Scottish Ministers with a view to an evaluation of its application and usefulness across their areas of responsibility."

That is wrapped up in the discussion that we have had. Do members agree with the recommendation?

Members indicated agreement.

The Convener: The next recommendation is that the Parliament consider seriously hosting a red tape conference. Do we agree with that recommendation?

Members indicated agreement.

Gordon Jackson: David Mundell went to the first such conference in Sydney. I think that he suggested that the Parliament host one. When we got to the conference, delegates mentioned that to us. It was already an issue. We did not raise it from scratch.

I am keen on the Parliament hosting such a conference. We are a new Parliament. If we can get the regulatory stuff right, that would make a huge difference to how we do things. I am also keen on anything that puts us on the world map as a proper parliamentary body. I am blunt about that. Conference delegates from countries throughout the west—some European stuff was mentioned—were interested in what we do. I am up for anything that gives us a place at the general discussion table of world parliamentary affairs. I am not trying to make a political point, whether nationalist or non-nationalist—my point is more general. As others were interested, we should follow that up.

Jackie Baillie: I agree. It would be useful for the future committee to tie up its work on red tape in the lead-up to the Parliament hosting a conference, because that would make a connection with what we are doing at a Scottish level.

Colin Campbell: The publicity for a red tape conference preceded by some kind of inquiry by our successors would provide a sequence that the public could grasp.

Gordon Jackson: It is important to say that such an inquiry would not be technical work. A lot of the committee's work is technical. The Parliament has a wee smile at us because it thinks that we are just technocrats. However, there is a

very popular and populist line to changing how regulation is done. The issue would really matter to people outside the committee—it is not merely technical.

The Convener: The accessibility aspect is as important as anything else is.

Jackie Baillie: Can we remove the typos before we issue the report? I am conscious that the report says "draft" at the top, but there are quite a few typos.

The Convener: They have been expunged from the version that I hold in my hands.

Jackie Baillie: You are fortunate.

The Convener: Yes. I am the convener.

Meeting closed at 12:01.

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