

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 28 January 2003  
(*Morning*)

Session 1

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **4<sup>th</sup> 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 28 January 2003*

*(Morning)*

[THE CONVENER *opened the meeting at 11:17*]

**The Convener (Ms Margo MacDonald):** I welcome everyone to the fourth meeting in 2003 of the Subordinate Legislation Committee. The meeting will be done on a wing and a prayer this week, but is it not always?

### Delegated Powers Scrutiny

#### Gaelic Language (Scotland) Bill: Stage 1

**The Convener:** The first item is the Gaelic Language (Scotland) Bill at stage 1. The first person to pronounce it the “Gaylick” language will be expelled from the committee.

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** How will that be put down in the *Official Report*?

**Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab):** Phonetically.

**The Convener:** We are not talking about Irish Gaelic. We are doing a Scottish Gaelic bill.

The bill is a member’s bill that is promoted by Michael Russell. He has approached the subordinate legislation powers—

**Brian Fitzpatrick:** Is Michael Russell coming to the meeting?

**The Convener:** No.

**Brian Fitzpatrick:** What a pity—today of all days.

**The Convener:** You do not like blood sports. I remember your vote. Right. Carry on.

**Brian Fitzpatrick:** I brought a big packet of mints.

**The Convener:** Well, anyway, Michael Russell approached the subordinate legislation requirements in the bill in ways that are, I think, quite imaginative. However, the committee might want to consider those.

**Brian Fitzpatrick:** May I make a point, convener, because I am concerned about this? My point about whether Michael Russell would be here was a serious one. I am genuinely not trying

to obstruct what I think is a well-intentioned bill, but the question that falls to me as a constituency member—and to you, convener, and others—is what would the bill do for parents at the Gaelic-medium school in my constituency? What would the bill do to support the kids there in relation to what I think is the need for a Gaelic language plan in East Dunbartonshire, which will not be one of the bill’s designated areas?

**The Convener:** Right. I am going to stop you at that stage. It occurred to me also that there was much explanation along operational lines, if you like. However, that is not a matter for the Subordinate Legislation Committee, but for the subject committee.

**Brian Fitzpatrick:** I just wonder in terms of—

**The Convener:** The bill’s explanatory notes say that immediately royal assent is given to the bill, it will take effect in an area that would be obvious to us. Then the explanatory notes say that other parts of Scotland will be phased in. I think that that is about policy. In fact, one of our concerns is that the reasons behind a decision about when to phase the bill into a particular area would affect the bill’s policy.

**Murdo Fraser (Mid Scotland and Fife) (Con):** Yes, but there is no provision for consultation on the commencement order. The bill’s policy is affected by the commencement order, which will say, like the Land Registration (Scotland) Act 1979, that the bill’s provisions will be rolled out across Scotland. The eventual act would cover different areas.

**The Convener:** That would be according to how the local authorities regarded the bill. The bill’s regulations would not be mandatory, but would only provide guidance for local authorities. Therefore, it would be down to local authorities’ judgment as to when and how the bill would roll out.

**Brian Fitzpatrick:** I presume that a local authority could be challenged on its failure to comply with what was in the local plan by saying that that non-compliance did not represent continuous improvement in the delivery of public services. The issue could then come back to Scottish ministers, who could be told that the local authorities are failing. Ministers could then be asked to proceed by way of enforcement notice or whatever.

**The Convener:** You are clever.

**Ian Jenkins:** Michael Russell said in the Education, Culture and Sport Committee’s evidence that one of the things that he recognises about the bill is that there are no enforcement procedures, even once the bill has been rolled out.

**Brian Fitzpatrick:** I would have thought that the bill's roll-out proposals would allow the use of the Local Government in Scotland Bill's mechanisms.

**The Convener:** Is that the well-being power?

**Brian Fitzpatrick:** Is it not part 1, section 1 on the failure to demonstrate continuous improvement in delivering a public service?

**The Convener:** Yes.

I welcome Bill Butler to the meeting—good morning.

**Bill Butler (Glasgow Anniesland) (Lab):** Good morning, convener.

**The Convener:** We are in the Gaidhealtachd at the moment. Brian Fitzpatrick raised concerns about the fact that we would need more information from the promoter of the Gaelic Language (Scotland) Bill—Michael Russell. I think that Brian Fitzpatrick indicated that he would like Michael Russell to come to a meeting of the Subordinate Legislation Committee.

**Brian Fitzpatrick:** Well, it is up to him whether he comes to the committee.

**The Convener:** Aye, but we can ask, if you want.

**Brian Fitzpatrick:** I raised that as a serious point. I think that Bill Butler probably feels the same.

**The Convener:** Oh, aye. I was not in the least suggesting that it was not a serious point. I appreciate that it is.

**Brian Fitzpatrick:** I think that Bill Butler is probably in the same position as me. Curiously, it seems that the bill will not help those areas of the country where Gaelic language provision is in difficulty. To refer to that point is partly to go into the bill's policy, but it is also why I am interested in exploring the mechanism. We have a local difficulty in that I would suggest that my local authority does not take Gaelic-medium education seriously. As far as I can see, Michael Russell proposes that the one area of the country where GME is taken seriously will be the part of the country where the bill will operate first. I do not know why that is suggested.

I thought that the committee's legal advisers introduced a useful analogy in the briefing paper about the roll-out of the Land Registration (Scotland) Act 1979. However, they then—correctly, I think—dismissed the analogy because the roll-out of the 1979 act was driven by the capacity of Register House and was a technical and resource issue. I do not know whether that kind of roll-out is being suggested for the Gaelic Language (Scotland) Bill, or whether it is, as Michael Russell says, a suck-it-and-see position in

terms of what happens in the Gaidhealtachd. Curiously, the commencement provisions and the delegated powers have substantial inputs as to how the bill would go forward and how Parliament would get involved in that.

**The Convener:** Right. You have persuaded me. Have you persuaded the rest of the committee?

**Murdo Fraser:** I suggest that we write to Mike Russell and set out our concerns. We can invite him to come to the next meeting of the committee, if he wishes. He might want just to reply by letter, but we can certainly give him the opportunity to come to the next meeting and answer questions.

**The Convener:** Does that suit everyone?

**Bill Butler:** I think that that is very sensible.

**The Convener:** Right. We will defer further consideration of the bill, including the public bodies part of it, until we have heard from Michael Russell.

**Bill Butler:** Yes.

**The Convener:** Okay. We will write to him and ask the questions that the legal brief raised. We would want to do that so that, if he decides to come to the meeting, he can prepare. Whether he comes, or replies by letter, the same questions require answers.

### **Budget (Scotland) (No 4) Bill: Stage 1**

**The Convener:** This bill makes provision for the Scottish Administration's budget for 2003-04.

**Ian Jenkins:** As the powers are similar to those that we have seen and asked about before, we should just let the bill go through.

**The Convener:** Fine.

## Executive Responses

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

**The Convener:** We asked the Executive about the steps that were being taken to bring the enabling powers into force. We will simply draw the satisfactory response that we have received to the lead committee's attention.

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

**The Convener:** We asked the Executive about the arrangements that are in place to bring the enabling powers into force. The commencement order has been prepared and will come into force on 24 February. Scottish Ministers have been consulted in connection with the making of the order, and it is intended that the order will be made within the next few days and published in the usual manner. We thank the Executive for its response and will bring the matter to the Parliament's attention.

We also asked the Executive to explain why the code omits any reference to a need to comply with human rights obligations. The issue has arisen before, and our attitude is that, as the code is designed to give guidance to "proper persons", it should be as clear as possible. The Executive takes a different view and feels that it does not need to go into the detail that we would consider to be necessary. However, Westminster agrees with us, which should come as no surprise to anyone. Apparently, certain committees at Westminster have argued strongly and repeatedly that compliance with such obligations should be clear in an instrument.

I do not know whether we will move the Executive on this issue, and it is certainly not up to us to do so—that is up to the lead committee. However, if we feel strongly about the issue, we should draw it to the lead committee's attention and find out whether it agrees that such information should appear in the order.

**Ian Jenkins:** There is no harm in reminding someone who reads the guidance about obligations under the European convention on human rights.

**Colin Campbell (West of Scotland) (SNP):** It would take only a line or two.

**Brian Fitzpatrick:** Although we do not want to suggest that our police, customs officers and others who deal with drug dealers are not fully aware of the accused's human rights.

**The Convener:** No. Ian Jenkins was not even suggesting that, Brian.

**Brian Fitzpatrick:** Of course, I would not want to suggest that a Liberal Democrat was soft on crime and soft on the causes of crime.

**Ian Jenkins:** After all, someone else who was not in such a position might read the guidance.

**Colin Campbell:** There could be some new kid on the block.

**The Convener:** You forgot about that, Brian.

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

11:30

**The Convener:** On these regulations, the committee alleged that the preamble contained defective drafting and wondered whether it made entirely clear the effect that any convictions from outwith the British Isles would have on a person's application. We concluded that it was still an unexpected use of the enabling power, even though we accepted the explanation that we have received on such matters in the past.

Some people might think that we are just being too exact about the preamble, which refers to the Adoption Act 1978 instead of the Adoption (Scotland) Act 1978. The Executive has responded by pointing out—understandably, I think—that it does not create any significant legal difficulties.

**Brian Fitzpatrick:** I do not know whether the Subordinate Legislation Committee is considering a legacy paper, but I think that there is a nuts element to Scottish legal drafting. For example, we have just passed the Local Government in Scotland Bill. Would the French have a local government in France bill or the Austrians a local government in Austria bill? The insistence on putting Scotland into the titles of legislation strikes me as insane. I realise that there is some sort of theology behind the whole matter—anyway, the issue is not up to us—but perhaps someone should blow the whistle on it.

**The Convener:** I look forward to your doing that, Brian. After all, there would be no question of ideology if you took that commonsense approach to the matter.

**Colin Campbell:** Convener, are you saying that Brian Fitzpatrick is devoid of ideology?

**The Convener:** No, just that he is a very sensible person.

**Murdo Fraser:** Perhaps he is devoid of the wrong type of ideology.

**Brian Fitzpatrick:** Touché.

Convener—you are doing well today. For those out there in radio land, she is also looking gorgeous. *[Laughter.]*

It must cheer you up, being announced.

**Ian Jenkins:** You have upset her now.

**The Convener:** No, no. Brian Fitzpatrick has made an absolutely excellent point that the committee will take on board. We have been discussing a legacy paper, and we could indeed raise the issue in it. In any case, we should draw the defective drafting to the lead committee's attention.

**Ian Jenkins:** Our second question highlighted the fact that the regulations do not mention the Isle of Man and the Channel Islands among the different jurisdictions in Britain. The Executive says that that does not matter very much.

**The Convener:** It has pointed out that adoption agencies will have the discretion to decide whether a previous conviction should result in the applicant's being declared unsuitable to be an adoptive parent.

**Ian Jenkins:** That is a statutory duty in England, Wales, Northern Ireland and Scotland, but not in the Isle of Man, the Channel Islands or other countries outwith the British Isles. Any offence that is committed in the UK's larger jurisdictions immediately disqualifies prospective parents from adopting. However, if the offences were committed in other countries, the decision is at the discretion of those who decide such matters. The provision seems a little inconsistent.

**Colin Campbell:** It is incredibly inconsistent.

**The Convener:** Although we have received a clear explanation of why the Executive is sticking by its story, that does not necessarily satisfy the committee.

**Colin Campbell:** Obviously, the Executive has taken this approach for drafting reasons. After all, it is following the text of the Adoption (Intercountry Aspects) Act 1999. However, it is an odd aberration.

**Bill Butler:** Perhaps we should draw the matter to the attention of the lead committee and the Parliament as it seems an unusual use of the power. I think that we are allowed to do that, at least.

**The Convener:** In our letter, we should say that, given the subject area in question, the matter is rather important and that we would be obliged if the Executive would reconsider it.

We also asked the Executive the perennial question of what is meant by the phrase "in

writing". It has explained that the phrase does not automatically include electronic communications. It is interesting that the Executive's view is that the process will be paper based at present and for the foreseeable future.

**Ian Jenkins:** That is what the Executive officials who appeared as witnesses at last week's Education, Culture and Sport Committee meeting said. At first, I thought that that position was odd. We have discussed this before, in relation to agricultural regulations, for example. We have insisted that people should be able to use electronic communication in such circumstances. The Executive's argument in this case was that the process would need to be paper based, as many adoption papers would be involved and signatures would need to be authentic.

**Brian Fitzpatrick:** I presume that the necessary papers will come from multiple sources.

**The Convener:** That is right. They will come from sources that are not necessarily geared up electronically.

We will draw the attention of the lead committee and the Parliament to that issue.

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

**The Convener:** Do members remember this one? We asked the Executive about who got to spy—just to use the shorthand—on people.

**Brian Fitzpatrick:** The order is about fraud.

**The Convener:** Our first question was about when the order would come into force. We asked the Executive to confirm that the date was inserted in the order prior to signature. The Executive was completely honest in admitting that there had been an administrative oversight, which can happen in the best of places. We will not hammer it for that.

However, although the Executive has given us an explanation of why the original order—the Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Order 2000 (SSI 2000/343)—needs to be changed, it has not said whether persons of less responsible ranks will be able to authorise directed surveillance or the use of covert intelligence sources. The name of the relevant organisation has changed.

**Murdo Fraser:** We should refer the issue to the lead committee.

**The Convener:** Absolutely. We did well there—we spotted that and no one else did.

## Draft Instruments Subject to Approval

### Child Support Appeals (Jurisdiction of Courts) (Scotland) Order 2003 (draft)

**The Convener:** I wonder whether this is the order that I thought I should ask the lawyers about. It might be.

**Ian Jenkins:** The order raises many drafting points of a technical nature, which we should draw to the Executive's attention in a formal letter. If we start discussing the issues now, we will confuse listeners and ourselves. The legal brief contains many technicalities.

I liked its reference to the fact that arguments have raged both ways over the years.

**Colin Campbell:** No arguments have raged in the Subordinate Legislation Committee.

**Ian Jenkins:** The Subordinate Legislation Committee should not rage; we should let the lawyers rage—and do whatever nasty things they do to one another—in the background.

**Bill Butler:** Ian Jenkins is being far too poetic.

**The Convener:** We have to obtain factual information and to find out when the order will come into force. As the order will sub-delegate the commencement of the new appeal provisions to UK ministers, it would be worth while for the committee to consider that issue. The order sits at the interface of the two jurisdictions—we are talking about a national policy or strategy and its local application.

There is a typo and a few other points that we will mention. Do members agree to send an informal letter to find out what is going on in the order and what the Executive's intention is?

**Members** *indicated agreement.*

## Instruments Subject to Approval

### Local Government Finance (Scotland) Order 2003 (SSI 2003/42)

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

**The Convener:** Hunky-dory.

## Special Grant Reports

### Special Grant Report No 1—Special Grant for Scotland Asylum Seeker Assistance: Report by Scottish Ministers (SE 2003/15)

**The Convener:** It is just as well that we are not the subject committee for consideration of this report, as I might have been more interested.

**Brian Fitzpatrick:** We note the report.

## Instruments Subject to Annulment

### Police and Police (Special Constables) (Scotland) Amendment Regulations 2003 (SSI 2003/21)

**The Convener:** Although the regulations breach the 21-day rule, there is a perfectly reasonable reason for that. Are members content with the regulations?

**Members** *indicated agreement.*

### Tobacco Advertising and Promotion (Sponsorship Transitional Provisions) (Scotland) Regulations 2003 (SSI 2003/34)

**Colin Campbell:** The regulations are okay.

**The Convener:** Right, okay.

## **Instruments Not Subject to Parliamentary Control**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning)  
(West Coast) (No 13) (Scotland) Order  
2002 Partial Revocation Order 2003  
(SSI 2003/22)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning)  
(West Coast) (No 12) (Scotland) Order  
2002 Revocation Order 2003 (SSI 2003/23)**

**Food Protection (Emergency Prohibitions)  
(Amnesic Shellfish Poisoning)  
(West Coast) (No 14) (Scotland) Order  
2002 Revocation Order 2003 (SSI 2003/24)**

**The Convener:** No points arise on the orders.

**Brian Fitzpatrick:** Shellfish are back on the menu.

## **Instruments Not Laid Before the Parliament**

**Act of Sederunt (Ordinary Cause Rules)  
Amendment (Form of Simplified Divorce  
Application) 2003 (SSI 2003/25)**

**Act of Sederunt (Ordinary Cause,  
Summary Application, Summary Cause  
and Small Claim Rules) Amendment  
(Miscellaneous) 2003 (SSI 2003/26)**

**Act of Sederunt (Summary Applications,  
Statutory Applications and Appeals etc  
Rules) Amendment (International Criminal  
Court) 2003 (SSI 2003/27)**

**The Convener:** These instruments are all fine.

When you look at what the instruments that we consider do, you realise that the Subordinate Legislation Committee is the nuts and bolts of the Parliament—the Parliament could not do without us.

There is nothing else on the agenda. I thank members for their attendance.

*Meeting closed at 11:42.*

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