

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 4 February 2003  
*(Morning)*

Session 1

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## SUBORDINATE LEGISLATION COMMITTEE

5<sup>th</sup> Meeting 2003, Session 1

### CONVENER

\*Margo MacDonald (Lothians) (Ind)

### 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 4 February 2003*

*(Morning)*

[THE CONVENER *opened the meeting at 11:28*]

**The Convener (Margo MacDonald):** I welcome everyone to the fifth meeting this year of the Subordinate Legislation Committee. I must first intimate the apologies of Murdo Fraser and Brian Fitzpatrick, who have constituency business—who said anything about an election? Ian Jenkins and Bill Butler are attending the Health and Community Care Committee for its stage 2 consideration of the Mental Health (Scotland) Bill. However, we are now quorate, as Gordon Jackson has joined us.

**Colin Campbell (West of Scotland) (SNP):** We happy few.

### Delegated Powers Scrutiny

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

**The Convener:** The first item on the agenda is the Gaelic Language (Scotland) Bill, which is Mike Russell's member's bill. Mike Russell is unable to attend due to a previous engagement outside the city, but he has furnished us with a comprehensive reply to the couple of points that we raised last week. We have another week to consider the bill, but I recommend that we write to him now to say what we think would be better practice in terms of subordinate legislation under the bill.

The first comment concerns section 1, which obliges public bodies to prepare Gaelic language plans. Mike Russell proposes that orders made under section 1(7) would follow the negative procedure, but we would prefer them to follow the affirmative procedure. Is that agreed?

**Members indicated agreement.**

**The Convener:** The second comment concerns the use of commencement orders, which is an issue that touches on the policy of the bill. The bill will come into effect in, if you like, the Gaelic-speaking areas right away but would be extended to other parts of Scotland by order. Mike Russell suggests that that should be done through a staged commencement order. However, that is an unusual way of using a commencement order and is not one that the committee would recommend. I suggest that we recommend that the bill be drafted

so that it provides for an instrument that would be exercisable by the ministers under the negative procedure.

**Colin Campbell:** Agreed.

**The Convener:** Is that all right with Gordon Jackson?

**Gordon Jackson (Glasgow Govan) (Lab):** Yes.

**The Convener:** Thank you. We shall do that.

#### Criminal Justice (Scotland) Bill: as amended at Stage 2

**The Convener:** The Criminal Justice (Scotland) Bill, as amended at stage 2, makes a number of amendments to the Scottish criminal justice system and contains several powers to make subordinate legislation, which the committee considered at stage 1. As some of those powers have been substantially changed or removed and new powers have been inserted at stage 2, the bill has come before the committee again for consideration of the changes. The Executive has provided an updated memorandum and has indicated that it intends to make further changes to the delegated powers at stage 3.

As this committee and the Justice 2 Committee recommended, an amendment was made at stage 2 to section 69, which provides that the powers conferred on the Scottish ministers to make orders or regulations will be exercised by statutory instrument. The effect of the amendment is to provide that the order-making powers in sections 6(1)(b), 14(1), 14(12), 15(6), 15(5) and 36(5), as well as orders under section 65 that amend or repeal primary legislation, will be subject to affirmative resolution.

**Colin Campbell:** That is good.

**The Convener:** Yes, that is fine.

Section 44, which provided for a youth pilot study, has been dropped from the bill. We will simply note that.

Under section 56(7), which deals with the review of certain decisions on registration and criminal record certificates, a new power has been introduced that enables Scottish ministers to make regulations under section 124A in part V of the Police Act 1997. The exercise of the power will be by statutory instrument subject to negative resolution. As in similar circumstances in the past, we think that that level of scrutiny is adequate. Is that agreed?

**Members indicated agreement.**

**The Convener:** There is perhaps a bit of overkill on the next issue. The Executive proposes to amend the bill at stage 3 by removing the order-

making power that is contained in section 15(1). Section 15(1) gives victims of certain crimes the right to receive information about their assailant's release from prison. That is an important issue, where the legislation touches folks' lives.

Under section 15(1), the Scottish ministers would have to prescribe through subordinate legislation the way in which information would be submitted by a victim. The Executive considers that the power to prescribe the means by which victims intimate their wish to receive information is unnecessary; ministers would not want to prescribe the medium, as that seems overly bureaucratic. The suggested amendment seems to be an improvement. Are members agreed?

**Members indicated agreement.**

### **Building (Scotland) Bill: as amended at Stage 2**

**The Convener:** Discussion of the Building (Scotland) Bill, as amended at stage 2, caused great joy at the committee's briefing. Colin Campbell spoke for four minutes about the bill and seems to know all about it. We look to be guided by him.

**Colin Campbell:** Thank you. In some measure, the Building (Scotland) Bill emanates from Europe. It proposes different methods of overseeing design and the proper application of and adherence to building rules and regulations. Certified people will overlook design and verifiers will ensure that building regulations are kept to.

**The Convener:** That was well said, sir.

The Executive has drafted its memorandum in a slightly different way from normal, but we are advised that that is a useful development and has been of particular assistance in analysing the various changes that have been made to the powers. Some people might say that, but I still found the memorandum quite challenging.

Section 1 of the bill contains the principal power to make building regulations and is at the heart of the bill. There is provision for consultation before the regulations are made, which is sensible. Section 1(2), as now amended by the Executive, expands the circumstances in which the Scottish ministers must consult the Building Standards Advisory Committee and representative interests, which is fine. They must now do so before making an order to modify paragraph 5(2) of schedule 1, which provides an illustrative list of matters for which building regulations may make provision. The amendment was made in response to a recommendation by the committee.

Bill Butler has just arrived. Good morning, Bill. Did you get fed up with the Health and Community Care Committee?

**Bill Butler (Glasgow Anniesland) (Lab):** One can never get tired of health matters.

**The Convener:** That is good. You have arrived in time for discussion of the Building (Scotland) Bill, which will probably drive you back to discussing mental health at the Health and Community Care Committee—it will seem a haven of sanity.

Schedule 1 to the bill concerns specified matters for which building regulations can be made.

**Gordon Jackson:** The committee does not need to go into the matter too much, does it?

**The Convener:** No. An amendment to improve access for disabled people was lodged, which is fine.

Section 2(4) of the bill concerns continuing requirements, which is where the verifiers that Colin Campbell has spoken about come in. Section 2(1) provides that building regulations may impose continuing requirements on owners of buildings to ensure that the purposes of any designated provision of the regulations are not frustrated. That is fine, but the power conferred on ministers seems to have been greatly widened. However, Colin Campbell has assured us that the power is in line with the European regulations—ministers want to take the power in case they have to make adjustments as adjustments are made in Europe. Are members content with that?

**Members indicated agreement.**

**The Convener:** Section 3(2) concerns the relaxation of building regulations. We were concerned about the section and drew it to the attention of ministers, who have added new subsection (2A).

**Colin Campbell:** We thank them for that.

**The Convener:** Section 6 concerns building standards assessments. The section, which provided for a local authority to carry out a building standards assessment, has been expanded. It now provides that, where the assessment examines the extent to which the building complies with building regulations, the regulations that apply are those that apply to the building at the time of the assessment—that is, not any previous regulations that were valid when building work was carried out. That is definitely an improvement. Are members agreed?

**Members indicated agreement.**

## Executive Responses

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

**The Convener:** I presume that we should draw the attention of the lead committee and the Parliament to the order, as we have noted a failure to comply with proper drafting practice. The Executive has acknowledged that, although the drafting does not affect the legality of the order. The Executive has explained what it meant in the first place, and we thank it for that. It was gracious in acknowledging that it could have done better and it did do better.

## Draft Instruments Subject to Approval

### Housing Support Grant (Scotland) Order 2003 (draft)

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

### Ethical Standards in Public Life etc (Scotland) Act 2000 (Modification of Enactments) Order 2003 (draft)

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

**The Convener:** That is not to say that we do not have ethical standards—we have lots of them.

**Colin Campbell:** I mean that no legal points arise on the order.

**The Convener:** I see Ian Jenkins. Good morning, Ian.

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** Good morning.

**The Convener:** I did not see you arriving. You have missed some really good discussions.

**Ian Jenkins:** I have been here for half an hour.

**The Convener:** You have not. If you had been, I am sure that you would have said lots about building standards.

**Ian Jenkins:** I am sure that I would have done.

### Advice and Assistance (Financial Conditions) (Scotland) Regulations 2003 (draft)

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

### Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2003 (draft)

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

### Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 (draft)

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

**The Convener:** We might mention a wee footnote to the Executive. It is suggested that the content of footnote (k) on page 3 might more appropriately be in the body of the text.

### Members of the Parole Board (Removal Tribunal) Regulations 2003 (draft)

**The Convener:** The committee might ask the Executive to explain the legal basis of regulation 5(3). Paragraph 3B of schedule 2 to the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides that:

“The tribunal shall consist of the following three members, who shall be appointed by the Lord President of the Court of Session—

(a) either a Senator of the College of Justice or a sheriff principal (who shall preside);

(b) a person who is, and has been for at least ten years, legally qualified; and

(c) one other person who shall not be legally qualified.”

That implies no variation. The regulations would introduce the possibility of variation. If one member of the tribunal were unable to participate in an investigation, the Lord President could decide that the tribunal might proceed with only some of the three prescribed members.

**Colin Campbell:** So there is no established quorum.

**The Convener:** The enabling power, which is paragraph 3D of schedule 2 to the 1993 act, states that:

“The regulations made by the Scottish ministers—

(a) may make provision enabling the tribunal, at any time during an investigation, to suspend a member from office and providing as to the effect and duration of such suspension; and

(b) shall make such further provision as respects the tribunal as the Scottish Ministers consider necessary or expedient, including provision for the procedure to be followed by and before it.”

**Gordon Jackson:** I suppose that that might apply to a situation in which the work was almost finished.

**The Convener:** I hate to say this, my learned friend, but for nit-pickers it does not matter whether work is starting, is in progress or has

finished. An investigation either can or cannot take place, and according to the 1993 act, it cannot.

11:45

**Gordon Jackson:** If a tribunal with three members has not started its proceedings and one of its members dies, that person is replaced by another person of that category. However, when the hearing is almost finished, all the evidence has been heard and everything has been done, it might be obvious to everybody that all three tribunal members agree, and the person who is under investigation might know that they agree, because people get vibes. If one tribunal member died just 10 minutes before the tribunal was to issue its final determination—I am being facetious, but only a little—what would be the sense in appointing a replacement? What would be done? Would that person restart proceedings and hear all the evidence again?

**The Convener:** That is entirely reasonable if all three members agree and the outcome is obvious to the person who is under investigation. However, what happens if all three members do not agree and the outcome is not obvious to the person who is under investigation?

**Gordon Jackson:** The replacement is made only if the person who is under investigation wants the missing member to be replaced. The person who is under investigation can always insist on a third person's appointment.

**The Convener:** I understand that.

**Gordon Jackson:** If the person who is under investigation says, "I am content for the determination to be issued in the names of the two remaining members of the tribunal," why should a third member be appointed? What is that person to do? Should the tribunal start again and hear the case again? What role can that third person play in proceedings?

**The Convener:** Nobody disagrees with you, because that is common sense. However, the enabling act does not allow for that. We are saying that the act does not allow for such a situation and that a change needs to be made to allow for that.

**Gordon Jackson:** I do not understand. Perhaps I am just being stupid.

**The Convener:** No. The act does not allow for the variation in the regulations. I do not argue that it is not a good idea to have the variation in the regulations. I argue that, legally, that variation is not permitted under the act, so a change will have to be made.

**Ian Jenkins:** Could we draw the matter to the Executive's attention?

**Gordon Jackson:** The convener says that,

under schedule 2 to the 1993 act, a tribunal must have three members.

**The Convener:** That is correct, because the act uses the word "shall".

**Gordon Jackson:** Therefore, the fact that the regulations say that the third member does not have to be reappointed is—

**The Convener:** Illegal. That is ultra vires.

**Bill Butler:** The position is contradictory. Perhaps we could ask the Executive for clarification.

**The Convener:** We can draw the matter to the Executive's attention, because we are probably right. The Executive can fix it.

**Gordon Jackson:** It does not make sense to appoint a third person with five minutes to go.

**The Convener:** We are not talking sense; we are talking subordinate legislation and powers.

**Bill Butler:** I think that everybody agrees with Gordon Jackson.

**The Convener:** Nobody disagrees with him, but the act does not provide such a power. We think that that power should be available, because it makes sense. It is up to the Executive to find out how to obtain that power.

**Ian Jenkins:** Substitutes in extra time have been known to score winning goals and change the situation.

**Gordon Jackson:** Absolutely, and therefore I can see why—

**The Convener:** I am sorry, gentlemen—we are arguing policy. We do not talk policy.

**Gordon Jackson:** I can see why, if the person who is under investigation says that they want the tribunal member to be replaced, they can have that member replaced, but the replacement should be made only with the consent of the person who is under investigation. However, perhaps doing so would still be illegal.

**Bill Butler:** I am sure that the Executive will clear up the matter for us before our argument resembles that in the letters between the Marx brothers and the brothers Warner.

**The Convener:** Is that subject to the negative procedure?

**Bill Butler:** That is life-affirming procedure.



## Instruments Subject to Annulment

### Civil Legal Aid (Scotland) Amendment Regulations 2003 (SSI 2003/49)

**Gordon Jackson:** The regulations are okay.

**The Convener:** Fine.

### Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment (No 2) Order 2003 (SSI 2003/50)

**The Convener:** Is the order okay?

**Gordon Jackson:** Yes.

**The Convener:** The order replaces a previous order that lacked a date for when the provisions would come into effect. A date has now been included.

## Instruments Not Laid Before the Parliament

### Act of Sederunt (Child Care and Maintenance Rules) Amendment (1993 Hague Convention Adoption) 2003 (SSI 2003/44)

**The Convener:** The act of sederunt makes rules of court in relation to adoptions under the Hague convention. I am advised that there might be something wrong with the definition of the term "Convention adoption order" in rule 2.36A. The definition seems more appropriate to an adoption than to an order.

The term "Convention adoption" is not defined, although it appears in the definition of the phrase "Scottish accredited body". In the definition of the term "Scottish accredited body", the Regulation of Care (Scotland) Act 2001 is wrongly cited as the

"Registration of Care (Scotland) Act 2001".

Could we ask for clarification on that?

**Members** *indicated agreement.*

**The Convener:** I have one or two things to intimate to the committee.

**Alasdair Rankin (Clerk):** They are for next week's agenda.

**The Convener:** That is what I have to intimate. Members should read their agendas for next week carefully, because we are doing some different things.

**Gordon Jackson:** Like what?

**The Convener:** I am not telling you now.

**Gordon Jackson:** Go on—give us a clue, so that we can plan our lives.

**The Convener:** Members know that we must leave a legacy paper. We might have a wee look at that. We will also deal with the procedural questions that we have asked about time limiting. Also, the negative procedure has been used in the Parliament, and perhaps we must draw that to the attention of the Parliament or the Procedures Committee. I do not want to tell members more than that, as that would spoil next week's meeting.

*Meeting closed at 11:52.*



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