

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 11 February 2003  
*(Morning)*

Session 1

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **6<sup>th</sup> Meeting 2003, Session 1**

### **CONVENER**

\*Margo MacDonald (Lothians) (Ind)

### **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

### **WITNESSES**

Joyce Carr (Scottish Executive Environment and Rural Affairs Department)

Elspeth MacDonald (Office of the Solicitor to the Scottish Executive)

James Shaw (Office of the Solicitor to the Scottish Executive)

Neil Sinclair (Scottish Executive Environment and Rural Affairs Department)

### **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 11 February 2003*

*(Morning)*

[THE CONVENER *opened the meeting at 11:32*]

**The Convener (Margo MacDonald):** I welcome everyone to the sixth meeting in 2003 of the Subordinate Legislation Committee. In particular, I welcome Jackie Baillie, who has either been a very bad girl or loved the committee so much last time that she got to come back again. We have no apologies, so we may be joined—[*Interruption.*] The clerk informs me that we have apologies from Brian Fitzpatrick. Is he at another committee?

**Jackie Baillie (Dumbarton) (Lab):** I think that he has something else on. That is why I am here, although I enjoyed being here last time.

**The Convener:** Well, that is all right. You might have to be Gordon Jackson as well.

**Jackie Baillie:** That would be truly difficult.

**The Convener:** We will see whether Gordon turns up.

## Delegated Powers Scrutiny

### Title Conditions (Scotland) Bill: as amended at Stage 2

**The Convener:** The first item on the agenda is the Title Conditions (Scotland) Bill, as amended at stage 2.

**Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD):** We do not think that the committee needs to raise any further points about the amended provisions.

**The Convener:** Excellent.

### Dog Fouling (Scotland) Bill: as amended at Stage 2

**The Convener:** We had a nice letter from the bill's proposer, Keith Harding. He said that he agreed with our recommendation and has effected the amendments to which he committed himself. Is that okay?

**Members indicated agreement.**

## Executive Responses

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

**The Convener:** We had an interesting discussion on the regulations and now have the Executive's response. Perhaps all that we can do at this stage is draw the attention of the lead committee and the Parliament to that response. There is still a doubt as to whether the regulations are *intra vires*, but we will leave that matter to the lead committee.

**Members indicated agreement.**

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

**Colin Campbell (West of Scotland) (SNP):** The Executive has acknowledged defective drafting. It might be an idea to let the lead committee know.

**The Convener:** Yes. We raised a couple of questions on the instrument and have had an answer from the Executive. It is just a case of notifying the lead committee.

## Draft Instruments Subject to Approval

### Budget (Scotland) Act 2002 Amendment Order 2003 (draft)

**Bill Butler (Glasgow Anniesland) (Lab):** No points arise on the order.

**The Convener:** An earlier draft of the order was withdrawn, but the order has been laid again and is fine now.

### Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2003 (draft)

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

### Regulation of Investigatory Powers (Covert Surveillance – Code of Practice) (Scotland) Order 2003 (draft)

**Murdo Fraser (Mid Scotland and Fife) (Con):** No points of substance arise on the order.

**The Convener:** I was really worried about the instrument, but I think that it is all right now.

### General Commissioners of Income Tax (Costs) (Scotland) Regulations 2003 (draft)

**The Convener:** The regulations have been withdrawn and will be laid before the Parliament again next week. They were full of boo-boos, but I am sure that they will be fixed.

### Non-Domestic Rating (Petrol Filling Stations, Public Houses and Hotels) (Scotland) Order 2003 (draft)

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

**The Convener:** Under European Union law, relief from rates is considered to be a state aid and can sometimes therefore be open to challenge. However, that is probably not relevant in the present case.

### Water Undertakings (Rateable Values) (Scotland) Order 2003 (draft)

**Bill Butler:** No points arise on the instrument.

## Instruments Subject to Approval

### Nitrate Vulnerable Zones (Grants) (Scotland) Scheme 2003 (SSI 2003/52)

**The Convener:** The instrument contains today's boo-boo. I must not say that, because our two witnesses—Neil Sinclair from the Scottish Executive environment and rural affairs department and James Shaw from the office of the solicitor to the Scottish Executive—will be quite keen on it. Welcome and thank you for attending.

Before we start to ask the detailed questions of which you had notification, I will ask you about paragraph 14 in the Executive note, which says that you do not expect there to be any problem with the instrument receiving clearance from the European Commission. Will you tell us why? It is a point of interest.

**Neil Sinclair (Scottish Executive Environment and Rural Affairs Department):** Since 1996, England has had a similar scheme that provided grants of 25 per cent when it was first introduced and was later improved to provide grants of 40 per cent. The English have put in a further application on the extended nitrate vulnerable zones. We have yet to hear formally that there is a problem with our application, which the Commission will consider, so we do not anticipate one.

**The Convener:** So that we know, please tell us whether it is correct that the Commission has the power to say no and, if it did, you could not pay the grants.

**Neil Sinclair:** I think that that is correct. If the Commission believed that the scheme was contrary to the state-aid rules, it could say no.

**The Convener:** I will ask a further question out of interest and to learn how such schemes work. What happens when the Westminster Government makes a similar application? Do you co-operate with it initially or do you meet up when you get to the Commission?

**Neil Sinclair:** We submit our application via the United Kingdom permanent representation to the European Union. Our application is passed round Whitehall first, and then, once it is acceptable, it moves on to the European Commission.

**The Convener:** I am a wee touch paranoid about that. What do you mean by "once it is acceptable"?

**Neil Sinclair:** We pass the application down to Whitehall and seek comments from our colleagues there. Once it has been agreed, it goes to UKRep through the Department for Environment, Food

and Rural Affairs and on to the European Commission.

**The Convener:** Will the same level of grants be paid north and south of the border?

**Neil Sinclair:** Yes. The grant rate will be 40 per cent.

**The Convener:** We will start the detailed questions. [*Interruption.*] Please excuse me: the clerk was advising me because we have two similar instruments that are equally confusing for the committee.

Will you explain—slowly, please—how paragraph 7 of the scheme is intra vires in relation to section 29(4) of the Agriculture Act 1970?

**James Shaw (Office of the Solicitor to the Scottish Executive):** I do not have much to say, except that we are relatively content that paragraph 7 is intra vires. One of the clerks gave me advance notice of the question by telephone yesterday, which was helpful.

I presume that the difficulty is with section 29(4) of the 1970 act, which provides for the recovery and withholding of grants made under a scheme that is made under section 29 of that act. I assume that the difficulty is that paragraph 7 sets out the grounds under which a grant can be recovered under the scheme.

**The Convener:** We are with you so far.

**James Shaw:** Paragraph 7 was constructed carefully to ensure that it was

“Without prejudice to section 29(4)”

of the 1970 act. We put that in the instrument to make it absolutely clear that we are aware of that subsection.

We do not think that section 29(4) of the 1970 act in any way obliges us to do anything else, because the grounds in paragraphs 7(1)(a) to (d) of the scheme are not found in that section. We believe that their inclusion was necessary to safeguard the grants that we are paying out and their recovery, as the grants ultimately come from taxpayers' moneys. That is why we included those grounds in the scheme.

**The Convener:** You could have done it another way, could you not?

**James Shaw:** What other way could we have done that?

**The Convener:** You could have gone to the 1970 act.

**James Shaw:** We could have done that, but the act does not prohibit the provision. We also make explicit in the scheme the scenarios in which we believe grants may become recoverable. If you look at the grounds in paragraphs 7(1)(a) to (d),

you will see that they are specific. They particularly attack recovery of moneys in circumstances that might not have been envisaged when the 1970 act was passed.

We have been up front about the scheme's provisions by saying that we know about section 29(4) of the act. We constructed the scheme carefully so that an applicant could be in no doubt as to whether we were recovering a grant under section 29(4) of the 1970 act or under paragraph 7 of the scheme, because the grounds for doing so do not overlap.

**The Convener:** We were not suggesting that you were being sneaky.

**James Shaw:** I am sure that you were not.

**The Convener:** I think that I understand the instrument a bit better now. As no other members wish to pursue the matter, I thank the witnesses for their evidence. That is all. It did not hurt a bit, did it?

## Instruments Subject to Annulment

### Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2003 (SSI 2003/51)

**The Convener:** I welcome to the committee Joyce Carr from the Scottish Executive environment and rural affairs department, who has a stripy jersey on, and Elspeth MacDonald from the office of the solicitor to the Scottish Executive, who is also wearing a jersey, although it is not stripy.

We will work through the questions, of which we have given the witnesses notice. I do not mean to be rude or superficial, but we are not experts on the matter, so we would be greatly obliged if the witnesses answered in straightforward language. The meeting is supposed to be accessible to the people who are affected by the legislation. If the witnesses keep it simple, we will understand and so will the readers.

I ask the witnesses to clarify the first point that we intimated to them, which is about the definition of "nitrate vulnerable zone".

11:45

**Joyce Carr (Scottish Executive Environment and Rural Affairs Department):** The committee is correct: there is a drafting error. However, the definition should refer to regulation 3 of the Designation of Nitrate Vulnerable Zones (Scotland) Regulations 2002, not article 3(1) of the nitrates directive, as the committee's note suggests. There is no regulation 3(1) in the 2002 regulations.

**The Convener:** Good—that was easy.

In the definition of "occupier", the difference between "occupier" and a person

"using part of the farm"

is not clear. Will you clarify that?

**Joyce Carr:** Farmland may be farmed in a variety of ways. We tried to indicate in the definition that a range of people might use the land at any one time. The main farmer will be treated as the occupier in most cases, but there are times when he may rent out part of his land to another user.

**The Convener:** Okay. I think that that makes sense.

Regulation 3 imposes an obligation on the occupier—that is, the farmer—to ensure that the action plan

"is implemented in relation to any part of the farm which is in a nitrate vulnerable zone."

We are confused about whether the "person" referred to throughout regulations 4 and 5 is the occupier.

**Joyce Carr:** It is the occupier, but there might be a range of occupiers, depending on the circumstances of the particular farm.

**Ian Jenkins:** Does not that point slightly counter what you said a moment ago that the occupier and the person who uses part of the farm are not always the same person? You said that there is only one occupier.

**Joyce Carr:** The term "person" in regulations 4 and 5 refers to the occupier.

**Ian Jenkins:** So it is not some other person who uses part of the farm.

**Joyce Carr:** No. The word "person" refers to whoever would be treated as the occupier in the circumstances to which we referred.

**Murdo Fraser:** In that case, would it not have been better drafting to have put the word "occupier", rather than "person", in regulations 4 and 5?

**Elspeth MacDonald (Office of the Solicitor to the Scottish Executive):** I think that the answer is probably.

**Murdo Fraser:** Okay.

**The Convener:** I ask the clerk whether, at this point, there is time for such small matters to be fixed.

**Alasdair Rankin (Clerk):** That would have to be done by an amending instrument.

**Elspeth MacDonald:** Yes. We certainly propose to amend the reference to regulation 3(1) of the 2002 regulations as soon as practicable because we do not want any dubiety on that point. We will produce an amending instrument for that purpose.

**The Convener:** That is great. This is easier than I thought.

Can you say whether regulation 4 should apply to the requirements that are set out in the action plan?

**Joyce Carr:** Regulation 4 refers to the requirements set out in the action plan, although that is achieved by a short way of drafting. Regulation 4 was drafted that way because regulation 3 already refers to the occupier being responsible for implementing the requirements in the action plan.

**The Convener:** Are members content with that or could the matter be a bit clearer? We might write to you about that.



Regulation 5(4) refers to the “cost of the modification” of a notice. Will you explain that?

**Joyce Carr:** The reference is not to the cost of modification of the notice, but to the cost of modifications made to comply with the requirements set out in the notice. I understand that members might have found that unclear when reading the regulations, but the phrase refers not to the cost of modification of the notice, but to the cost of the modifying works.

**Bill Butler:** Would it be possible to make the regulation clearer by adding what you have just said?

**Colin Campbell:** In plain English.

**The Convener:** Especially as you are going to make amendments anyway.

**Elsbeth MacDonald:** The question suggests that members read the provision as saying that the “cost of modification” relates to the notice, but it actually relates to part of the appellant’s grounds of appeal if he wishes the notice to be modified. The grounds of appeal would give details of the modification and

“indicate the nature, extent and cost of the modification”

that the appellant proposes. The phrase “cost of the modification” does not relate directly to the notice; it relates to what changes the appellant wants to make. The court would receive an indication of those costs.

**The Convener:** Is that clearer?

**Murdo Fraser:** I understand exactly—I see that the regulation makes sense.

**Elsbeth MacDonald:** The provision requires reasonably close reading, but I suspect that changing it might not make it any clearer.

**Ian Jenkins:** The phrase “that modification” would be better than “the modification”, because it would refer to the modification that has just been mentioned.

**The Convener:** Thank you, Mr Jenkins.

**Colin Campbell:** That is the value of having an English teacher on the committee.

**The Convener:** Yes.

What is the purpose of regulation 5(6)?

**Joyce Carr:** Regulation 5(5) relates to the powers of the Scottish Land Court and regulation 5(6) relates to the powers of the chairman of the Scottish Land Court. We make that distinction in the regulations.

**The Convener:** That seems straightforward.

Before we move on, we turn to the reference to “field middens” in paragraph 14 of the schedule. Should that term be defined?

**Elsbeth MacDonald:** When the regulations were being drafted, we asked whether we needed a definition of that term and various others, but we were told that, as people in the agriculture world would understand the meaning of the term, no definition was required. We were told that the term is, in effect, a term of art and we have used it in that manner.

**The Convener:** That is all right then. I just wondered whether the term was a load of old rubbish, but it is obviously not.

**Colin Campbell:** Whether or not it is enclosed or free standing.

**The Convener:** We noticed all sorts of typos and so on, but we will draw them to the attention of the appropriate authorities.

I thank the witnesses for attending.

**Ian Jenkins:** There are colourful definitions of words such as “slurry”, but we had better not go into that.

**The Convener:** We do not want a definition of slurry—not in this committee and not before lunch. You have such a dirty mind, Mr Jenkins.

**Colin Campbell:** He represents a rural area.

**The Convener:** That is true.

### **Animal By-Products (Identification) Amendment (Scotland) Regulations 2003 (SSI 2003/53)**

**Murdo Fraser:** There is a question whether the regulations should be notified to the European Commission under the technical standards directive. As a result, we should ask the Executive whether it has obtained the necessary clearance.

**The Convener:** Indeed, because if it has not done so, it cannot enforce the regulations—even though I have absolutely no doubt that our standards are higher in this respect. Anyway, we should ascertain whether the Executive has obtained clearance. Perhaps we should also ask the Executive always to indicate in its explanatory note whether it has done so.

### **Housing Revenue Account General Fund Contribution Limits (Scotland) Order 2003 (SSI 2003/54)**

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

### **Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2003 (SSI 2003/56)**

**The Convener:** The order was obviously drafted by a meat eater. Article 6(4) contains the provision that a transfer of unused fishing days is not permitted unless a logbook has been submitted

before 1 February 2003. That would be fair enough, except that the order came into force on that day. Moreover, it was not laid until 4 February. As a result, anyone who wants to transfer some of their fishing days will not be able to. We must ask the Executive whether that was its intention.

**Ian Jenkins:** It might have something to do with ensuring that people do not circumvent regulations after the date by carrying out some kind of transfer that might benefit them.

**The Convener:** That would be a matter for the subject committee to sort out. Anyway, it would be worth while to draw the point to the Executive's attention.

**Murdo Fraser:** Articles 3(9)(a) and 3(9)(b) might refer incorrectly to paragraphs (3)(2)(a) and (3)(2)(b); the reference instead should perhaps be to paragraphs (2)(a) and (2)(b). We should simply ask the Executive to clarify that.

### **Community Care and Health (Scotland) Act 2002 (Transitional Provisions) Order 2003 (SSI 2003/63)**

**Colin Campbell:** We might like to ask the Executive why the italic headnote to the order gives 28 February 2003 as the date on which the order will come into force when article 1 states that it comes into force in May 2003. That seems to be a discrepancy.

**The Convener:** There is also some confusion about the terms that have been used in the order. It seems to have been written in a hurry. For example, article 1(2) defines certain terms with reference to the National Health Service (Scotland) Act 1978, but not other terms, such as "medical practitioner" and "medical list". I think that we will have to draw the Executive's attention to the matter and ask whether it intended to do that.

### **National Health Service (General Medical Services Supplementary Lists) (Scotland) Regulations 2003 (SSI 2003/64)**

**The Convener:** There are loads of points to highlight in these regulations. However, they might just be the result of rushed or sloppy drafting.

**Colin Campbell:** We are having to complain about that far too often.

12:00

**The Convener:** We acknowledge that there is terrific pressure on staff as we reach the end of the session. That said, we cannot put the regulations through on the nod. We need to ask the Executive for clarification on these points.

Instead of going through the 13 points outlined in our legal briefing one by one, I seek the

committee's agreement simply to send a letter to the Executive, asking for clarification.

**Members indicated agreement.**

### **Domestic Water and Sewerage Charges (Reduction) (Scotland) Regulations 2003 (SSI 2003/65)**

**The Convener:** No date of signature appears on the regulation, which is quite rude. Does that not mean that the instrument is illegal? Anyway, there should be a date.

We should ask the Executive to explain the words

"payable in respect of the relevant year shall be less than it would be but for these regulations",

in regulation 3. We do not know what they mean.

### **Sea Fishing (Restriction on Days at Sea) (Scotland) Amendment Order 2003 (SSI 2003/66)**

**Ian Jenkins:** Although we have no technical points to raise, we wonder whether the amended order will be issued free of charge to people who purchased the order in its earlier form. Although that is what usually happens, the explanatory note does not make that officially clear. As a result, we should ask whether the Executive intends to do so.

**The Convener:** Is there a difference between an amended instrument and an instrument that is simply wrong? If there are mistakes in an instrument, the Executive normally issues the corrected version free to anyone who has purchased the earlier version. Does it make a difference if the instrument has been amended? Och, that would be mean and penny-pinching. We should tell the Executive that it should stick to its usual generous practice—and that we love it.

## Instruments Not Laid Before the Parliament

### Community Care and Health (Scotland) Act 2002 (Commencement No 2) Order 2003 (SSI 2003/62)

**The Convener:** We should ask the Executive whether the failure of the order to commence section 18(1) for the purpose of inserting section 17EA(3) is deliberate. [*Interruption.*] Please, Murdo. We are not finished yet—we will need that equipment again next week.

**Colin Campbell:** Yes. Do not trash the joint.

**The Convener:** You are not a rock star, you know.

**Ian Jenkins:** I see that the Young Conservatives are in today.

## Conveners Group Legacy Paper

**The Convener:** The next item is our consideration of the Conveners Group legacy paper. Members will notice that the paper mentions the time scales for subordinate legislation procedures. Lead committees have said that they can experience time pressures when scrutinising subordinate legislation or considering this committee's recommendations or observations on certain instruments.

We can all make such a complaint, which might have something to do with restrictions in dealing with subordinate legislation that have been imposed on us by the Parliament's standing orders. As a result, our legacy paper suggests that the Parliament needs to examine the way in which it deals with subordinate legislation.

We are being asked whether we think it advisable that, instead of having the 40-day limit, we should have a 60-day limit, which is what the Conveners Group is suggesting. The pressure on the committees is occasioned not simply by the amount of time that they have, but by the way in which things are structured, with cycles of meetings and so on.

I suggest that we do not tie ourselves to calling for a 60-day limit, but say that the 40-day limit is proving to be unsatisfactory and suggest that an extension be considered. Before another number of days is fixed, we should take account of the debates that have gone on in Westminster, because members there have already talked about the issue.

**Murdo Fraser:** That is very unionist of you, convener.

**The Convener:** Well, you know me—I am an independent, so I am allowed to cherry pick good ideas from wherever.

I do not know whether what I have suggested is a good idea. It is certainly a good idea that we do not continue to put ourselves under the pressure that we are under now, because we know that some stuff slips through without proper scrutiny. We also know that we have put a huge burden of work on the committee's clerks and advisers, who, as we have informed the Executive, have been asked to perform above and beyond the call of duty.

Do members agree with the suggestion that I have made?

**Members** *indicated agreement.*

**The Convener:** In that case, I will suggest to the Conveners Group this afternoon a formal amendment to the procedures.

## Late Annulment Motions

**The Convener:** The next item is similar, but it relates to a particular restriction. I think that Lloyd Quinan's late annulment motion is the only one that has been considered, although there might have been others—anyway, it is a good example. He did not have the information to allow him to decide whether to lodge a motion until the 38<sup>th</sup> day of the 40-day period. It was by good luck rather than by guidance that the relevant subject committee, which was the Enterprise and Lifelong Learning Committee, had a meeting scheduled with the Minister for Enterprise, Transport and Lifelong Learning the following day. The minister was there on another matter, so it was just good luck that the committee was able to discuss the motion with him. That is unsatisfactory.

We are testing the system, which in that instance was found to be less than perfect. However, I caution the committee that, having given the matter great thought, I suggest that it might be the case that no system is ever perfect.

**Colin Campbell:** We all know that.

**The Convener:** The decision to be made is whether, under the standing orders, the subject committee has discharged its duty if it has discussed and disposed of an instrument in advance of the 40-day limit for a motion of annulment to be lodged. In the case of Lloyd Quinan's motion, the Enterprise and Lifelong Learning Committee had disposed of the matter, but Lloyd Quinan lodged his motion and the committee revisited it. There is the question whether that is *intra vires*.

**Bill Butler:** Can we ask the Procedures Committee?

**The Convener:** That is where the matter goes. We must draw the issue to the Procedures Committee's attention and ask it to make up its mind about the correct way of proceeding. There is nothing to worry about. We learn as we go.

**Ian Jenkins:** Let us suppose that Lloyd Quinan had not been able to lodge the motion or that the Enterprise and Lifelong Learning Committee had not considered it. Would he have been able to ask about the matter after the 40-day period?

**The Convener:** The precedent from Westminster is that members can raise the matter in other ways. They can lodge all sorts of motions. I presume that our system would allow for that, too. Members could lodge a motion, but that would not have the same force that lodging a motion under the 40-day procedure would have.

We have talked about this enough. We will let the Procedures Committee decide, because that is

what it is in business for. We have flagged up the points that are of interest and importance. We can give guidance if it is sought, but we cannot take a decision on the matter.

I thank members for their attendance and I will see them again next week.

*Meeting closed at 12:10.*

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