

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 March 2003
(*Morning*)

Session 1

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2003.

Applications for reproduction should be made in writing to the Licensing Division,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate
Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The
Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now
trading as The Stationery Office Ltd, which is responsible for printing and publishing
Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 4 March 2003

Col.

DELEGATED POWERS SCRUTINY	1257
Mental Health (Care and Treatment) (Scotland) Bill: as amended at Stage 2	1257
EXECUTIVE RESPONSES	1263
Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (draft).....	1263
Fishing Vessels (Decommissioning) (Scotland) Scheme 2003 (SSI 2003/87)	1263
Sea Fishing (Transitional Support) (Scotland) Scheme 2003 (SSI 2003/92)	1263
Surface Waters (Fishlife) (Classification) (Scotland) Amendment Regulations 2003 (SSI 2003/85)	1264
Bluetongue (Scotland) Order 2003 (SSI 2003/91)	1264
DRAFT INSTRUMENTS SUBJECT TO APPROVAL	1266
Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (draft)	1266
General and Specialist Medical Practice (Education, Training and Qualifications) Order 2003 (draft)	1266
INSTRUMENT SUBJECT TO APPROVAL	1266
Sea Fishing (Transitional Support) (Scotland) (No 2) Scheme 2003 (SSI 2003/116)	1266
INSTRUMENTS SUBJECT TO ANNULMENT	1267
Sheriff Court Fees Amendment Order 2003 (SSI 2003/97)	1267
Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Amendment Order 2003 (SSI 2003/100)	1267
Feeding Stuffs (Scotland) Amendment Regulations 2003 (SSI 2003/101)	1267
INSTRUMENT NOT SUBJECT TO PARLIAMENTARY CONTROL	1268
Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2002 Revocation Order 2003 (SSI 2003/115)	1268
INSTRUMENTS NOT LAID BEFORE PARLIAMENT	1268
Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc Rules) Amendment (No 6) (Proceeds of Crime Act 2002) 2003 (SSI 2003/98)	1268
Tobacco Advertising and Promotion Act 2002 (Commencement No 5) (Scotland) Order 2003 (SSI 2003/113)	1268

SUBORDINATE LEGISLATION COMMITTEE

9th 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

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 March 2003

(Morning)

[THE CONVENER opened the meeting at 11:27]

The Convener (Margo MacDonald): I welcome everybody to the Subordinate Legislation Committee's ninth meeting in 2003. We have apologies from Gordon Jackson and Brian Fitzpatrick. Brian Fitzpatrick is dealing with a personal matter, and Gordon Jackson is dealing with an even more personal matter, given the size of the majority in Govan. However, the committee does not talk about policies or anything like that—fortunately.

Delegated Powers Scrutiny

Mental Health (Care and Treatment) (Scotland) Bill: as amended at Stage 2

The Convener: We could consider the bill over two or three meetings, but such is the pressure of business that I think that we should get through it today, if we can. Does the committee agree?

Members indicated agreement.

The Convener: The Mental Health (Care and Treatment) (Scotland) Bill was formerly called the Mental Health (Scotland) Bill. We considered it at stage 1 twice last year and expressed serious concerns about several of its delegated powers. The Executive told us that it intended to make substantial amendments, including amendments to the delegated powers. It has kept its word. The substantially amended bill includes a significant number of amendments and additional powers. Our responses might well be mixed.

The bill contains 14 new powers to make subordinate legislation. The subordinate legislation powers that the committee considered in section 27(7), which was on the appointment of mental health officers; section 41(6), which dealt with conflicts of interest; and section 97(6), which dealt with the transfer of prisoners for treatment for mental disorder, have been removed. I presume that the committee rests content with that.

Members indicated agreement.

The Convener: Other changes have been made to sections 46(5), 168, 184, 196, 197 and 215 and to schedule 2.

We will work through the additional powers in the bill. Subsections (2) and (4) of section 58 deal with placing a care plan in medical records. Section 58 has been greatly expanded. In its memorandum, the Executive explains that the new provisions are intended to make it clear that the final care plan that results from the mental health tribunal's consideration of an application for a compulsory treatment order might not be the same as the proposed care plan that is submitted with the application. That appears to be an improvement on the original proposition. Does the committee agree?

Members indicated agreement.

The Convener: Section 81(2) deals with ancillary powers of the tribunal and allows the tribunal to require the responsible medical officer or mental health officer

"to prepare and submit ... reports on such matters as may be prescribed."

The Executive might have done more than it needed to.

Murdo Fraser (Mid Scotland and Fife) (Con): Should such reports be ordered by the tribunal, or should they be a matter for regulation by ministers? Whether the power is necessary is questionable.

The Convener: We will ask the Executive for clarification.

New powers to make delegated legislation have been inserted to bring the provisions that relate to mentally disordered offenders into line with those that apply to other patients.

Bill Butler (Glasgow Anniesland) (Lab): That has been done for uniformity.

The Convener: And fairness.

Bill Butler: The changes are reasonable.

The Convener: Does the committee agree?

Members indicated agreement.

The Convener: We might have more to say about section 171A, which deals with the Scottish ministers' power to make provision in relation to treatment for some informal patients. The section applies mainly to children.

Murdo Fraser: The section deals with under-16s who might be suffering from mental disorder. Concern might be expressed about the width of the powers that are being given to ministers, given the sensitivity of the subject.

The Convener: The Executive says that the regulations would be subject to affirmative procedure, but we might feel that something more is required. I am tempted to think that the situation is anomalous and that the judgments that the

committee sometimes makes about the width of powers that ministers can exercise do not apply. I do not mean to influence the committee greatly, but members might remember that under part 13 of the bill, which is about compulsory and other forms of treatment, definition was difficult. Is it acceptable to delegate such a power and for it to be so open-ended, or should some prescription be required?

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): If I read the information correctly, it says that the Executive is to consult more and to ask people about the proprieties. However, we should still ask the Executive whether it should consider putting more stuff in the bill.

The Convener: I am sure that it should. However, it is difficult to decide what stuff the bill should include.

Ian Jenkins: The purpose of the provision is the protection of children. Our worry is that people might disagree about what protecting children involves and whether their human rights would be infringed if the provision were applied.

The Convener: There might also be disagreement about who could protect them. Bill, is there anything that you want to bring to the discussion from your experience of the Health and Community Care Committee's discussions on the bill?

Bill Butler: Many of our discussions concerned the difficulty of striking the right balance between protection and what could be regarded as interfering with a person's human rights. It would be reasonable for us to ask the Executive whether the provision should appear in the bill. Members will readily accept that the discussions around the paradox of protection and liberty were difficult. However, I do not see why we should not ask that question in the context of subordinate legislation.

The Convener: This is where subordinate legislation comes into its own—it is the pointy end of something that affects people dramatically. Perhaps we should tell the Executive, at the same time, that we sympathise with its dilemma.

Bill Butler: I think that the Executive's intention is to use the power for protection, as Ian Jenkins said.

The Convener: Right—and to have further consultation.

Section 172A concerns "Certificates under section 166" and corrects an omission from the bill as introduced. Do members agree that it is a good correction?

Members indicated agreement.

The Convener: Section 181A, which is entitled "Named person: application by patient etc", allows

the patient or another interested party to apply to the tribunal for an order appointing a named person or removing an existing named person. That is an obvious subject for delegated powers and the annulment procedure. Okay?

Members indicated agreement.

The Convener: Section 185, which is entitled "Provision of information to patient", is another obvious subject for delegated powers and the annulment procedure. Okay?

Members indicated agreement.

The Convener: Sections 202B(6) and 202D(5) deal with removal to a place of safety and the recall or variation of a removal order. Bill, do you want to take a minute to see whether you can remember any of the Health and Community Care Committee's thinking on those sections?

Ian Jenkins: The Executive is going to give further consideration to these sections, too.

Bill Butler: I agree with Ian Jenkins. Perhaps we could ask the Executive whether it has had any further thoughts on the provisions.

The Convener: The provisions allow a sheriff to order that a mentally disordered person who is at risk be removed to a place of safety for a short period.

Colin Campbell (West of Scotland) (SNP): The Executive wants the right to add to the list of people who could make representations.

The Convener: Should we ask the Executive how it intends to make clearer how the list would be added to?

Bill Butler: Yes.

Ian Jenkins: Perhaps we could, as a halfway house, ask which additions already figure in the Executive's thinking and leave it with the option of adding to that list later.

The Convener: Okay. We will do that.

Section 228A deals with "Supplementary provisions etc". Members have nothing to say about that section. It is fine.

We move on to significant changes to powers in the bill on introduction. Section 46(5) is in a section entitled "Medical examination: requirements". The bill establishes the basic principle that there must not be a conflict of interests. It appears that the regulations will define what is or is not a conflict of interests for the purposes of the provision. Is not that very difficult to do?

Murdo Fraser: Usually, the courts determine whether there is a conflict of interests. I understand where the Executive is coming from, in

trying to specify that in regulations; however, I am not sure how it could give a definitive statement, as the courts will always have the final say.

The Convener: That is right. Is it worth while asking the Executive to explain to us how it imagines that that would happen? Alternatively, will it define "conflict of interests" in the regulations and wait until somebody challenges that definition before it works it out?

Murdo Fraser: We could ask the Executive how it envisages that the regulations will work in practice.

The Convener: Okay. That is a much nicer way of putting it.

Section 168 is entitled "Treatments given over period of time etc". The detail of the provisions required is such that it is considered more appropriate to put that detail into regulations to allow for the flexibility to alter the provisions at a later date. The Executive has acknowledged our earlier concerns.

Murdo Fraser: However, there is an important typing error in section 225, which states that regulations made under section 168(3)(b) are subject to the affirmative procedure.

The Convener: Yes. That is very important. It just shows that all the children who send text messages can get themselves into real problems if they do not learn proper English and grammar. I mention that in passing.

Murdo Fraser: They will never get jobs as parliamentary draftsmen.

The Convener: No, or even aspire to a place on the Subordinate Legislation Committee.

Murdo Fraser: Their career choices will be limited.

Ian Jenkins: We should ask the Executive to tighten up section 225.

The Convener: Should not the exercise of the power in section 168(5) be subject to the affirmative procedure, as it would amend the text of an act?

Murdo Fraser: Yes, perhaps.

The Convener: That may just be a wee slip due to the volume of work that is being pushed through the sausage machine at the end of the session.

Bill Butler: We could raise that as a concern, convener.

The Convener: The sausage machine or that particular error?

Colin Campbell: Both.

Bill Butler: That particular error.

The Convener: Definitely.

Section 184 deals with the code of practice.

Murdo Fraser: The amended drafting is welcome. I think that we can accept section 184.

The Convener: That is excellent.

Section 196 is entitled "Certain persons detained in hospital: use of telephones". That section is okay.

Members indicated agreement.

The Convener: Section 197 is about "Safety and security in hospitals". That section is also okay.

Colin Campbell: It is an improvement on the original.

The Convener: Section 215 is entitled "Persons providing care services: sexual offences". That section has been improved.

Schedule 2 concerns the mental health tribunal for Scotland. We talked about schedule 2 as drafted.

Murdo Fraser: The amended provisions are certainly an improvement on the original drafting.

The Convener: Yes. The effects would be an improvement, but is the drafting good?

Murdo Fraser: There is a problem with the power in paragraph 9(2)(p) of part 3 of schedule 2, which seems to overlap with the new power in section 81(3). There is a question about the Executive having the power to make both rules and regulations.

The Convener: It cannot do both in the one instrument, as there would be overlapping and confusion about which to use. We will draw that question to the Executive's attention.

Members indicated agreement.

11:45

The Convener: We also made some suggestions about sections 70, 73, 108 and 131, which the Executive has decided not to change.

Under changes to procedure for instruments, the committee suggested amendments to section 225. The Executive seems to have agreed with us.

Murdo Fraser: I welcome that.

The Convener: Good.

Members indicated agreement.

Executive Responses

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (draft)

The Convener: The Executive has acknowledged that this draft order was defectively drafted in respect of almost all the points that the committee raised. The order has been withdrawn and a fresh draft has been laid. That is to be drawn to the attention of the subject committee—another triumph for the Subordinate Legislation Committee.

Members *indicated agreement.*

Fishing Vessels (Decommissioning) (Scotland) Scheme 2003 (SSI 2003/87)

The Convener: Let us see whether the committee will eventually triumph with this order.

Murdo Fraser: The committee asked about the scheme's lack of a provision on protection against self-incrimination. The Executive said that no such provision was necessary because it is effectively a given through the European convention on human rights. That is a rather inconsistent approach to drafting, because protection against self-incrimination is specifically inserted in other instruments. Therefore, it is worth mentioning in our report that drafting should be consistent.

The Convener: We would also prefer the scheme to mention that provision.

Murdo Fraser: Yes.

Sea Fishing (Transitional Support) (Scotland) Scheme 2003 (SSI 2003/92)

The Convener: Something similar might be said about this statutory instrument.

Ian Jenkins: The Executive has recognised problems with a couple of smaller drafting points.

Colin Campbell: It was suffering from rogue inverted commas.

Ian Jenkins: Yes. The reference to "capacity means" should refer just to "capacity".

Murdo Fraser: The reference to "P" should be a reference to "B".

Ian Jenkins: The Executive does not know its p's from its b's.

Colin Campbell: That "B" is for breadth.

Ian Jenkins: A similar question to that outlined by Murdo Fraser on the previous instrument also arises. We should make the same point.

The Convener: Westminster seems to take the same attitude. No doubt, it is copying the good standards that the Subordinate Legislation Committee has established.

Surface Waters (Fishlife) (Classification) (Scotland) Amendment Regulations 2003 (SSI 2003/85)

The Convener: There is a question about whether proper legislative practice has been followed in the drafting of this instrument. The committee asked the Executive to explain why regulation 1 contains a definition of the Surface Waters (Fishlife) (Classification) (Scotland) Regulations 1997 when they are mentioned only once. The Executive said that it could have done the drafting differently, but we could say in our report that the instrument could have been drafted a little better.

Members *indicated agreement.*

Bluetongue (Scotland) Order 2003 (SSI 2003/91)

The Convener: Now we come to today's *bête noire*.

Ian Jenkins: Should not that be *bête bleue*?

The Convener: Who would like to take a pot shot at this?

Colin Campbell: I think that you would. It is *de trop*.

The Convener: It is *de trop*—that shows that I am not a narrow nationalist and that I know one or two words of the *lingua franca*.

The order should have been put into effect by 1 January 2002. Members will recall that I was griping somewhat at its having lain around for all that time only for it to be lumped in with the additional work that the committee's clerks and legal advisers have to get through at this stage in the parliamentary process. However, I do not expect that anyone bothered too much about that.

We should bring the instrument to the Parliament's attention on a number of grounds. The main problem is that the instrument may be absolutely invalid.

Murdo Fraser: It may be *ultra vires*.

The Convener: We should indicate to the Executive that we think the instrument may be invalid and ask it to check with its lawyers.

Colin Campbell: Indeed, the instrument may be a nullity.

The Convener: We must ask whether the instrument is *intra vires*. Further, a devolution issue has been raised in respect of the instrument

and one point is defectively drafted. We have also requested extra information from the Executive on the question of the instrument's validity.

We will quote the judgment of Lord Rodger, who overturned Lord Reed's judgment in respect of the devolution matter. In mitigation, we will mention that a court might take a different view of what is meant by compatibility with Community law for the purposes of section 57(2) of the Scotland Act 1998 from that which was taken in relation to convention rights in the case of *HM Advocate v Rourke*.

That will show the Executive. We will await its reply with interest.

Draft Instruments Subject to Approval

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2003 (draft)

Murdo Fraser: The order is fine.

The Convener: It replaces a similar draft order.

General and Specialist Medical Practice (Education, Training and Qualifications) Order 2003 (draft)

The Convener: The order has already been replaced by a fresh draft, which must be laid before all United Kingdom legislatures. We have nothing more to say about it.

Instrument Subject to Approval

Sea Fishing (Transitional Support) (Scotland) (No 2) Scheme 2003 (SSI 2003/116)

The Convener: The Executive has admitted to issuing a faulty original draft of the instrument. We have requested a replacement, free of charge.

Instruments Subject to Annulment

Sheriff Court Fees Amendment Order 2003 (SSI 2003/97)

Murdo Fraser: The explanatory note to the instrument states:

“Article 3 makes a saving which permits the charging of the fee ... during the transitional period, provided for by the 2002 Act”.

However, the Debt Arrangement and Attachment (Scotland) Act 2002 does not appear to provide for a transitional period. We should ask the Executive what that means and whether it has made a mistake.

The Convener: It sounds as if the Executive has made a wee mistake. However, having brought Murdo Fraser's fine legal mind to bear on the matter, we will ask about it. I had no clue what the provision meant.

Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Amendment Order 2003 (SSI 2003/100)

Colin Campbell: The order is all right.

The Convener: It is hunky-dory.

Ian Jenkins: Are we allowed to fish off the pier at Rothesay using a bent pin?

Colin Campbell: The member will find out when he is a pensioner.

The Convener: What an interesting time Ian Jenkins will have.

Colin Campbell: He is really looking forward to it.

The Convener: Do members know that I worked a season in Rothesay?

Bill Butler: So did I.

Ian Jenkins: Were you in “The Entertainers”?

The Convener: There is nothing wrong with the Pavilion. However, I worked as a waitress across the road; my mother's friend worked in the Pavilion.

Feeding Stuffs (Scotland) Amendment Regulations 2003 (SSI 2003/101)

Colin Campbell: We have no points to make on the instrument.

Instrument Not Subject to Parliamentary Control

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2002 Revocation Order 2003 (SSI 2003/115)

The Convener: We have no points to make on the instrument.

Instruments Not Laid Before Parliament

Act of Sederunt (Summary Applications, Statutory Applications and Appeals Etc Rules) Amendment (No 6) (Proceeds of Crime Act 2002) 2003 (SSI 2003/98)

Colin Campbell: No points arise on the instrument.

Tobacco Advertising and Promotion Act 2002 (Commencement No 5) (Scotland) Order 2003 (SSI 2003/113)

The Convener: Eventually, we come to an instrument that the Executive has got right.

Ian Jenkins: No points arise on the order.

The Convener: Congratulations all round—*[Interruption.]*

Did someone just throw their nameplate out with the bathwater?

Colin Campbell: Ian Jenkins has just thrown his plastic thing on the floor.

The Convener: Is that what that was?

A number of additional instruments might be laid during the coming week. I shall inform members if I think that the committee has to take extraordinary action.

Murdo Fraser: We trust you to take any extraordinary action that might be required.

The Convener: I think that I also have news from the broadcasting front. I do not think that we will be playing a starring role after all.

Colin Campbell: Are we still in public?

The Convener: The meeting has now finished. I thank everyone for their attendance.

Meeting closed at 11:56.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 11 March 2003

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5

Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75

Special issue price: £5

Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF1 2BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation
Helpline may be able to assist with additional information
on publications of or about the Scottish Parliament,
their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers