

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 November 2003
(Morning)

Session 2

£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 11 November 2003

Col.

DELEGATED POWERS SCRUTINY	191
Nature Conservation (Scotland) Bill: Stage 1	191
EXECUTIVE RESPONSE	198
Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2003 (SSI 2003/511)	198
INSTRUMENTS SUBJECT TO APPROVAL	199
Nitrate Vulnerable Zones (Grants) (Scotland) Amendment Scheme 2003 (SSI 2003/518)	199
Mink Keeping (Scotland) Order 2003 (SSI 2003/528)	199
INSTRUMENTS SUBJECT TO ANNULMENT	201
National Health Service Superannuation Scheme (Scotland) Amendment (No 3) Regulations 2003 (SSI 2003/517)	201
Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2003 (SSI 2003/519)	201
Specified Sugar Products (Scotland) Regulations 2003 (SSI 2003/527)	201
INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT	203
Adults with Incapacity (Scotland) Act 2000 (Commencement No 5) Order 2003 (SSI 2003/516)	203
Lands Tribunal for Scotland Amendment (Fees) Rules 2003 (SSI 2003/521)	203

SUBORDINATE LEGISLATION COMMITTEE

12th Meeting 2003, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Stewart Maxwell (West of Scotland) (SNP)

Christine May (Central Fife) (Lab)

*Alasdair Morgan (South of Scotland) (SNP)

*Mike Pringle (Edinburgh South) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)

Alex Johnstone (North East Scotland) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 November 2003

(Morning)

[THE CONVENER *opened the meeting at 10:30*]

Delegated Powers Scrutiny

Nature Conservation (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome everyone to the 12th meeting this session of the Subordinate Legislation Committee. We have received apologies from Gordon Jackson and Christine May.

First on the agenda is the Nature Conservation (Scotland) Bill, which has arisen from the consultation paper, "The Nature of Scotland: A Policy Statement". The draft bill was published in March this year. Obviously we are considering the orders and regulations.

Part 1 of the bill deals with biodiversity and we are considering section 2, which concerns the Scottish biodiversity strategy. There are questions about whether the strategy should be subject to more parliamentary scrutiny, and whether the section confers administrative or legislative powers. At the moment there is no provision for formal parliamentary input.

The legal adviser has suggested three options for the committee to consider. Can I hear the committee's response to those options, and your views on consultation? Scottish ministers are under no statutory duty to consult before designing a strategy.

Mr Stewart Maxwell (West of Scotland) (SNP): We discussed a statutory duty to consult last week and we wrote to the Executive about it, albeit on a different matter. It would be wise for ministers to consult, even if they are not under a statutory duty to do so. We should make that point to the Executive. It is a wider issue and it has come up more than once.

I am not clear about how we should proceed on the question of whether the power should be administrative or legislative. It is difficult to make an absolute decision because it is not as clear cut as other, similar issues that we have dealt with in the past. My feeling is that there is not enough

parliamentary involvement in the method that the Executive has suggested. I am open to suggestions as to how we take that further, but I am not clear about which of the three suggested options would be the best way forward.

Murray Tosh (West of Scotland) (Con): I agree with the points made about the statutory duty to consult. In practice, the Executive is likely to consult widely and, indeed, to make a virtue of consulting on a strategy. It seems strange, therefore, that ministers are not under a statutory duty to consult. We should not have to be grateful to ministers for consulting. Parliament should be expecting ministers to consult across the board, and that applies to all legislation, including the bill that we are considering.

The strategy is probably analogous to all sorts of other ministerial strategies. When the agricultural strategy was launched last year we had a debate in Parliament. When the Executive issues new planning policy guidelines, it will probably give presentations to and discuss them with the appropriate committees. However, all that is haphazard. There is no settled procedure for parliamentary scrutiny of what are effectively Executive policies, although it would be over the top to expect that sort of document to be launched as a statutory instrument. Policy statements are significant and there ought to be some kind of code so that strategy and policy statements undergo a consistent and recognisable form of parliamentary procedure.

It is easy to say that, but it is much harder to say what should be done in this instance. Perhaps we should be thinking about the role of the committees in the development of that sort of Executive action.

The Convener: Neither Mike Pringle nor Alasdair Morgan have further comments to make, and Murray Tosh's points summed up what Stewart Maxwell was saying. When we write to the Executive, we will reflect the three options that we have received from our legal adviser, as well as what Murray Tosh was saying about greater parliamentary input and how to go about achieving that. At the same time, we should mention our concern about the duty to consult.

The clerks will also keep a note of the two issues. Stewart Maxwell made a point about the duty to consult last week. We will keep those points on our list of on-going issues for when we next meet representatives of the Executive.

Part 2 of the bill is about the conservation and enhancement of natural heritage. Again, there is no provision for parliamentary involvement. What are the committee's views on that? With regard to sites of special scientific interest, do members think that that is okay or should there be more subordinate legislation?

Mike Pringle (Edinburgh South) (LD): We should leave it to Scottish Natural Heritage. They are the experts and we do not need to get further involved.

The Convener: That is the advice that we have received. Are we agreed?

Members indicated agreement.

The Convener: Section 15(2) concerns the power to identify a relevant regulatory authority in relation to operations that affect SSSIs. It is suggested that we might want there to be an illustrative list. We have had debates about whether illustrative lists become firm lists and are then misunderstood. What are the committee's views on that?

Murray Tosh: I did not understand the suggestion in paragraph 27 of the legal brief to be for an illustrative list. I understood that any list would be definitive to the extent that it would require amendment by order. I am not sure if that is the same point as an illustrative list becoming definitive.

The Convener: You are talking about a final list that would be made up. We were talking about a list of examples to give guidance. Mike Pringle had some views on that point.

Mike Pringle: My point is the same as the one that you made, convener. If there is a list, people might think that the organisations on the list are the only ones that have to be consulted. However, if the ministers have to consult and then make up the list, they are responsible for making sure that they notify everyone on that list. An illustrative list could be put in, but how long is it going to be and where will it stop?

The Convener: That is the point that the Scottish Executive argued previously. The lists could be a bit misleading.

Mike Pringle: I know that. There is an argument for both sides.

The Convener: Perhaps we should leave the section as it is.

Mike Pringle: That is my view. We should leave it as it is and make sure that everyone who goes on any such list is notified. If there is no list, no one will be missed out. Is that the point that Murray Tosh was making?

Murray Tosh: Regulatory authorities are specific bodies. It is not as if we will be adding a community council here and a local amenity group there. We are talking about bodies that have statutory powers. I would not have thought it unreasonable for those to be listed. I take the point that regulatory bodies change and that their functions can be merged or separated, so there would have to be changes to such a list and it

would have to be kept up to date. However, I think that there should be a list.

The Convener: The committee will note that there is no obligation on ministers to make any order. That is in paragraph 27 of our legal briefing paper. Is that an issue?

Mr Maxwell: I am concerned about that. It seems to be a wide power that allows the section to be effectively ignored. At the very least, we should write to the Executive and ask its opinions and intentions.

The Convener: Yes, because there would be concern if that were not proceeded with.

Mike Pringle: I agree.

The Convener: We will write to the Executive on that last point.

Section 20(1) is on powers to make byelaws. I think that we are quite happy with that.

Members indicated agreement.

The Convener: Section 22(4) is on the SSSI register. The Executive's reason for taking delegated powers is the need for flexibility to make provision for the register from time to time as appropriate. Are we all okay with that?

Members indicated agreement.

The Convener: Section 23 is on nature conservation orders. We have to be sure that the power is administrative. Orders made under the power are not statutory instruments, but SNH will have to include in its annual report—which is laid before the Parliament—details of all nature conservation orders and amendments that come into effect during the year, so they will be picked up by the Parliament. Are we happy that that is sufficient?

Members indicated agreement.

The Convener: Section 29 is on land management orders. Again, any orders made under the power are not statutory instruments. Are members happy with that?

Murray Tosh: May I query—because it is not entirely clear from the brief—whether the same points that were made in relation to nature conservation orders about reporting to the Parliament will also apply to land management orders? If the answer is positive, that is a satisfactory position for us to take.

The Convener: We will check for you, Murray, if you give us two seconds. Can you leave us to check that? If it is not clear, we will make that point to the Executive.

Murray Tosh: I would have thought that a similar level of scrutiny would be appropriate for

land management orders as for nature conservation orders. However it is done, and wherever it is written down, that should be the principle.

The Convener: We will double-check that and, if what you suggest is not the case, we will include your point.

The issue with the guidance seems to be whether it will be in the public domain. If it is not in the public domain, it will not be very useful.

Alasdair Morgan (South of Scotland) (SNP): I have what may be a niggling point. Under section 42(4) it appears that there is no requirement on Scottish ministers to publish guidance that they have not issued—in other words, that has been issued by somebody else—but which has subsequently been approved by them. There may be a slight incompleteness there, so we should seek clarification.

The Convener: Okay. Section 49(4) is on the power to amend the list of interested parties. The question is whether annulment, which is what is being suggested, is sufficient. It could be said that the power is quite wide, but having said that, it could be argued that flexibility to add to or remove from the list is needed. How do members feel?

Murray Tosh: I do not know enough detail to be able to make that judgment. I would have thought that if, as a matter of principle, we require secondary legislation that amends primary legislation to be subject to the affirmative procedure, it is difficult for us to justify circumstances where we say, “This isn’t all that important. We’ll allow annulment.” I would like to have more information, examples and discussion about that before I feel comfortable accepting that exception. I am happier with the principle that says, “If this is what we do, we do it even if it doesn’t seem all that significant in its own right.” However, there may be good practical reasons, across the whole corpus of secondary legislation, why we should make some exceptions to the general principle.

10:45

Alasdair Morgan: I know what Murray Tosh is saying, but the list is a list of bodies that SNH or Scottish ministers have to tell that something is happening. Clearly, an order is not going to change the rest of the legislation; it is just going to change that list. The most obvious reasons why the list would be changed are if some of the bodies no longer existed, in which case their names would be deleted at some stage, or if new statutory bodies were created, in which case their names would be added to the list. Being added to the list would give a body an absolute right to be notified, rather than just an optional right under

section 49(2)(k). that seems to be a reasonable proposition. I cannot see a Machiavellian reason why any minister might remove a body from the list. While I understand the principle to which Murray Tosh refers, this is one case where, for the sake of good and speedy administration, annulment should be allowed.

The Convener: Is that the general view?

Murray Tosh: That seems to be reasonably argued. I have no difficulty with specific decisions not to apply the usual principle, if that decision is based on credible and consistent grounds. Alasdair Morgan’s explanation seems satisfactory to me.

The Convener: So it is agreed that we will leave section 49(4) as it is.

Part 4 is the general section of the bill. Section 54 is on the power to make ancillary and transitional provisions, and relates to a general issue that we have raised previously with regard to the use of the word “supplemental”. Are there any other points?

Alasdair Morgan: We were not convinced last time—I hope that I am reflecting the committee’s views accurately—with the response to our argument that supplemental was unnecessary or that, if it did convey any extra meaning, it was one that we did not welcome. Despite the Executive’s stance, our view stands; therefore we should object or make representations in the same manner as we did previously.

The Convener: Yes. The context is that we are going to take this up in future. Our legal advice tells us about one case that gives us some comfort, as it was about what could be judged as supplemental. However, I take your point and agree that we should raise it.

Mr Maxwell: I point out that the exercise of the power will be subject to the negative procedure, except where it amends primary legislation, where it will be subject to the affirmative procedure. We have recommended that approach and talked about it since this committee started, so I am pleased that that principle is being adopted.

The Convener: Okay. We will also make Alasdair Morgan’s point, and continue to make it to be consistent.

Section 57(2) is on the short title and commencement, and it is okay.

Schedule 6 is on the protection of wildlife. There are quite substantial changes to the Wildlife and Countryside Act 1981. I think that consultation is sufficiently built in, but I want to hear members’ views to ensure that they are happy with the process.

Mike Pringle: I am happy with what is in the bill. It certainly tightens up the Wildlife and Countryside Act 1981.

The Convener: Good. That deals with paragraph 10. Are there any points on paragraph 12? Are members happy with that?

Mike Pringle: Yes, likewise.

The Convener: Paragraph 17 deals with amending the list of species in the Wildlife and Countryside Act 1981. Is that okay?

Murray Tosh: I have a query about that. We are advised to accept that that is all right, on the basis that the existing procedure is negative—or was that simply an observation, rather than a guiding principle?

The Convener: It was an observation.

Murray Tosh: Okay, but the same point that I made before applies here. We would normally want the affirmative procedure to apply. I would like to be clearer about why, in this particular instance, it is felt that the negative procedure is adequate.

The Convener: We will ask the Executive that question.

Executive Response

Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Amendment Regulations 2003 (SSI 2003/511)

10:50

The Convener: Item 2 is an Executive response. The issue was discussed last week, when I was not chairing the committee, so I need members to take the lead on this. It is recommended that we report on consultation.

Mr Maxwell: We discussed the matter last week and we raised it at this morning's legal briefing. The Executive's response does not answer the fundamental question about consultation. The fact that it says that it has consulted the Scottish Legal Aid Board in this instance is insufficient, as an awful lot of other people are stakeholders—I think that that is the common phrase—in the procedure and would be affected by the regulations. It is important that those people are consulted as well. The basic point that we raised remains, and I would be unhappy to let the matter lie. We should take the matter up further, either by writing to the Executive, if we have time, or—at the very least—by drawing it to the attention of the lead committee.

Alasdair Morgan: I do not think that it is sufficient that the Scottish Legal Aid Board, which has a vested interest in the matter, should be the mechanism by which other people's views—if they are noted at all—are filtered and sanitised before they reach ministers.

Murray Tosh: I just think that SLAB is a wonderful acronym, given the other contexts in which we use the word slab. I agree with what has been said.

The Convener: Because of time pressure, the point will have to go in our report now; however, we could also write to the Executive and put the issue on the list that we are accumulating.

Mike Pringle: That list is becoming longer and longer.

The Convener: Yes. Are members agreed to follow option (a) in relation to item 2?

Members indicated agreement.

Instruments Subject to Approval

Nitrate Vulnerable Zones (Grants) (Scotland) Amendment Scheme 2003 (SSI 2003/518)

10:52

The Convener: Although no points of substance arise, our European law expert has suggested that the scheme could go against the principle that the polluter pays. I need to get the committee's views on that. Should we simply ask that question of the Scottish Executive?

Alasdair Morgan: We should just seek clarification.

Mike Pringle: I agree with that.

The Convener: Otherwise, no points of substance arise. Is that agreed?

Members *indicated agreement.*

Mink Keeping (Scotland) Order 2003 (SSI 2003/528)

The Convener: No points have arisen that I have written down. Do members want to raise any matters?

Murray Tosh: I thought that we might ask whether Arran is covered by a separate order, or whether mink keeping is specifically allowed there by Arran's not being included in the order, unlike other islands.

The Convener: We raised that question at our legal briefing earlier, but we have not got an answer yet.

Alasdair Morgan: Arran is in the same position as the rest of Scotland, where a licence is needed.

Murray Tosh: Mink keeping is forbidden on other islands.

Alasdair Morgan: Yes, but not on Arran. It is also forbidden in Caithness and Sutherland, but not in Ross and Cromarty.

The Convener: We do not know whether it is to do with the swimming ability of mink.

Murray Tosh: It may be because of the shortness of the channel between Arran and mainland Argyll. We tend to think of Arran as distant from the Ayrshire coast, but it is quite close to Argyll. The issue is perhaps not one that the committee should take up, although it raises an interesting point.

The Convener: No, but it is interesting and I would like to know the answer.

Mike Pringle: If somebody could find out, I would be interested in hearing the answer as well.

Mr Maxwell: The committee could perhaps try to find out the Local Government and Transport Committee's view on ferry travel for mink.

The Convener: I shall see whether I can raise that matter this afternoon.

Instruments Subject to Annulment

National Health Service Superannuation Scheme (Scotland) Amendment (No 3) Regulations 2003 (SSI 2003/517)

10:55

The Convener: The regulations propose changes to the NHS superannuation scheme. No points arise.

Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2003 (SSI 2003/519)

The Convener: I have noted no points of substance on the order. Do members have any points to raise?

Mr Maxwell: When the Deputy Minister for Justice, Hugh Henry, came before the Justice 1 Committee, he was asked about the absence of robbery from the list of crimes for which a victim statement would be allowed. I am pleased to see that he took the Justice 1 Committee's comments on board, as robbery has now been included in that list. It is nice to see that the matter has been dealt with.

The Convener: Do you want us to send the minister a nice letter, or are you happy just to note that in the report?

Mr Maxwell: I am happy with that. Perhaps the Justice 1 Committee should deal with the matter.

Specified Sugar Products (Scotland) Regulations 2003 (SSI 2003/527)

The Convener: The regulations are quite a weighty tome. It is suggested that we may wish to write to the Executive, requesting an explanation for the late implementation of the regulations. I think that that is reasonable.

Alasdair Morgan: Yes.

Mike Pringle: I think so, too.

Murray Tosh: Will we also raise with the Executive the issue about no reference being made in the preamble to compliance with the consultation requirements in article 9 of EC regulation 178/2002? That is something that we mention frequently, although the Executive continues not to pay any attention to what we say. It is one of those general issues that we should probably keep on the agenda for our periodic informal meetings with Executive officials.

The Convener: Yes. There will be a meeting before Christmas, I hope. Do you want us to keep the issue on our on-going list, or do you want us to write to the Executive?

Murray Tosh: We should just add it to the list of all the other areas on which we have said to the Executive, "Look, you know that we will come back on this. Why do you not explain it or do something about it?"

The Convener: Okay. Is that agreed?

Members indicated agreement.

Instruments Not Laid Before the Parliament

Meeting closed at 10:57.

**Adults with Incapacity (Scotland) Act 2000
(Commencement No 5) Order 2003
(SSI 2003/516)**

**Lands Tribunal for Scotland Amendment
(Fees) Rules 2003 (SSI 2003/521)**

10:57

The Convener: No points arise on the instruments.

I thank you very much. We will see you again next week.

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 18 November 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
0870 606 5566 Fax 0870 606 5588

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

RNID TYPETALK calls welcome on
18001 0131 348 5412
Textphone 0131 348 3415

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers