SUBORDINATE LEGISLATION COMMITTEE

Tuesday 18 November 2003
(*Morning*)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
13th 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 CLERK

Joanne Clinton

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 18 November 2003

(*Morning*)

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

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 13th meeting this session of the Subordinate Legislation Committee. I have received no apologies.

I begin by saying that the committee was very sad to hear about the death last week of Alistair Fleming, assistant clerk to the committee. The Presiding Officer has sent a letter to Mrs Fleming and I will also write to her. Alistair did very good work for the committee and we are very sorry at this sad loss.

Christine May (Central Fife) (Lab): Members of the committee would like formally to record our collective sadness and to express our sympathies to Alistair Fleming's widow and family.

Mike Pringle (Edinburgh South) (LD): I knew Alistair for quite a long time; I knew him when he worked in the local authority.

Delegated Powers Scrutiny

Nature Conservation (Scotland) Bill: Stage 1

10:31

The Convener: We move on to the first item of business, which is delegated powers scrutiny of the Nature Conservation (Scotland) Bill at stage 1. The committee wrote to the Executive to raise a number of points. Members should have the Executive's response. I am sorry that most of us received our copies only this morning, but the legal advice on the Executive's answers arrived a little earlier.

The first point that we raised, on the Scottish biodiversity strategy, related to the general issue of when provisions are legislative or administrative in effect. The procedure in relation to the strategy has been regarded as administrative, as the Executive confirmed in its response. In our letter to the Executive we suggested three options, none of which has been taken up. Are members happy with the response?

Alasdair Morgan (South of Scotland) (SNP): Yes. I do not think that there is anything for us to get too excited about. As you say, a line needs to be drawn, but I think that the provisions that we are discussing are well on the administrative, rather than the legislative, side of that line, so I think that—in this case—the Executive is right.

The Convener: In its response, the Executive said that it would submit the strategy to us. However, it is obviously more important for the lead committee to have the strategy, as that committee will take forward any policy aspects.

Murray Tosh (West of Scotland) (Con): I still think that there is a bit of a gap—at least in my understanding of the Executive's approach, if not in the approach itself. It might well be that the Scottish biodiversity strategy will be more an administrative than a legislative document. However, lots of strategies are policy documents and might fall into neither camp in particular.

The Executive's suggestion that the strategy will be sent to the lead committee for scrutiny is useful. However, that almost implies that the Executive would not do that in other circumstances and that it is not in the habit of doing so. One wonders what the fine gradations are between administrative, legislative, political and other strategies, which would determine when the Executive submits a strategy to a lead committee. What degree of involvement, feedback and discussion about the principles that have been raised does the Executive expect from lead committees?

I have no particular axe to grind in relation to the Scottish biodiversity strategy, but I think that we should pursue with the Executive the issue of how we handle its strategy documents, so that we have a clear understanding of what it does and so that we can be satisfied that a consistent approach is taken on strategy, policy or any other documents that fall within those general parameters.

The Convener: I think that we reached a fairly firm agreement last week that we would add that issue to our list of wider points that need to be raised. Do members agree that, in relation to the particular case that we are discussing, we are happy with the Executive's response, but that the wider issue still needs to be taken up?

Members *indicated agreement*.

The Convener: The second point that we raised with the Executive related to the power to identify a regulatory authority. Members will remember that the committee had been worried that the Executive might not introduce an order, but the Executive has at least provided reassurance on the proposed timing of the first order. Are members happy with the Executive's response?

Mr Stewart Maxwell (West of Scotland) (SNP): The Executive has responded to our main point, which was to ask for clarification that it would implement section 15(2) of the bill, by stating that there is a firm policy intention to do so—in fact it used the word "commitment". That is what we wanted to know.

The Convener: Is the committee happy with that?

Members *indicated agreement*.

The Convener: The third question was on section 42 of the bill, on guidance. Members will remember that this is similar to the first point that we discussed. Murray Tosh said quite a lot about the issue. What are your feelings about the response? Again, a general point is raised here.

Murray Tosh: The points that I made about the first question also obtain here. We should retain it as an area for further exploration with the Executive.

The Convener: It is obvious that guidance is important in relation to how provisions are implemented. Therefore, we will put the issue on our list of wider issues to be taken up.

Murray Tosh: The Executive's statement that it is happy to provide interested committees with copies of guidance throws all the responsibility for scrutiny on to the committees. It does not appear to put an obligation on the Executive to inform committees so that they know that they should be interested. The balance should be the other way round.

The Convener: We should note that point for later, when we will consider our list of wider issues. Apart from that, do members agree that we should go along with what the Executive says?

Christine May: There is a wider issue about how rigidly guidance is enforced and what force it has. When is it obligatory to follow guidance and when is it merely discretionary?

The Convener: We will add that comment.

Section 54 of the bill is on the power to make ancillary and transitional provision. We made a point about supplemental provision and the letter from the Executive gives examples of where supplemental provision has taken place.

Alasdair Morgan: I am not totally convinced by the Executive's explanation. Our question asked why the word supplemental is necessary in this case, and in the other cases that we have mentioned, especially as the words consequential and incidental are already used in the bill. The word supplemental is not usually used in bills.

I am unclear whether the example that the Executive cites in its letter would not be covered in any event by the word incidental. We could argue about that, and I suppose that the example that is cited would be subject to the affirmative procedure because it would add something to the act. That gives us some reassurance, but the argument about the word supplemental remains. It is all very well for the Executive to say that it uses the word to allow it to put in a minor provision, but our argument is that it could be used to put in something much more significant. That is the danger; our worry is not about the Executive doing something trivial, but about an ill-disposed future Executive doing something substantial.

The Convener: Do members agree that we have raised the issue and received sufficient reassurance, and that we will take up the wider issue at a later date. Are we happy with that?

Members *indicated agreement*.

The Convener: Paragraph 17 of schedule 6 to the bill is on amendment of schedules to the Wildlife and Countryside Act 1981. We thought that the power under that paragraph should be subject to the affirmative procedure. It involves changing items on schedules—for example, it could involve removing or adding birds or animals. It appears that the Executive does not agree with us; its response shows that it wants the power to be subject to the annulment procedure. What are our feelings?

Christine May: We should stick to our guns. I note that we are advised that a mechanism is available to the Executive that involves notification to local authorities of proposed orders under the power. The mechanism also allows for,

subsequently, objections to be lodged and a public inquiry to be held, should ministers so decide. However, that is a lengthy, time-consuming and expensive procedure and to do it the other way round, by affirmative procedure, would allow the issues to be dealt with simply, without the expense of a public inquiry.

The Convener: Are we agreed on that?

Murray Tosh: Absolutely.

The Convener: I take it that we will include Christine May's comments in the report that we send to the lead committee. Is that agreed?

Members *indicated agreement.*

Murray Tosh: If I may, I will jump back to section 2 of the bill. We were discussing whether the subordinate legislation was purely administrative, or whether it was legislative, policy-related or whatever. Wrapped up in that was an issue of consultation, which we did not really address. I am not sure that we wanted to make the case that there should be statutory consultation; however, we were anxious to establish that consultation should take place. I am now walking in a landscape that I do not know, but I would suggest that we add the question of consultation to the list of strategic issues that we might wish to discuss at some future date. The Executive has codes of accepted practice that determine when and how it consults, but that is not the same as statutory consultation.

I do not want to set a hare running whereby we insist on having statutory consultation all over the place. It is appropriate, however, that we consider how the Executive consults on statutory instruments and that we scrutinise its conduct and activity from the point of view of consistency and a logical and uniform approach. I do not suggest that we raise the matter with the Executive now—I do not know what exactly I would raise at this stage—but I would not mind spending a wee bit of time discussing how the Executive goes about consultation in general.

The Convener: That is a very good point, which we missed last week. That will be added to our list of points relating to the strategies that we wish to adopt with regard to such provisions.

Executive Response

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

10:41

The Convener: We move now to item 2, which is an Executive response. [*Interruption.*] We welcome Gordon Jackson to the committee.

Members will recall that we wrote to the Executive, inquiring about the allocation of grants. There was also the principle that the polluter pays, which was established by the European Commission. There was a debate about how those two things sit together.

The Executive's response states that the procedure was gone through in the submission that was made to the Commission for state aid. Notification was made about state aid—if that is the correct terminology—therefore the Executive feels that there is no issue. We must remember our position as a devolved Parliament, so any powers that we have in this regard are very limited.

Alasdair Morgan: On a non-legalistic point, it is easy to say that the polluter should pay, but that is only clear if the definition of pollution is absolute. It is not absolute, however; it changes from time to time. That was particularly the case when some of the previous orders on nitrate vulnerable zones went through. There was considerable debate—I participated in one such debate at the Transport and the Environment Committee early this year—about whether certain areas should be included as nitrate vulnerable zones, and considerable dispute over whether the measurements justified the inclusion of certain areas.

There is a strong political argument that we should allocate aid if it is available and if it is not ultra vires to do so in order to meet the relevant requirements. I know that that does not affect the Subordinate Legislation Committee, but it might colour people's judgment if it is not possible for both regulations to apply. As often happens, we have to have either one or the other.

The Convener: I recommend that we pass to the lead committee and the Parliament the Executive's response to our question, in which we raised what we thought was an important point. It would appear from the answer, however, that the necessary work has been undertaken. Is that agreed?

Members *indicated agreement.*

Instruments Subject to Annulment

Home Energy Efficiency Scheme Amendment (No 2) (Scotland) Regulations 2003 (SSI 2003/529)

10:45

The Convener: The legal advice indicates that no particular issues of substance arise.

Public Finance and Accountability (Scotland) Act 2000 (Access to Documents and Information) (Relevant Persons) Order 2003 (SSI 2003/530)

The Convener: Several issues were raised in relation to the order, which I will summarise, unless members wish to highlight any particular points.

Alasdair Morgan: Article 2 says "'relevant person' includes". As our legal advice indicates, the "relevant person" should either be defined or not. It is not right to purport to have a definition that covers some people who may be relevant, but which leaves it open for other people also to be relevant persons. I am assuming that that wording in article 2 is a mistake, and that the word "includes" should not have been used.

The legal advisers also pointed out that the order is difficult to understand as a whole, despite the fact that it comes to less than a page. In article 3, for example, we have to read paragraph (3) in order to understand paragraph (2), and in order to understand paragraph (3), we then have to go on to read paragraph (4). That will not get the order a plain English award.

The Convener: That is agreed.

Murray Tosh: That was very impressive, Alasdair.

Christine May: There has also been a delay between the date of making the instrument and its being laid before Parliament. We should perhaps ask the Executive to explain why that was the case—unless we already have such an explanation.

Mike Pringle: No, we do not have one. We want to find out why that was.

The Convener: There is also the breach of the 21-day rule, which ties in with what Christine May said. We will make those four points, which cover clarity, the 21-day rule and the delay, to the Executive.

Christine May: Having made those points, the description of what constitutes a subcontract is very clear.

The Convener: Good. Perhaps we should include a positive note on that—for a change.

Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003 (SSI 2003/531)

The Convener: For the benefit of Gordon Jackson, who was not here for the legal briefing, I should point out that the legal advice contained a slight error. Paragraph 53 should have begun "On page 2, regulation 1(3)(c)", in case you were confused about that point, Gordon.

Gordon Jackson (Glasgow Govan) (Lab): You mean I sat up the whole night reading the legal brief and it was wrong?

The Convener: That information is also for Murray Tosh. The main issue about the regulations seems to be whether the reference in regulation 12 to the 1999 regulations should in fact be to regulations made in 1991. We need clarification on that. There is also doubt as to the meaning of "the present Regulation" in regulation 1(3)(c).

Gordon Jackson: On the point about the erroneous reference to the 1999 regulations, do we know that there are other regulations that were made in 1991? Was that just a typographical error?

The Convener: We think that it was a typographical error.

Christine May: There is also the fact that amending instruments have not been revoked in addition to the principal regulations. Given that it is generally regarded as good practice to clear the statute book, we might wish also to mention that.

The Convener: In addition to the two substantive points, which we will raise with the Executive, we could make Christine May's point in an informal letter. We can include in that letter a minor drafting point in relation to regulation 11.

Murray Tosh: When you say that we will raise the matter of the revocation of amending instruments in an informal letter, does that mean that the committee will receive a response to that point?

The Convener: We do not normally get responses to informal letters, but we could include that point with the two main points.

Murray Tosh: It would be interesting to find out whether this is an oversight or an error, in which case we could just forget about it. Alternatively, it might be a reflection of the Executive's practice—sometimes such instruments are revoked;

sometimes they are not. If that is the case, there might be some interesting questions to raise.

The Convener: We will raise the matter in the main letter, then.

Murray Tosh: I see the legal adviser wincing at the thought of additional work.

The Convener: Do members agree to raise the three points that we have mentioned in a formal letter to the Executive and to make the minor point about drafting in an informal letter?

Members *indicated agreement*.

Housing (Scotland) Act 2001 (Transfer of Scottish Homes Property and Liabilities) Order 2003 (SSI 2003/532)

The Convener: Although we have no points of substance on the order, I think that Alasdair Morgan wants to raise a wee point about Scottish Homes.

Alasdair Morgan: The order defines Scottish Homes, which is the first time that that persona has been given a legal definition. I am not sure whether former employees of Scottish Homes may feel slighted that the first time that the organisation is thought to be worthy of a legal definition is when it is about to be abolished—sic transit gloria, I suppose.

The Convener: The question is whether that point is worthy of communication to the Executive. Would you like an informal letter to be sent?

Alasdair Morgan: Why not?

The Convener: Okay. Apart from that, no points arise on the order.

Environmental Protection (Duty of Care) Amendment (Scotland) Regulations 2003 (SSI 2003/533)

The Convener: No points of substance arise, but there are some small points that we can put in an informal letter. In the explanatory note, the second sentence is not easy to follow and there are a few other small points. Is it agreed to raise the points that are mentioned in the legal brief in an informal letter to the Executive?

Members *indicated agreement*.

Act of Sederunt (Fees of Sheriff Officers) 2003 (SSI 2003/538)

The Convener: We come to today's first act of sederunt—Gordon Jackson will keep me right on pronunciation. No points of substance arise, although there are a few minor points about footnotes. Alasdair Morgan has a point.

Alasdair Morgan: I am beginning to get a bit wary, convener, of your saying, "When there are no points of substance I will call on Alasdair Morgan".

One interesting point is that the instrument is made under two separate acts, one of which allows the Parliament to annul the instrument, whereas the other does not. If the instrument were more complex, the interesting question might arise of which bits Parliament could annul should it decide to avail itself of the annulling power. The issue is complicated by the fact that, unusually, the enabling act allows the Parliament partly to annul the instrument. When the officers of court have some time on their hands, it would be useful if they could find out which bits of the instrument we could annul if we were so minded, and which bits we could not. That is by no means clear to me.

The Convener: Do members agree to send a letter to the court authorities to ask that question? The answer might be helpful if we were to raise the issue more generally at a later date.

Murray Tosh: Mike Pringle ought to be excited that one of the acts involved is from 1907. We do not often get the opportunity to comment on legislation that was passed by the Liberals.

Mike Pringle: I am very excited—thank you for pointing that out. I must note that it was a little before my time.

Christine May: We do not believe you.

The Convener: At least the Subordinate Legislation Committee is becoming a little more exciting.

Mike Pringle: That is because the Liberals are involved.

The Convener: I assume that we are agreed on the course of action that I outlined earlier.

Air Quality Limit Values (Scotland) Amendment Regulations 2003 (SSI 2003/547)

The Convener: No points have been identified on the regulations.

Instruments Not Laid Before the Parliament

Scottish Milk Marketing Board (Dissolution) Order 2003 (SSI 2003/534)

10:54

The Convener: No points of substance arise, but I gather from the legal advice that an issue arises about the commencement of the commencement. Perhaps we should write a letter to the Executive on that point.

Christine May: The order involves the commencement of a dissolution. Is the dissolution instantaneous? Does it fall instantly?

Alasdair Morgan: Perhaps it comes into force for a nanosecond.

The Convener: Do members agree to write a letter on the issue?

Members *indicated agreement*.

Christine May: There is a feel of "The Hitchhiker's Guide to the Galaxy" about this.

Act of Sederunt (Fees of Messengers-at-Arms) 2003 (SSI 2003/536)

The Convener: Although no points of substance arise on the act of sederunt, there are a few minor issues about missing footnotes, which we will raise in an informal letter.

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Diligence on the Dependence) 2003 (SSI 2003/537)

The Convener: Although no points of substance arise, we have a couple of issues.

Christine May: I do not know about other, more experienced members, but I found the act of sederunt absolutely impenetrable. I read it, the legal brief and the explanatory letter, but I still cannot understand it. If I were served a notice under one of the rules, I would not know what to do unless somebody told me. I am not sure whether it is the committee's habit to provide simple English explanations in such cases, but can somebody explain what the instrument actually does? If I got one of those notices, what would happen to me? New rule 13.8A.(1)(b)(iv) mentions something about "dismantling a ship".

Alasdair Morgan: The answer is that you stop dismantling it.

Christine May: That is not clear.

The Convener: I had similar problems with the instrument and I did not find the explanatory letter from the Executive terribly helpful. Perhaps we should ask for a clearer explanation, if there is time.

Christine May: It would be helpful to have an explanation in plain English.

The Convener: Gordon Jackson, with his legal background, might like to elaborate.

Gordon Jackson: I could, but life is too short.

The Convener: Are you happy that we ask the Executive for an explanation?

Gordon Jackson: By all means, but the trouble is that the instrument is written in language for lawyers. I do not want to sound elitist, but I cannot imagine that a lay person without a lawyer would be a pursuer in a court action in a case that involved dismantling a ship. Lay people occasionally take small debt summonses to court in their own name, but that legal process does not involve arresting a ship at Leith and taking it to pieces. I appreciate that instruments must be simple and explained to everybody, but the language here is for lawyers.

Alasdair Morgan: Surely dismantling a ship happens a lot in Govan.

Gordon Jackson: We try to build ships.

Christine May: There was one at Methil a while ago.

The Convener: Christine, do you want further explanation?

Christine May: I would be happy with an informal private explanation.

Gordon Jackson: The explanation is that, if a court action might take a long time, a lot of things can be done in the meantime to hold the money that is sought. It is common to arrest people's wages, but apparently it is also possible to dismantle a ship. I have never come across that, although I am sure that it happens. Huge actions between ship brokers and other commercial interests may involve dismantling a ship.

The Convener: Does that rule go back a long way?

Gordon Jackson: If an action is going on, one can hold people's money or put an inhibition on their property to stop them disposing of or selling it—that is what "inhibition on the dependence" means. To be honest, I have never come across the action of dismantling a ship.

Alasdair Morgan: It is certainly a bit drastic.

Christine May: I now know what we are talking about—although I do not know about other members.

Gordon Jackson: We are talking about the actions that one can take to preserve property while a court action is pending.

The Convener: Fair enough. Are committee members happy that we understand the gist of this?

Members *indicated agreement*.

11:00

Mr Maxwell: Might I suggest that we go back to the original recommendation, which was that no points of substance arose?

The Convener: Indeed, Stewart. There are also some minor typos that we will point out in an informal letter.

Members *indicated agreement*.

Agricultural Holdings (Scotland) Act 2003 (Commencement No 3, Transitional and Savings Provisions) Order 2003 (SSI 2003/548)

The Convener: We now come to the third commencement order on the Agricultural Holdings (Scotland) Act 2003. Most of us will have followed the passage of the act through Parliament and will be pleased that it is coming to fruition. Following this order, the provisions in the act relating to a tenant's right to buy land will be the only ones not yet in force. We might therefore ask when those provisions will come into force; in other words, we might ask about the completeness of the act.

Alasdair Morgan: That would be useful. The crux of the political debate surrounding the act was the tenant's right to buy. When those provisions are brought into force—if that is done in one go—it will be the fourth commencement order for this particular act. Things are getting a little bit complex, although there may be good reasons for that, such as the need for an orderly progression from one stage to the next. For example, it may be that rights under section 2 cannot be exercised unless other provisions have been brought into force beforehand. It would be worth while asking the Executive to explain that and to indicate when progress will be made in implementing section 2.

The Convener: Yes—and we will ask why the commencement orders have arrived in this particular order. Is that agreed?

Members *indicated agreement*.

Murray Tosh: I have no objection to that, convener, but I would have thought that such questions would be for the lead committee, rather than for us, to ask. Is it reasonable for us to ask about the pace of implementation?

The Convener: You could be right—this is on the brink of being a policy issue. However, when different orders come into force at different times, we thought that it would be useful to get a holistic view.

Meeting closed at 11:02.

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