

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 November 2007

Session 3

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CONTENTS

Tuesday 6 November 2007

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DECISION ON TAKING BUSINESS IN PRIVATE	67
SCOTTISH GOVERNMENT RESPONSES	68
Budget (Scotland) Act 2007 Amendment Order 2007 (Draft)	68
Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Vulnerable Witnesses (Scotland) Act 2004) 2007 (SSI 2007/463)	73
Materials and Articles in Contact with Food (Scotland) Regulations 2007 (SSI 2007/471)	73
DRAFT INSTRUMENT SUBJECT TO APPROVAL	73
Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Incidental, Supplemental and Consequential Provisions) Order 2007 (Draft)	73
INSTRUMENTS SUBJECT TO ANNULMENT	74
District Courts and Justices of the Peace (Scotland) Order 2007 (SSI 2007/480)	74
Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment (No 3) Regulations 2007 (SSI 2007/481)	74
Natural Mineral Water, Spring Water and Bottled Drinking Water (Scotland) (No 2) Regulations 2007 (SS1 2007/483)	74
Environmental Impact Assessment (Scotland) Amendment Regulations 2007 (SSI 2007/484)	75
Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Regulations 2007 (SSI 2007/485)	75
Education (School and Placing Information) (Scotland) Amendment Regulations 2007 (SSI 2007/487)	76
INSTRUMENT NOT LAID BEFORE THE PARLIAMENT	77
Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 (SSI 2007/479)	77
CONSOLIDATION WORKING GROUP (REPORT)	78

SUBORDINATE LEGISLATION COMMITTEE

10th Meeting 2007, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross)
(LD)

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Jackson Carlaw (West of Scotland) (Con)
*Helen Eadie (Dunfermline East) (Lab)
*Ian McKee (Lothians) (SNP)
*John Park (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED :

Mairi Gibson (Legal Adviser)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 November 2007

[THE CONVENER *opened the meeting at 14:15*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I open this meeting to the public and welcome members to the 10th meeting in session 3 of the Subordinate Legislation Committee. There are no apologies, as we have a full team; that is great. Please turn off any mobile phones or BlackBerrys.

Are members content that we take item 7, about the forward work programme, in private?

Members indicated agreement.

Scottish Government Responses

14:15

The Convener: Before I go into detail on the responses, I refer members to the summary of recommendations, which is a useful way of putting the paper on the record without my having to read it out at great length.

Following last week's meeting, we wrote to the Scottish Government about three instruments and members have the responses before them.

Budget (Scotland) Act 2007 Amendment Order 2007 (Draft)

The Convener: Members need to consider whether omitting to define the term "the third sector", which appears in articles 3(2)(f)(ii) and 3(2)(h)(v), or otherwise clarify its meaning, amounts to failure to follow normal drafting practice, and whether the use of the term "Scottish Government" in the explanatory note, which does not appear in the order or in the enabling act, is a failure to follow normal drafting practice, but not such as to impact on the operation of the order. We also need to agree to report the order to the lead committee and Parliament accordingly.

I open the discussion to members at this point.

Ian McKee (Lothians) (SNP): I suggest that, on this occasion, we should accept that the term "third sector" accords with normal drafting practice, but we should also recommend to the Government that, in future orders, the term should be more clearly defined.

The Convener: Should we do that in writing, through the committee clerks?

Ian McKee: That is what I would suggest.

The Convener: Thank you. That is a sensible suggestion; it means that we keep on the rails the progress of events that are necessary to the governance of Scotland. I take it that there is general agreement to that.

The Government's response implied that the committee strayed into policy issues, which is an absolute no-no. We must stick strictly to our remit. However, I would like to say on the record that our questions were all about interpretation and drafting, which are in the committee's remit. With that said, are there any other comments?

Richard Baker (North East Scotland) (Lab): What are we saying to the Government about the use of the term "Scottish Government"?

The Convener: My understanding is that that is not covered by Ian McKee's suggestion.

Richard Baker: No, but clearly the committee should be concerned that there is no such legally constituted body as the Scottish Government. That term is not contained within the Scotland Act 1998, which quite clearly mentions the Scottish Executive.

I am gravely concerned about the legislative competence of some of these instruments. If they refer to the Scottish Government, they could be challenged because there is no such entity in law. Surely primary legislation would be required to enable the Executive to be referred to as the Scottish Government.

I apologise for missing the pre-meeting discussion, but this is a crucial point.

The Convener: Our legal advice is that the Scotland Act 1998 dictates that the term "Scottish Executive" must be used in the instrument itself. Outwith the remit of the 1998 act, you can call yourself whatever you see fit. The term "Scottish Government" is used in the explanatory note, which is pretty close to the instrument, and if an instrument is considered in court, consideration will also be given to the explanatory note. The further away we get from the instrument in term of advice or conversation, the less important the terms that are used become. Gillian Baxendine, the clerk, will keep an eye on the issue, but on balance, it is within the 1998 act to use the term.

Richard Baker: It is within the law to use the term "Scottish Government" in the explanatory notes.

The Convener: Yes.

Richard Baker: But it is not legal to use it within the instrument itself.

The Convener: Yes. I will read out the question from the summary of recommendations again. It asks

"(2) whether use of the term 'Scottish Government' in the Explanatory Note, which does not appear in the instrument or enabling Act, is a failure to follow normal drafting practice, but not such as to impact on the operation of the instrument".

We could say that there is only a drafting practice issue; that technically speaking the explanatory note should be drawn up in the same way as the instrument itself. It is for members to take a view on that; I am in your hands, colleagues.

Richard Baker: The question must be whether the courts have considered the impact on an instrument of the use of that term when reference to the explanatory note has been involved. What legal status does the note have, and to what extent is it binding on the rest of the instrument?

Mairi Gibson (Legal Adviser): The general position is that the explanatory note can be used

as an aid to interpretation of the instrument where there is, for example, ambiguity in the instrument. I do not think that there is ambiguity in relation to the point in the order that we are discussing.

John Park (Mid Scotland and Fife) (Lab): But would it not be best practice to have consistency between the explanatory note and the order?

Mairi Gibson: Yes. That would be drafting practice.

John Park: It is probably worth flagging that up.

Mairi Gibson: Yes. Our comments are not about the competency or legality of the order, only the drafting practice.

Ian McKee: The explanatory note is for helping people to understand the instrument. As time goes by, the term "Scottish Government" will be used more in common parlance than the term "Scottish Executive". There is, therefore, a chance that people will think that the Scottish Executive is the administrative branch of the Scottish Government. We should not get too party political about this, but if the Government is going to go on using the term "Scottish Government", it makes sense to use it in the explanatory note while using the technically legal term in the instrument.

Gil Paterson (West of Scotland) (SNP): During the first session of Parliament, the Procedures Committee took evidence throughout Scotland that suggested that people did not understand what the term "Scottish Executive" actually meant. Ian McKee is correct; quite clever people thought that they knew what the definition of the term "Scottish Executive" was. The term was never changed.

John Park talked about best practice. If we use two terms to describe the same thing, and we understand what the two terms mean, then would not calling something by one term and using another term to describe it be best practice? In other words, the Scottish Executive and the Scottish Government are the same thing; there is no confusion.

I take on board the earlier points about the law. It is worth clarifying exactly where we stand.

The Convener: Is it worth asking the clerks to take away the point and consider it and come back with some sort of paper at a future meeting?

I have to say, colleagues, that we are very near the edge of straying into a policy issue.

John Park: That is the point that I was making.

Richard Baker: I know exactly what Gil Paterson and Ian McKee are saying, but I do not want to stray into party political areas. Our debates over policy and whether we should use the term Executive or Government are not really of concern to me. I understand what Ian McKee is

saying, but it does not really matter if people generally understand the term "Government" better than they do the term "Executive"; we are talking about the legal clarity of the order.

Gil Paterson was right to say that we are talking about a point of law, and that is our concern as legislators, not whether the word "Government" is better understood or not. That is irrelevant to what we know as constituted by the 1998 act itself. So Gil Paterson's suggestion that we should seek further clarity on the issue is constructive, and I hope that the committee will decide to pursue it.

John Park: I was going to make the same point that Richard Baker made. We are sailing close to the wind in almost talking about policy. I am relatively relaxed about how we describe the Scottish Government or the Scottish Executive when talking about policies, but we are in the legal realm in this committee and best practice would be consistency in our descriptions. The point that Ian McKee made on issue (1) in the summary of recommendations was well made. The same arguments that underpinned his point underpin our arguments about the use of the term "Scottish Executive."

Helen Eadie (Dunfermline East) (Lab): I agree with what John Park and Richard Baker said. The primary concern for all of us round the table must be the extent to which the use of the term "Scottish Government" might put in jeopardy any legislation that we consider. We certainly do not want people to take us to task in future for not having paid due regard to the issue, which, as Gil rightly pointed out, could result in all sorts of litigation being pursued. That is not desirable, so we must resolve the matter.

Gil Paterson: You pronounced "Gil" as "Jill".

Helen Eadie: I beg your pardon.

Gil Paterson: Do not worry—many people are disarmed by the pronunciation.

I have two points. I seek clarity on when the term "Scottish Government" can be used. In that context, it would be worth while hearing what people have to say from a legal perspective.

I thought that we were coming to agreement, but I am still greatly at odds with what John Park says. It is clear that two different words can be used to mean the same thing. Not being able to use the description "Scottish Government" when we consider subordinate legislation would make the legal brief a minefield; it would mean that the same description would need to be used every time. If members agree to open the parameters slightly and not to prescribe as best practice the use of only one description in the run-up to the passing of legislation, they will have my support, but otherwise I might need to force the matter to a vote.

The Convener: At this stage, it looks as if we want to ask our clerks and our legal advisers to produce a paper on what I and others have said is an extremely tricky issue in the context of our remit. Are we agreed on that course of action?

Members indicated agreement.

The Convener: Do members want to mention the issue in the context of the draft budget amendment order? My view is that we should let the order go, but that we should not let the wider issue go. Do members agree?

Gil Paterson: I think so.

Helen Eadie: Our consideration of the order should be held back until we have clarity on the issue. We do not want to agree to a whole sheaf of Scottish statutory instruments, only to have to revisit them at a later date.

Ian McKee: It should be a simple fact whether the use of the term "Scottish Government" is part of the order? I gather that it is not. Is that right?

The Convener: That is correct.

Ian McKee: So, in that context, there cannot be any legal challenge to the use of those words.

The Convener: I am in members' hands, but my advice would be that, as the issue has been raised and we have flagged up that we will examine it, I would be hesitant to delay the progress of the order when we have a job of work to do. Do I have trouble persuading colleagues of that?

John Park: It would be helpful to have some clarification on the implications of delaying the order.

The Convener: Indeed. What would be the implications of saying, "Hold it"?

Gillian Baxendine (Clerk): We have to report on the order within a certain timescale. The advice that we have is that the issue in question has no impact on the operation of the order, so it would not make much difference if the committee were to let the order go, but to consider the issue as one that is likely to recur in relation to other instruments.

The Convener: My view is that the order has flagged up the issue and that we have now moved on to consider the issue. Do I persuade members?

Jackson Carlaw (West of Scotland) (Con): Yes.

Helen Eadie: I would like my concerns to be noted.

The Convener: Your dissent has been recorded.

**Act of Sederunt (Ordinary Cause,
Summary Application, Summary Cause
and Small Claim Rules) Amendment
(Vulnerable Witnesses (Scotland) Act
2004) 2007 (SSI 2007/463)**

14:30

The Convener: Are members content to report the instrument to Parliament on the ground that further information was sought from and received by the Lord President's office? Are you satisfied with the response?

Members indicated agreement.

The Convener: I ask members to note the commitment that the response gives to correcting, at the earliest opportunity, the error that relates to the numbering of the rules.

**Materials and Articles in Contact with
Food (Scotland) Regulations 2007 (SSI
2007/471)**

The Convener: Are members content to report the regulations to the lead committee and Parliament on the ground that an explanation was sought from and provided by the Scottish Government? Are you satisfied with the response?

Members indicated agreement.

**Draft Instrument Subject
to Approval**

**Criminal Proceedings etc (Reform)
(Scotland) Act 2007 (Incidental,
Supplemental and Consequential
Provisions) Order 2007 (Draft)**

14:30

The committee agreed to raise a minor point on the instrument.

**Instruments Subject
to Annulment**

**District Courts and Justices of the Peace
(Scotland) Order 2007 (SSI 2007/480)**

14:31

The Convener: Instead of reading out points (a) to (f), I draw members' attention to the summary of recommendations. We seek clarification on all the issues raised, but the one in paragraph (d) sprang out at me. Are members content that we ask those six questions, and to raise minor points informally?

Members indicated agreement.

**Pesticides (Maximum Residue Levels in
Crops, Food and Feeding Stuff)s
(Scotland) Amendment (No 3) Regulations
2007 (SSI 2007/481)**

The Convener: Are members content to ask the Scottish Government the questions in paragraphs (a), (b) and (c) in the summary of recommendations, and to raise minor points informally?

Members indicated agreement.

The Convener: In addition, are members content that the question whether the principal regulations—the Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuff)s (Scotland) Regulations 2005 (SSI 2005/109)—that the regulations amend should be consolidated has been adequately addressed by the Scottish Government, as explained in its note?

Members indicated agreement.

**Natural Mineral Water, Spring Water and
Bottled Drinking Water (Scotland) (No 2)
Regulations 2007 (SSI 2007/483)**

The Convener: We move to consideration of a highly newsy item. I am sure that members will have noticed that, for the first time, the Subordinate Legislation Committee has made the pages of *The Sun*. Perhaps that is why we got rather excitable about a previous agenda item.

It is worth noting in passing that the question that we had thought about asking the Executive, which is mentioned in our legal brief, has been addressed, as was mentioned before the meeting. Therefore, are members happy that we no longer need to write to the Scottish Government on that point?

Members indicated agreement.

The Convener: It is great the way our legal advisers take up such matters and sort them out efficiently.

Perhaps I should now do what I failed to do earlier, which is to extend a cordial welcome to our new colleagues on the legal team, Judith Morrison and Colin Gilchrist. We look forward to working with them in the future and thank them very much for joining us. They have come from the Scottish Executive—or rather, the Scottish Government. Whoops!

John Park: They have come from what is legally known as the Scottish Executive, which is often described as the Scottish Government.

The Convener: I am probably legally known as the committee's convener, but have many other names behind the scenes.

Are members satisfied with the explanation that the Scottish Government has provided in relation to the breach of the 21-day rule? Are you content with the regulations?

Members indicated agreement.

Environmental Impact Assessment (Scotland) Amendment Regulations 2007 (SSI 2007/484)

The Convener: Are members happy to raise points (a) and (b) in the summary of recommendations, and to raise minor drafting points informally?

Members indicated agreement.

The Convener: In addition, I ask members to note that this is the sixth occasion on which the principal regulations—the Environmental Impact Assessment (Scotland) Regulations (SSI 1999/1)—have been amended. As the consolidation working group is under way—we shall hear more about that later—the committee may consider that the principal regulations warrant mentioning to the group as a potential candidate for consolidation. They are crying out for it, would you not think? Do members agree?

Members indicated agreement.

Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Regulations 2007 (SSI 2007/485)

The Convener: Are members content to ask the Scottish Government to clarify whether, in light of regulation 2(1)(e), it is intended that the regulations should have extraterritorial effect and, if so, whether that might have been reflected in the extent provision?

Members indicated agreement.

Education (School and Placing Information) (Scotland) Amendment Regulations 2007 (SSI 2007/487)

The committee agreed to raise minor points on the instrument.

The Convener: I ask the committee also to note, as earlier, that this is the fifth occasion on which the principal regulations—the Education (School and Placing Information) (Scotland) Regulations (SI 1982/950) have been amended. As the consolidation working group is now under way, the committee may consider that the principal regulations warrant mentioning to the group as a potential candidate for consolidation. As before, they are crying out for it. Do members agree?

Members indicated agreement.

Instrument Not Laid Before the Parliament

Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Commencement No 2 and Transitional Provisions and Savings) Order 2007 (SSI 2007/479)

14:35

The Convener: Are members content to ask the Scottish Government questions (a) and (b) in the summary of recommendations and to raise minor points informally?

Members *indicated agreement.*

Consolidation Working Group (Report)

14:36

The Convener: That takes us to what we have already mentioned twice—the consolidation working group. We have all seen the paper before us. Do members have any comments on it at this stage? If not, is the committee content to note the paper as a work in progress?

Members *indicated agreement.*

The Convener: At this point, we will go into private session.

14:36

Meeting continued in private until 14:45.

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