

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 24 February 2009

Session 3

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2009.

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 RR  
Donnelley.

---

## CONTENTS

Tuesday 24 February 2009

Col.

<b>DECISION ON TAKING BUSINESS IN PRIVATE</b> .....	487
<b>CLIMATE CHANGE (SCOTLAND) BILL: STAGE 1</b> .....	488
<b>FLOOD RISK MANAGEMENT (SCOTLAND) BILL: AFTER STAGE 1</b> .....	494
<b>WELFARE REFORM BILL</b> .....	494
<b>DRAFT INSTRUMENTS SUBJECT TO APPROVAL</b> .....	495
Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2009 (Draft) ...	495
Community Care and Health (Scotland) Act 2002 (Amendment to schedule 1) Order 2009 (Draft).....	495
Regulation of Care (Fitness to Register, Provide and Manage Care Services) (Scotland) Amendment Regulations 2009 (Draft).....	495
Regulation of Care (Scotland) Act 2001 (Minimum Frequency of Inspections) Order 2009 (Draft) .....	495
Licensing of Animal Dealers (Young Cats and Young Dogs) (Scotland) Regulations 2009 (Draft) .....	495
Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 (Draft) .....	495
Representation of the People (Postal Voting for Local Government Elections) (Scotland) Amendment Regulations 2009 (Draft).....	495
<b>INSTRUMENTS SUBJECT TO ANNULMENT</b> .....	496
Plastic Materials and Articles in Contact with Food (Scotland) Regulations 2009 (SSI 2009/30) .....	496
Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009 (SSI 2009/34).....	496
Scottish Local Government Elections Amendment Order 2009 (SSI 2009/36) .....	496
Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) Order 2009 (SSI 2009/39) .....	496
Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2009 (SSI 2009/40) .....	496
Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2009 (SSI 2009/38) .....	496
Police Grant (Variation) (Scotland) Order 2009 (SSI 2009/41) .....	496
Police Grant (Revocation and Variation No 2) (Scotland) Order 2009 (SSI 2009/55).....	496
<b>INSTRUMENTS NOT LAID BEFORE THE PARLIAMENT</b> .....	498
Act of Sederunt (Child Care and Maintenance Rules) Amendment 2009 (SSI 2009/29) .....	498

---

# **SUBORDINATE LEGISLATION COMMITTEE**

## **7<sup>th</sup> Meeting 2009, Session 3**

### **CONVENER**

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

### **DEPUTY CONVENER**

\*Ian McKee (Lothians) (SNP)

### **COMMITTEE MEMBERS**

\*Jackson Carlaw (West of Scotland) (Con)

\*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

\*Bob Doris (Glasgow) (SNP)

\*Helen Eadie (Dunfermline East) (Lab)

\*Tom McCabe (Hamilton South) (Lab)

### **COMMITTEE SUBSTITUTES**

Bill Aitken (Glasgow) (Con)

Ross Finnie (West of Scotland) (LD)

Christopher Harvie (Mid Scotland and Fife) (SNP)

Elaine Smith (Coatbridge and Chryston) (Lab)

\*attended

### **THE FOLLOWING ALSO ATTENDED:**

Judith Morrison (Legal Adviser)

### **CLERK TO THE COMMITTEE**

Shelagh McKinlay

### **ASSISTANT CLERK**

Jake Thomas

### **LOCATION**

Committee Room 4

## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 24 February 2009*

[THE CONVENER opened the meeting at 14:15]

### Decision on Taking Business in Private

**The Convener (Jamie Stone):** Welcome to the seventh meeting this year of the Subordinate Legislation Committee.

Under the first agenda item, I seek the committee's agreement to take in private item 8, under which the committee will discuss proposed changes to standing orders in connection with the Scottish Parliamentary Pensions Bill, in order to inform the work of the Standards, Procedures and Public Appointments Committee. In advance of a report on the matter from that committee, it is appropriate to consider this matter in private. Do we agree so to do?

**Members indicated agreement.**

## Climate Change (Scotland) Bill: Stage 1

14:15

**The Convener:** The next item concerns consideration of the Scottish Government's response to points raised by the committee on the delegated powers in the Climate Change (Scotland) Bill at Stage 1.

Are we content with the delegated power in section 4, "Setting annual targets", and that it is subject to affirmative procedure?

**Members indicated agreement.**

**The Convener:** Are we content with the delegated powers in section 6, "Modifying annual targets etc", and that they are subject to affirmative procedure?

**Members indicated agreement.**

**The Convener:** Are we content with the delegated powers in section 12, "The net Scottish emissions account", and that they are subject to affirmative procedure on the first occasion, but that the second and subsequent regulations will be subject to negative resolution, other than regulations making provision to alter the amount by which a carbon unit credited or debited to the net Scottish emissions account for a period reduces or increases the account for that period?

**Members indicated agreement.**

**Ian McKee (Lothians) (SNP):** The Scottish Government's response talks about emissions from domestic aviation being considered to have been emitted from sources in Scotland. Do we have a definition of "domestic aviation" in the Scottish context?

**The Convener:** I certainly do not.

**Judith Morrison (Legal Adviser):** Section 14 of the bill contains a power to make provision regarding what emissions are to be attributable to Scotland. The Government will use delegated powers to define what emissions are attributable to Scotland for the purposes of the account.

**Ian McKee:** Do you mean the Scottish Government or the United Kingdom Government?

**Judith Morrison:** The Scottish ministers define the emissions for the purposes of the bill.

**The Convener:** Are you content with that? It is not an easy subject.

**Ian McKee:** It seems to give the Scottish ministers a welcome degree of freedom.

**The Convener:** Indeed. Are we content to report that, generally, we do not favour the use of

affirmative procedure for a first set of regulations and negative procedure for second and subsequent regulations, but that we believe that, in the instance of section 12 of this bill, the Scottish Government has provided sufficient reasons why that choice of procedure appears to be suitable?

**Members indicated agreement.**

**The Convener:** Are we content with the delegated power in section 14, “Scottish share of emissions from international aviation and international shipping”, and that it is subject to affirmative procedure?

**Members indicated agreement.**

**The Convener:** Are we content with the delegated powers in section 18, “Carbon units and carbon accounting”, and that they are subject to affirmative procedure on the first occasion, but that the second and subsequent regulations will be subject to negative resolution, other than regulations making provision specifying a carbon unit of a kind not previously specified in regulations?

**Members indicated agreement.**

**The Convener:** Again, are we content to report that, generally, we do not favour the use of affirmative procedure for a first set of regulations and negative procedure for second and subsequent regulations, but that we believe that, in the instance of section 18 of this bill, the Scottish Government has provided sufficient reasons why that choice of procedure appears to be suitable?

**Members indicated agreement.**

**The Convener:** On section 36, “Duties of public bodies relating to climate change”, are we content to report to the lead committee that the power under section 36(1) to impose climate change duties on public bodies is extremely wide in its scope, in particular as neither the public bodies that may be subject to climate change duties nor climate change duties themselves are adequately and clearly defined?

**Members indicated agreement.**

**The Convener:** Are we content to recommend that that could be mitigated to some extent by the provision of a list of public bodies to which the power is to apply, along with a power, subject to affirmative procedure, to add to the list? That would be in line with the approach that has been adopted with regard to other regimes regulating public bodies in relation to matters such as freedom of information.

We do not have to go down that route, but we could think about having some kind of list.

**Ian McKee:** I do not think that that suggestion is necessary. We are reporting our view—that the power is extremely wide in its scope—to the lead committee, which is a group of informed individuals. We should leave it to the lead committee to decide how that might be mitigated.

**Helen Eadie (Dunfermline East) (Lab):** I take a different view. Given that the approach has been adopted with regard to matters such as freedom of information, we should consider adopting it in relation to this bill. I recommend strongly that we take a different view to that which is proposed by Ian McKee.

**Malcolm Chisholm (Edinburgh North and Leith) (Lab):** I am fairly sceptical about the need to make that recommendation to the lead committee, but I accept that an argument can be made for having a list. It is better to have a detailed suggestion as that gets around the obvious objection that the bill is for the next 40 years, in which time there will be new public bodies. If we really want to deal with the problem, it is better to propose a solution.

**The Convener:** At the moment, the committee is inclining towards recommending that there be a list. Can you live with that, Dr McKee?

**Ian McKee:** I simply feel that it is up to the lead committee to decide how the problem should be solved. There are benefits to providing a list but there are also problems with providing a list.

**The Convener:** We could tell the lead committee that we have thought about the matter but that, ultimately, it is up to its members to decide. That might incorporate our thinking on the matter. Would that be a way forward?

**Helen Eadie:** The only problem with that is that it raises the question of why we meet. We, too, have a responsibility; it is not just down to the lead committee. We provide knowledge and expertise. We want to avoid a situation in which people get involved in litigation because they cannot decide on the definition of certain elements of legislation. It would be unfortunate for the people of Scotland if we were to leave them in that position.

**Bob Doris (Glasgow) (SNP):** I can see why a list might be desirable. However, I have not spoken up until now because I can see problems with it as well. Although the list can be added to via affirmative instruments, that takes time and if by some error a body is not on the list, the minister cannot set targets for it at the point when he or she would want to. Leaving those points to one side, however, I have to say that I do not know whether it should be this committee or the lead committee that decides whether there should be a list.

**Helen Eadie:** I agree that it would take time to add bodies to the list, but only a couple of months, which is not an inordinate amount of time. We have to take this committee seriously. We either do our job or we may as well not be here.

**Jackson Carlaw (West of Scotland) (Con):** I am inclined towards Helen Eadie's point of view on this matter.

**Tom McCabe (Hamilton South) (Lab):** So am I.

**The Convener:** I think that we have a majority view. Can you live with that, Ian?

**Ian McKee:** Yes.

**The Convener:** That is very considerate of you.

We ask our clerks to outline to the lead committee the nature of what we have in mind, and, of course, the record of our discussion can be read in the *Official Report*.

Moving on, are we agreed that it would be appropriate for the Parliament to have a role in scrutinising the guidance that is produced under section 37, "Guidance to relevant public bodies", because of its potential impact?

**Members indicated agreement.**

**The Convener:** That being the case, are we content to recommend that guidance under this section should be laid before Parliament for a period prior to implementation and that any resolutions of the Parliament that are made in respect of the draft guidance during that period should be implemented?

**Members indicated agreement.**

**The Convener:** On section 46, "Variation of permitted times for making muirburn", are we content with the Government's response in the respect that it may be taken to confirm that informal consultation with potentially interested parties will take place in advance of any instrument being made?

**Members indicated agreement.**

**Tom McCabe:** Convener, could I take us back to section 37? The final part of the recommendation says:

"and any resolutions of the Parliament made in respect of the draft guidance during that period implemented".

What exactly does that mean? Is it saying that if the Parliament passes a resolution on the guidance, the Government must take account of it?

**Judith Morrison:** The Government should take account of it in producing revised guidance.

**Tom McCabe:** Yes, but the Government is not obliged to do so.

**Judith Morrison:** It is for members to decide how they would like the Government to take account of the resolution.

**Tom McCabe:** My firm understanding is that Parliament cannot instruct Government. It can make its view known, but there is never an obligation on the Government to take up every dot and comma of that view, is there?

**Judith Morrison:** As I recall, there is a similar issue in relation to the national planning framework, whereby the planning framework must be laid in draft before the Parliament for a certain period of time, and if the Parliament makes a resolution in relation to that draft, the Government is required to take it into account. I do not have the legislation in front of me to give you chapter and verse, but I can certainly come back to you on it.

**Malcolm Chisholm:** The word "implemented" should probably be changed to "taken into account", or something like that.

**Tom McCabe:** Yes.

**The Convener:** Okay. Is that form of words acceptable?

**Tom McCabe:** Yes; it is softer.

**Members indicated agreement.**

**The Convener:** Let us go back to where we were. I am sure that we have all read the legal brief on section 47, "Power to modify functions of Forestry Commissioners", quite closely. *[Interruption.]* I call for just a touch of order from my Labour colleagues, please.

Are we content to draw it to the attention of the lead committee that the power under section 47(1), to modify the functions of the forestry commissioners in or as regards Scotland, is very wide in its scope as there is no limitation within the power on what may be done in exercise of the power, beyond that it must deliver a climate change purpose?

**Helen Eadie:** We agree with that.

**The Convener:** That was certainly quite a big issue; it leaped out of the legal brief.

**Ian McKee:** Could you give me an example of the misuse of the power?

**The Convener:** I would not use the word "misuse" but the powers are quite wide. The legal brief gives a couple of examples. In a way, we have a duty to report something like that. What the lead committee or Parliament does with it is another matter.

**Ian McKee:** I think that there are occasions when the climate change tail should wag the dog.

**The Convener:** Ah, you have read your legal brief. That was the test phrase.

**Ian McKee:** Did you doubt it, convener?

**The Convener:** Sections 52(1), (2) and (4) are on waste prevention and management plans, sections 53(1), (2), (3) and (5) are on information on waste, sections 54(1), (2), (4) and (5) are on facilities for the deposit of recyclable waste, and sections 56(1), (2), (3) and (6) are on regulations for the procurement of recycle.

Are we content to report to the lead committee and to Parliament that the powers are expressed in very broad terms and that there is nothing in the bill to restrict their application to purely commercial activity?

**Members indicated agreement.**

**The Convener:** Sections 57(1), (2) and (4) are on the targets for reduction of packaging. Are we agreed that the Parliament should be made aware that the powers are expressed in very broad terms and that there is nothing in the bill to restrict their application to commercial activity?

**Members indicated agreement.**

**The Convener:** On section 64, “Subordinate legislation”—our good selves—can we agree that the general power contained in section 64(3), which enables orders or regulations to modify any enactment, including the act, is, in the case of the bill, acceptable?

**Members indicated agreement.**

**The Convener:** That completes item 2. I thank you.

## Flood Risk Management (Scotland) Bill: After Stage 1

14:29

**The Convener:** In December last year we reported on the delegated powers provisions in the Flood Risk Management (Scotland) Bill at stage 1. We have now received the minister’s response to our report, and we will all have read it. Do members have any comments on the response? I was pretty content with it.

**Members:** No.

**The Convener:** So are we content to note the response and to return to consideration of the bill after stage 2?

**Members indicated agreement.**

## Welfare Reform Bill

14:30

**The Convener:** The bill is United Kingdom Parliament legislation and we will consider the powers to make subordinate legislation that it proposes to confer on the Scottish ministers, the first of which is under clause 31, “Power to make provision enabling exercise of greater choice and control”. Although the power is very wide, the bill indicates what it is contemplated might be done in exercise of the power and what any regulations might contain. Furthermore, protection is afforded by the requirement for affirmative procedure. So we have that cover.

Are we content with that, and are we also content to refer in our report to the provision of a non-mandatory pilot scheme in clause 34 of the bill?

**Members indicated agreement.**



## Draft Instruments Subject to Approval

**Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2009 (Draft)**

**Community Care and Health (Scotland) Act 2002 (Amendment to schedule 1) Order 2009 (Draft)**

**Regulation of Care (Fitness to Register, Provide and Manage Care Services) (Scotland) Amendment Regulations 2009 (Draft)**

**Regulation of Care (Scotland) Act 2001 (Minimum Frequency of Inspections) Order 2009 (Draft)**

**Licensing of Animal Dealers (Young Cats and Young Dogs) (Scotland) Regulations 2009 (Draft)**

**Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 (Draft)**

**Representation of the People (Postal Voting for Local Government Elections) (Scotland) Amendment Regulations 2009 (Draft)**

14:31

*The committee agreed that no points arose on the instruments.*

## Instruments Subject to Annulment

**Plastic Materials and Articles in Contact with Food (Scotland) Regulations 2009 (SSI 2009/30)**

**Town and Country Planning (General Permitted Development) (Domestic Microgeneration) (Scotland) Amendment Order 2009 (SSI 2009/34)**

**Scottish Local Government Elections Amendment Order 2009 (SSI 2009/36)**

**Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) Order 2009 (SSI 2009/39)**

**Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2009 (SSI 2009/40)**

14:31

*The committee agreed that no points arose on the instruments.*

**Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2009 (SSI 2009/38)**

**The Convener:** Are members satisfied with the Scottish Government's explanation for not complying with the dreaded 21-day rule in bringing the order into force?

**Members** *indicated agreement.*

**Police Grant (Variation) (Scotland) Order 2009 (SSI 2009/41)**

**Police Grant (Revocation and Variation No 2) (Scotland) Order 2009 (SSI 2009/55)**

**The Convener:** We are looking at the orders together because SSI 2009/55 revokes SSI 2009/41. We are asked to note the error in SSI 2009/41 that has been addressed by its revocation, and the further provision made by SSI 2009/55.

Are we content to report to the lead committee and Parliament that SSI 2009/41 is defectively drafted and, as a result, has been revoked by the Scottish Government, and that SSI 2009/55 is satisfactory?

**Members** *indicated agreement.*

**The Convener:** Also, on the 21-day rule, we will note the explanation and report accordingly. Are we agreed?

**Members** *indicated agreement.*

## **Instruments not laid before the Parliament**

### **Act of Sederunt (Child Care and Maintenance Rules) Amendment 2009 (SSI 2009/29)**

*The committee agreed that no points arose on the instrument.*

14:33

*Meeting continued in private until 14:36.*

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, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Wednesday 4 March 2009**

#### PRICES AND SUBSCRIPTION RATES

##### OFFICIAL REPORT daily editions

*Single copies: £5.00*

*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.

##### WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*

*Annual subscriptions: £150.00*

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

#### **Blackwell's Bookshop**

**53 South Bridge  
Edinburgh EH1 1YS  
0131 622 8222**

**Blackwell's Bookshops:**  
243-244 High Holborn  
London WC1 7DZ  
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

**Blackwell's 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**  
**0131 622 8283 or**  
**0131 622 8258**

**Fax orders**  
**0131 557 8149**

**E-mail orders**  
**business.edinburgh@blackwell.co.uk**

**Subscriptions & Standing Orders**  
**business.edinburgh@blackwell.co.uk**

#### **Scottish Parliament**

**RNID Typetalk calls welcome on**  
**18001 0131 348 5000**  
**Textphone 0845 270 0152**

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

**Accredited Agents**  
(see Yellow Pages)

and through good booksellers