

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 6 October 2009

Session 3

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **26<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

### **CLERK TO THE COMMITTEE**

Douglas Wands

### **ASSISTANT CLERK**

Jake Thomas

### **LOCATION**

Committee Room 5

**Scottish Parliament**  
**Subordinate Legislation**  
**Committee**

*Tuesday 6 October 2009*

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

**Interests**

**The Convener (Jamie Stone):** Welcome to our 26<sup>th</sup> meeting this year. We have received apologies from Tom McCabe, Jackson Carlaw and Bob Doris. I welcome Elaine Smith, who is substituting for Tom McCabe, and Chris Harvie, who is substituting for Bob Doris.

Item 1 is a declaration of interests. Because this is Elaine Smith's first time at the committee, I ask her to declare any interests that might be relevant to the committee's work.

**Elaine Smith (Coatbridge and Chryston) (Lab):** I have none.

**Control of Dogs (Scotland) Bill:**  
**Stage 1**

14:16

**The Convener:** Item 2 is our second consideration of the Control of Dogs (Scotland) Bill. We have received a response from the member in charge, Christine Grahame, to the two questions that we raised at our meeting of 15 September. Today we will conclude our consideration of the bill at stage 1.

On section 2, "Content of dog control notice", the committee sought clarification of section 2(7), on powers to amend content of the dog control notice, including requirements and examples of steps to be taken. Are members content to welcome the confirmation provided by Christine Grahame to the effect that the intention of the power set out in section 2(7)(a) is not to allow the Scottish ministers to remove a requirement set out in section 2(1)?

**Members indicated agreement.**

**The Convener:** Should we, however, indicate that there remains doubt about whether the power could be used to remove a requirement in section 2(1) and recommend that the member in charge lodges appropriate amendments at stage 2 to place matters beyond doubt?

**Members indicated agreement.**

**The Convener:** On section 8, "Scottish dog control database", the committee sought clarification of the power to make provision for the establishment, maintenance, operation, management and control of the database and the appointment of a database operator. Does the committee agree to welcome the terms of the reply that Christine Grahame has provided in relation to that power and her statement that it is not considered that the power in section 8(1) could be used to make provision as to the effect of the database and inclusion in it, and that any such provision would be beyond the vires of the power?

**Members indicated agreement.**

**The Convener:** Do members agree to bring the matter to the attention of the lead committee, which may choose to pursue it when taking evidence from the member in charge?

**Members indicated agreement.**

## Public Services Reform (Scotland) Bill: Stage 1

14:18

**The Convener:** Item 3 is on the Public Services Reform (Scotland) Bill. Members may have more to say about the bill than I have, given my recent absence from the committee.

As members know, we have received written responses to questions raised at our first consideration of the bill on 8 September. We heard from officials at a meeting on 22 September and received a supplementary written response following that meeting. Today we will conclude our consideration of the bill at stage 1 and will go through all the powers that we did not dispose of at our initial meeting.

Paragraph 2 of schedule 2 gives the Court of Session powers to regulate the conduct of officers of court in exercising their extrajudicial functions and to prescribe the procedure in relation to appeals under section 82 of the Debtors (Scotland) Act 1987. Are we content to report that the powers are acceptable? Are we further content that they are exercisable by act of sederunt?

*Members indicated agreement.*

**The Convener:** There are a number of recommendations relating to part 2 of the bill, "Order-making powers". I draw members' attention to the summary of recommendations paper that is before us. Are members content to report that the delegated powers in part 2 are very broad and could be used to deliver significant restructuring and revision of public functions across the Scottish Administration and public sector?

*Members indicated agreement.*

**The Convener:** We may also wish to report that whether such powers should be given to ministers is a matter of policy for determination by the Parliament as a whole and should not be prejudged by the committee. Given the nature of the powers, a range of opinions may be taken. Do we agree to express no view on whether the powers are acceptable in principle?

*Members indicated agreement.*

**Malcolm Chisholm (Edinburgh North and Leith) (Lab):** Is that just a procedural matter? We seem to be saying that it is not appropriate for the committee to express a view, rather than that we do not have one.

**The Convener:** It might be wiser for us to express no view. However, we have indicated clearly that the Parliament has a role to play.

The committee may wish to report that it recommends that in their scrutiny of the bill the lead committee and the Parliament consider further a number of significant concerns about the manner in which the powers are framed. First, do the criteria that are set for the limits of the powers in sections 10 and 13 and the restrictions that are set out in section 12 provide sufficient protection, and are they sufficiently precise and clearly defined? Secondly, should certain bodies be exempted from the scope of the bill and protected from inclusion in schedule 3 through orders under section 11? If so, the Parliament should ensure that that is done in a clear and unambiguous way.

**Ian McKee (Lothians) (SNP):** When reporting our concerns to the lead committee, we should give examples of bodies that could be considered, such as local government and bodies that have been set up specifically to scrutinise government.

**Malcolm Chisholm:** The term "sufficient protection" may be slightly unfortunate. The key phrase in the bill is "necessary protection"; everything hinges on the interpretation of that phrase. The officials' comments on the independence of the judiciary or the Mental Welfare Commission for Scotland sounded quite reassuring. In their answers, they kept coming back to the phrase "necessary protection", which we should highlight. We should ask whether the term is sufficiently clear and precise and whether it will be open to different interpretations. The term "sufficient protection" may mean something slightly different.

I agree with the point that Ian McKee makes. He mentioned local government. We were not entirely reassured by the answers to our questions about whether local government is exempt from inclusion in schedule 3. Given that that point relates to the order-making power, we may want to flag it up. The Government's intention seems clear, but it may need to put it beyond doubt in the bill.

**The Convener:** The points that I have highlighted are recommendations to the lead committee and the Parliament. The comments of Malcolm Chisholm and Dr McKee will appear in the *Official Report* of today's meeting, which will go to both the lead committee and the Parliament.

**Ian McKee:** Section 10(1) of the bill states:

"The Scottish Ministers may by order make any provision which they consider would improve the exercise of public functions".

The bill team reassured us that that restricts ministers' ability to make such provisions. Could the word "may" be toughened up, as "may" also implies that one "may not"? Does that make sense?

**Helen Eadie (Dunfermline East) (Lab):** Absolutely.

**The Convener:** The point is on the record and will be noted by the lead committee and the Parliament. Our clerks have the role of ensuring, with the clerks to the lead committee, that such points are picked up.

We could report that we have concerns about whether the procedures that are proposed in relation to the powers in sections 10, 11 and 13 provide for full and adequate parliamentary scrutiny of the respective orders in all cases. First, we could recommend that orders under sections 10 and 13 be subject to super-affirmative procedure, which requires a proposed draft order, together with the relevant explanatory document, to be laid before Parliament for a prescribed period, to permit public consultation on the terms of the proposed order before ministers present a draft order in final form to the Parliament for approval; and that ministers be required to consider comments received and to provide Parliament with an explanation of the extent to which such comments have been addressed in the final order. Secondly, we could recommend that orders under section 11 be subject to affirmative procedure, given that listing for inclusion in schedule 3 in such an order engages the powers under part 2 of the bill; and that ministers be under an obligation to consult bodies prior to their inclusion in schedule 3 through a section 11 order. Is that agreed?

*Members indicated agreement.*

**The Convener:** Section 46(4) contains a power to make further provision about the preparation, content and effect of reports. Do we agree to report that, although it is helpful to have had clarification that the Scottish Government does not intend the provision to provide a power with respect to the consequences of a report, we recommend that the Scottish Government consider redrafting the provision to make clear its intention in that respect?

*Members indicated agreement.*

**The Convener:** Section 47 contains a power to make further provision for conducting inspections. The power enables significant provision to be made with respect to interviews and physical and mental examinations, including how examinations are to be conducted, and the disclosure of information that is obtained from those examinations and interviews. Are we content to draw that to the attention of the lead committee?

*Members indicated agreement.*

**The Convener:** Section 53(1)(c) contains a power to prescribe grounds on which social care and social work improvement Scotland may propose to cancel the registration of a care service. We have had further explanation from the Scottish Government on the power. Do we agree

to report that we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** Section 62(1) contains a power to make regulations relating to the registration of care services. The Scottish Government has confirmed that it does not intend that the power be used to set out criteria for eligibility to provide services in the wider sense and that such provision would be made under section 63. Are we agreed to report that, having obtained further explanation from the Scottish Government, we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** Section 63 contains a power to make regulations to impose requirements in relation to care services, as appropriate, for the purposes of part 4. Proposed new section 10Z2 of the National Health Service (Scotland) Act 1978 makes provision to make regulations relating to independent health care services. Are we agreed to report that, having obtained further justification and explanation from the Scottish Government by means of evidence to us, we find the proposed powers acceptable in principle and are content that they are subject to affirmative procedure?

*Members indicated agreement.*

**The Convener:** Section 76(5)(c) contains a power to prescribe an act and thereby add the requirements or conditions that are contained in that act to the list of relevant requirements. Do we agree to report that, having obtained further explanation from the Scottish Government, we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** Section 76(6) contains a power to prescribe matters in relation to a care service that is registered under chapter 4 of part 4 and on which SCSWIS must report and provide information to the Scottish ministers. Do we agree to report that, having obtained clarification from the Scottish Government, we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** Proposed new section 10D(1) of the 1978 act contains a power to delegate functions. Do we agree to consider the proposed power acceptable in principle? Are members content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** Well done, Elaine Smith, for hanging in there.

Do members agree to draw to the attention of the lead committee the fact that the power is wider than is necessary to transfer the functions of NHS Quality Improvement Scotland—or any other functions that would properly be within healthcare improvement Scotland's remit—to healthcare improvement Scotland?

**Members indicated agreement.**

**The Convener:** Proposed new section 10M(4) of the 1978 act is the power to make regulations to make further provision concerning the preparation, content and effect of reports. Do we agree to report that, although it is helpful to have had clarification that the Scottish Government does not intend the provision to provide a power relating to the consequences of a report, the Scottish Government should consider redrafting the provision to make clear its intention in that respect?

**Members indicated agreement.**

**The Convener:** Proposed new section 10N(1) of the 1978 act contains a power to make regulations to make further provision for conducting inspections. The power enables significant provision to be made with respect to interviews and physical and mental examinations, including how examinations are to be conducted, and the disclosure of information that is obtained from those examinations and interviews. Do we agree to draw that to the attention of the lead committee?

**Members indicated agreement.**

**The Convener:** Proposed new section 10R(1)(c) of the 1978 act contains a power to prescribe grounds upon which HIS may cancel the registration of an independent health care service. Having obtained further explanation from the Scottish Government, do we agree that we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

**Members indicated agreement.**

**The Convener:** Proposed new section 10Z1 of the 1978 act contains a power to make regulations about registers and registration. The Scottish Government has confirmed that it does not intend that the power be used to set out criteria for eligibility to provide services in the wider sense and that such provision would be made under proposed new section 10Z2 of the 1978 act. Having obtained further explanation from the Government, do we agree that we find the proposed power acceptable in principle and are content that it is subject to negative procedure?

**Members indicated agreement.**

14:30

**The Convener:** Section 96(1) contains a power to direct a person or body to participate in a joint inspection. We have obtained further explanation from the Scottish Government. Do we agree that we find the exercise of the power in the form of directions satisfactory?

**Members indicated agreement.**

**The Convener:** Should we, however, express concern that there is no provision in the bill for the publication of directions whereby the public will be made aware which person or body has been directed to participate in a joint inspection and what powers they may exercise?

**Members indicated agreement.**

**The Convener:** Section 97(1) contains a power to make regulations relating to joint inspections. The power enables significant provision to be made with respect to interviews and physical and mental examinations, including how examinations are to be conducted, and the disclosure of information that is obtained from those examinations and interviews. Do we agree that we should draw to the attention of the lead committee the fact that regulations made under the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Act 2006, which the power in section 97(1) is said to reflect, do not provide for interviews and examinations?

**Members indicated agreement.**

**The Convener:** We are almost there, colleagues.

Paragraph 2(2) of schedule 7 contains a power to vary the number of members of SCSWIS. Paragraph 2(2) of schedule 11 contains a power to vary the number of members of HIS. Having obtained further clarification from the Scottish Government, do we agree to report that we find the proposed powers acceptable in principle and are content that they are subject to affirmative procedure?

**Members indicated agreement.**

**The Convener:** On part 7, "Miscellaneous and General", given the width of the proposed powers in sections 10 and 13, do we agree to recommend that affirmative rather than negative procedure should apply to all the ancillary powers as set out in section 101, as it relates to part 2?

**Members indicated agreement.**

## Home Owner and Debtor Protection (Scotland) Bill: Stage 1

14:32

**The Convener:** We move to agenda item 4, the much-anticipated Home Owner and Debtor Protection (Scotland) Bill. This is our first look at the delegated powers in the bill, which was introduced to Parliament last week. It is suggested that we ask the Government a short series of questions and consider its responses at our next meeting, on 27 October, after the short autumn recess.

Section 3(2) inserts proposed new section 5A(4) into the Heritable Securities (Scotland) Act 1894 and deals with court powers in an action for possession of residential property. Do we agree to report that we find the power to prescribe by regulations the form and manner of notice, as contained in section 3(2), acceptable in principle and are content that the power is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** On section 4, “Pre-action requirements”, we have several questions. Are we content to ask the questions that are set out in the summary of recommendations? I will not read them out.

*Members indicated agreement.*

**The Convener:** Section 4 concerns pre-action requirements and inserts proposed new section 24A(7) into the Conveyancing and Feudal Reform (Scotland) Act 1970 and proposed new section 5B(7) into the 1894 act. Should we ask the Scottish Government to explain what type of matters might be covered by the power to issue statutory guidance and the intended effect of the guidance?

*Members indicated agreement.*

**The Convener:** Are we content that the powers that are contained in section 7, “Representation in repossession proceedings”, are acceptable in principle? Are we further content that they are subject to negative procedure?

*Members indicated agreement.*

**The Convener:** On section 9, “Certificate for sequestration”, should we ask the Government to clarify the scope of the power in proposed new section 5B(5)(e) of the Bankruptcy (Scotland) Act 1985? The delegated powers memorandum suggests that the power can be used to add further substantive preconditions before the certification route is opened to debtors. We should

seek clarification on why a power to specify additional substantive conditions may be necessary and on whether such conditions could override the primary definition of the circumstances in which a certificate can be issued, which are set out in proposed new section 5B(1) of the 1985 act—for example, by stating that certain debts were to be excluded from consideration. A bit of tidying is needed. Is that agreed?

*Members indicated agreement.*

**The Convener:** Do we agree that we find the delegated powers in section 10, “Trust deeds”, acceptable in principle and are content that the powers are subject to affirmative procedure?

*Members indicated agreement.*

**The Convener:** On section 11, “Power in relation to debtor’s family home”, do we agree that we find the power in section 11(c) acceptable in principle and are content that it is subject to negative procedure?

*Members indicated agreement.*

**The Convener:** The amendments to some of the delegated powers provisions in the 1985 act, as provided for in section 13 of the bill, “Regulations under the 1985 Act”, appear to be acceptable. Are we agreed?

*Members indicated agreement.*

**The Convener:** On section 15, “Ancillary provision”, do we agree to ask the Scottish Government to explain why it considers that, in the context of the bill, it is not thought appropriate that all orders under section 15(1)(a), which must go beyond the terms of the bill, should be subject to affirmative procedure?

*Members indicated agreement.*

**The Convener:** Do we also agree to ask whether those powers should always be subject to affirmative procedure because, as the delegated powers memorandum suggests, it is more likely in this context that significant supplementary or consequential changes affecting primary legislation will be required?

*Members indicated agreement.*

**The Convener:** The commencement powers in subsections (3) and (4) of section 17 appear to be acceptable. Are we content that the powers are not subject to parliamentary procedure?

*Members indicated agreement.*

## **Instruments subject to Annulment**

### **Registration Services (Prescription of Forms) (Scotland) Regulations 2009 (SSI 2009/314)**

14:36

**The Convener:** There has been a failure to follow normal drafting practice in the regulations because one of the relevant enabling powers, namely paragraph 6(5) of schedule 1 to the Adoption and Children (Scotland) Act 2007, has not been referred to in the preamble. Is the committee happy to report that to the lead committee?

**Members** *indicated agreement.*

### **Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Order 2009 (SSI 2009/317)**

**The Convener:** The order is defectively drafted as it has omitted to specify criminal sanctions in respect of the offences in articles 10(4) and 11(2). The Scottish Government will correct those errors before the order comes into force, which we welcome. We should report the order on the grounds of defective drafting. Is that agreed? The Government has come to meet us and has agreed to put it right.

**Members** *indicated agreement.*

### **Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment No 2) 2009 (SSI 2009/321)**

**The Convener:** We have received a satisfactory response in relation to the application of fee rates under the new schedule introduced by the act of sederunt. Are members content with that?

**Members** *indicated agreement.*

### **Protection of Children (Scotland) Act 2003 (The Meaning of Disqualified from Working with Children: Corresponding Disqualifications in Northern Ireland) (No 2) Order 2009 (SSI 2009/316)**

### **Food Labelling (Nutrition Information) (Scotland) Regulations 2009 (SSI 2009/328)**

### **Fodder Plant Seed (Scotland) Amendment Regulations 2009 (SSI 2009/330)**

### **Justice of the Peace Courts (Sheriffdom of North Strathclyde) etc Order 2009 (SSI 2009/331)**

### **Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc Order 2009 (SSI 2009/332)**

### **Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Amendment Regulations 2009 (SSI 2009/333)**

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

## Instruments not laid before the Parliament

### Public Health etc (Scotland) Act 2008 (Commencement No 2, Savings and Consequential Provisions) Order 2009 (SSI 2009/319)

14:39

**The Convener:** The order contains a drafting error. In schedule 2, the reference in the first line of paragraph 2 should be to part 1 of schedule 3 to the Public Health etc (Scotland) Act 2008, and not to part 3 as stated. Although that is not likely to affect the validity or effect of the order because it should be clear to the informed reader what was intended, we should nonetheless report it to Parliament. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** I am much obliged to our legal team for picking up these niceties. That one would certainly have passed me by.

We should also report that the Scottish Government's explanation for the removal of certain words from the definition of "owner" in section 25(10) of the Agriculture (Safety, Health and Welfare Provisions) Act 1956, under part 1 of schedule 3 to the order, is satisfactory. Are we agreed?

**Members** *indicated agreement.*

### Act of Adjournal (Criminal Procedure Rules Amendment No 4) (Devolution Issues) 2009 (SSI 2009/322)

**The Convener:** The act of adjournal contains two drafting errors. The preamble contains an incomplete reference to schedule 6 to the Scotland Act 1998, and in paragraph 2(5), the reference to rule 40.9 should be a reference to rule 40.10. Do we agree to report it on those grounds?

**Members** *indicated agreement.*

### Act of Sederunt (Devolution Issues) (Appeals and References to the Supreme Court) 2009 (SSI 2009/323)

**The Convener:** There is a drafting error in the preamble, in that the reference in the final line should be to "section 32", not "section 33". It is not considered that the error affects the validity or operation of the act of sederunt, but shall we report it on those grounds?

**Members** *indicated agreement.*

**The Convener:** Is it not great when we pick up these points and make things all nice and straight?

### Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2009 (SSI 2009/315)

### Judiciary and Courts (Scotland) Act 2008 (Commencement No 3) Order 2009 (SSI 2009/318)

### Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Public Health etc (Scotland) Act 2008) 2009 (SSI 2009/320)

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

**The Convener:** That is it, folks. The next meeting is on Tuesday 27 October at 2.15pm, when we will take oral evidence on the Interpretation and Legislative Reform (Scotland) Bill.

I wish everyone a relaxing short break. My thanks go to the official report, the clerks and the legal team.

*Meeting closed at 14:42.*



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**Wednesday 14 October 2009**

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