

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 21 September 2005

Session 2

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CONVENER

*Sarah Boyack (Edinburgh Central) (Lab)

DEPUTY CONVENER

*Mr Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Rob Gibson (Highlands and Islands) (SNP)

Richard Lochhead (North East Scotland) (SNP)

*Maureen Macmillan (Highlands and Islands) (Lab)

*Mr Alasdair Morrison (Western Isles) (Lab)

*Nora Radcliffe (Gordon) (LD)

Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Alex Fergusson (Galloway and Upper Nithsdale) (Con)

*Trish Godman (West Renfrewshire) (Lab)

Jim Mather (Highlands and Islands) (SNP)

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

Eleanor Scott (Highlands and Islands) (Green)

*attended

CLERK TO THE COMMITTEE

Mark Brough

SENIOR ASSISTANT CLERK

Katherine Wright

ASSISTANT CLERK

Christine Lambourne

LOCATION

Committee Room 3

Scottish Parliament

Environment and Rural Development Committee

Wednesday 21 September 2005

[THE CONVENER *opened the meeting at 10:02*]

Regulatory Framework Inquiry

The Convener (Sarah Boyack): I welcome members to the meeting. I was going to welcome the press and members of the public, too, but we do not have anyone as yet—they must have looked at our agenda. I remind everyone to put their mobile phones on silent mode. We have received apologies from Rob Gibson, Richard Lochhead and Elaine Smith.

Our only agenda item is the Subordinate Legislation Committee's inquiry into the regulatory framework in Scotland. That committee seeks our comments. The Environment and Rural Development Committee is one of the committees with the biggest weight of statutory instruments to scrutinise, so it is important that we feed our views back to the Subordinate Legislation Committee. We have quite a lot of time to do that, as our response is not due until 14 October.

Members have before them a paper from the clerks. Mark Brough has produced a really good summary of the kind of issues that have come up at our committee over the past few years. He has included a background paper from the Subordinate Legislation Committee to let members see the questions that it has asked. Do members wish to make any particular recommendations to the Subordinate Legislation Committee? We need, first, to highlight our experiences; secondly, we should comment on how things could change.

Nora Radcliffe (Gordon) (LD): It has always seemed silly to me that, after instruments go before the Subordinate Legislation Committee, which suggests minor drafting amendments to improve them, the Executive will say, "Yes, we accept what you say, but we need another legislative opportunity to do it." That means taking two bites at the cherry, which must be confusing for the people who are regulated by the instruments.

It would seem to be common sense to develop a way of taking on board such minor amendments, whether that were to happen through the instruments not being laid until the Subordinate Legislation Committee had had a chance to look at them or through some other mechanism whereby

the amendments could be approved the first time round, instead of everybody having to come back to tidy things up.

The Convener: Do you have any thoughts on what you would expect to change or on procedures?

Nora Radcliffe: One of the suggestions in the inquiry paper is the option

"to recommend that an instrument is amended by the Executive".

That would be sensible. I do not think that an instrument needs to undergo parliamentary scrutiny if it is just a matter of it being improved or tidied up. Even typos seem to require the Executive to have a whole new legislative stab at the instrument.

The Convener: If the Subordinate Legislation Committee raises an issue and we, as the policy committee, agree with that, and everything is on the record so that everybody knows exactly what changes are being suggested—in other words, where there is consensus—it would make a huge amount of sense to do what Nora Radcliffe suggests. I can think of a couple of things that have had to come back to the committee. Sometimes we have had to remind ourselves that we have no issue with the statutory instrument at all, and that the issues that existed were merely technical.

When I read Mark Brough's paper, I was struck by the sheer amount of subordinate legislation that we receive, which always makes it difficult for us to monitor and scrutinise things. There is not a magic wand that the committee can wave, but the combination of that volume, plus the limited time that is available for our scrutiny, makes it difficult for me and the clerks to timetable committee scrutiny intelligently. I can think of a few instances in which statutory instruments would have benefited from earlier discussion and in which we would have liked to get witnesses in. The process of hearing from witnesses, even if they are not happy, is usually a good way of letting both the Executive and the committee have a debate around the whole topic with the people who will have to implement the item of subordinate legislation.

The Subordinate Legislation Committee has come up with a couple of options with regard to the timescale, which could be moved to 60 days. My instinct is to support that. What do colleagues think? We do not want to delay things forever, but having a longer period would be worth while if it meant getting technical amendments sorted out and being able to scrutinise the instrument properly. That applies in particular when we are approaching or have just had a recess. When the Parliament's business programme gets shifted—

as was the case when we resumed following the summer recess, and before we broke up for that recess—attempting to have a meaningful debate on the issues concerned becomes a nightmare. We cannot prioritise; we simply have to deal with what comes up on our list.

Nora Radcliffe: Could we come into the process a bit earlier? According to the background papers that accompany the instruments, the Executive has often consulted with the trade or with whomever is directly affected—the people with the expert knowledge. If the committee had a heads-up about what was being consulted on, that might give us an opportunity to take evidence from the same people, so that when instruments are laid, we might be able to get access to the advice and information that would allow us to consider them at that earlier stage. I do not know whether that would be feasible.

The Convener: There must be advance planning in the Executive. Our being brought in slightly earlier might indeed help.

Maureen Macmillan (Highlands and Islands) (Lab): I agree with Nora Radcliffe. There is nothing worse than suddenly being pounced upon by lobby groups a week before an instrument comes before a committee and being told that something is terrible and awful and should not be happening. It is impossible to get a take on the points that those people are making or to have time to sift out the issues from what they are saying.

Instruments can often be opaque when it comes to the impact that they will have. Often we do not know the jargon, and the Executive might be a bit sniffy about it and tell us that we should know what something means—but we do not. There is an issue about transparency, as well as about the time that we are given.

Mr Mark Ruskell (Mid Scotland and Fife) (Green): The issue about consultees is important. For example, we had very strong lobbies from certain stakeholders when it came to the draft Water Environment (Controlled Activities) (Scotland) Regulations 2005. If we had had more information with that Scottish statutory instrument on what the consultation had thrown up—even if the information was just in summary form, given we do not have much time to read through responses—we could have predicted the debate and the views of other stakeholders could have been brought in, possibly with a different take on the detailed issues.

I do not think that we should get completely overloaded with documents, but it would be good to get some advance understanding of what the main issues are with stakeholders and of whether there are any controversies. Much of the time,

there are no controversies with SSIs and we can simply let them through with minimal scrutiny. However, when there are issues, we need to stop, invite views and have a proper, balanced debate about the pros and cons.

The Convener: We have raised that issue in committee in relation to a couple of statutory instruments. Tantalisingly, the Executive note says that there has been a consultation and lists all the consultees, but it does not give us any sense of what any of them said. If one of us is lobbied by one of the consultees who is really unhappy although all the other consultees were happy, we have a skewed debate when we scrutinise the instrument. That is, therefore, a good idea.

Especially when late transposition from European Union law is involved and the Executive is running slightly behind schedule, by the time that the statutory instruments come to us some of them have already been laid. That puts us in an invidious position. If we were not happy with everything in a statutory instrument, we could put the Executive in breach of EU requirements. There is an issue for the Executive around advance planning and telling us what statutory instruments are coming up so that it can avoid putting us in that position.

Trish Godman (West Renfrewshire) (Lab): When I was convener of the Local Government Committee, there were times when we had to link in with Westminster legislation as well. Often, we got the statutory instruments late but we could not disagree to them because the procedure had already started. That made it difficult for us to challenge anything, as we did not have the time. We are talking about EU legislation, but the experience of the Local Government Committee—I do not know about this committee—was that Westminster was regularly ahead of us. Somewhere along the line, the Executive should alert the committee that a statutory instrument is coming, to give members time to prepare.

I agree with Maureen Macmillan that the committee should be given more explanation of subordinate legislation. I sat on the Subordinate Legislation Committee for four years and I never knew a thing about it when I left. I hope that that confession will not be recorded. It is a difficult subject to understand.

The Convener: Maureen Macmillan made a point about the jargon that is used in subordinate legislation. The impacts of the bills that we debate are relatively straightforward to grasp, but sometimes—even with the Executive note—everyone round the table struggles to work out exactly what subordinate legislation means and who will be affected by it. The instruments are drafted up with detailed intent, but consultation

and scrutiny are not helped by the terminology that is used.

We have covered most of the key issues that Mark Brough suggested we should address. Do members have any other points to raise?

Nora Radcliffe: The background papers mention all the statutory instruments that do not have to come before a committee of the Parliament—guidelines, guidance and all that sort of stuff. Some of that material is quite important, and knowing what is going out might help us to decide whether we want to look at it.

The Convener: Mark Brough's paper mentions things such as the order relating to the regulation of scallop fishing, about which the committee had a big and notorious debate a while ago. My understanding, from reading the paper, is that that issue will not come back to us because the regulation is now being implemented by another form of statutory instrument. Have I understood that correctly?

Mark Brough (Clerk): Yes. There have been a couple of such examples. When the Prohibition of Fishing for Scallops (Scotland) Order 2003 was lodged, in the early days of the committee—in the autumn of 2003—there was a motion to annul the instrument because it was creating some concern in the fishing industry. The order was part of a package of measures and, because of the way in which the parent acts worked, some other measures in that package were contained in instruments that were not subject to parliamentary procedure. They were to come forward at a later date and the committee would not scrutinise them or see what was involved.

A similar issue arose in the latter days of the Rural Development Committee, in session 1. Two instruments concerning the movement of animals on and off farms were lodged. The instrument that was of greatest interest to the committee concerned the 20-day rule for moving animals, but it was not subject to parliamentary procedure. That created confusion among the public about what the committee was scrutinising.

The Convener: We have tried hard to scrutinise what comes before us in a meaningful way, because we know that the legislation will have an impact on rural communities. We know that environmental non-governmental bodies will have strong views on the statutory instruments, and we want to air those debates rather than let the instruments slide through the Parliament. However, it is sometimes quite difficult for us to do that.

10:15

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): I was involved slightly in the scallop fishing

debate, wearing a fisheries hat. The focus seemed to move towards health and David Davidson, who was the Conservative health spokesman, started to speak on the issue from a health viewpoint. I now know what has happened concerning the instrument, and many of the things that the committee said at that time about end-product testing and that sort of thing appear, at long last, to have been accepted. However, at the time, it was difficult for me to know which committee was the lead committee on the issue—the Environment and Rural Development Committee or the Health Committee. I found that confusing.

The Convener: We are talking about a different scallops issue.

Mr Brocklebank: Sorry. I am talking about the closing down of the—

The Convener: We were talking about whether there were any scallops to save. The issue was the management of scallop fisheries, on which we had a robust debate in the early days of the committee. In effect, we discussed only one of a raft of measures because only one measure came before us. We were scrutinising a little bit of the bigger picture, and the rest of the bigger picture was not put to us. We had a strange debate—as Mark Brough said, the same situation has arisen in relation to one or two other issues—in which we were unable to flush out all the issues because they would come out six months later. If it is hard for us to understand the issues, it must be even harder for people who are not actively scrutinising the subordinate legislation that is coming through.

Mr Brocklebank: Sorry. I was referring to the instruments on amnesic shellfish poisoning.

The Convener: Mark Brough has volunteered to add a bit more light to the discussion.

Mark Brough: The allocation of statutory instruments to committees is a matter for the Subordinate Legislation Committee. The instruments on amnesic shellfish poisoning went to the Health Committee because they were laid under the Food Safety Act 1990. Instruments that concern food safety, such as those that deal with the moving of animals on and off farms, are sometimes in a grey area, but any statutory instruments that have been laid under the Food Safety Act 1990 have gone to the Health Committee. The Environment and Rural Development Committee has considered the fishing industry side of things—stock management, and so on.

The Convener: We have not discussed the issue of affirmative and negative instruments. We tend to have quite good discussions on affirmative instruments and we invite the minister to the committee. When we have had the time, we have taken evidence in advance or have invited

submissions from outside bodies, especially if we have not seen the Executive's consultation documents and had a sense of what people have said.

There is more parliamentary debate on affirmative instruments, but we do not choose which procedure instruments are laid under. Is there scope for prioritising the important instruments and just noting the other instruments as they go through the system? A couple of instruments have come to the committee under the affirmative procedure on which there has been very little disagreement. At other times, instruments have come to the committee under the negative procedure and we have had virtually no time to deal with them although they have dealt with quite controversial issues for those who are involved in the debate.

Maureen Macmillan: If we want to debate negative instruments, we have to lodge a motion to annul, which is the nuclear option. There should be a better way.

The Convener: It is a good way in which to raise the debate, but it does not necessarily deal with how we might want the instrument to be changed.

Maureen Macmillan: Yes. There is no way to amend a negative instrument: it is all or nothing.

The Convener: That is one of the issues that the Subordinate Legislation Committee has come up with. It has talked briefly about the possibility of the Executive amending its own instruments when everybody agrees that the problem is merely a technical issue. It has also discussed whether, when the problem is a policy issue, the Parliament should be able to amend the statutory instrument. In effect, the Parliament has delegated the matter to the Executive to get it right, and by taking back that power we would be taking on a huge responsibility.

Prioritising statutory instruments more effectively and having a longer debate run-in might help the process a lot. Perhaps that is where we should start, rather than by thinking about amendments. I cannot imagine how we would amend some statutory instruments.

Maureen Macmillan: We would get bogged down in the detail unnecessarily.

The Convener: I do not think that we would want to go down that route. The Subordinate Legislation Committee is trying to identify ways in which the final product could be better, in terms of policy as well as in terms of content.

Nora Radcliffe: The Subordinate Legislation Committee's consultation paper invites us to comment on whether

"all instruments of a legislative character, for example, guidelines and codes of conduct, should require to be SSI's."

I do not think that we need go that far; we just need to develop a mechanism that allows people to know what is being sent out, so that if they want to look at an instrument, they can ask to see it.

I think that the European Committee used to distribute lists of European documents to subject committees. The subject committees did not have to consider them all, but they were invited to look at the list and, if there was anything that looked as though it might generate an issue, they had the opportunity to do something about it. I would like there to be a mechanism that gave subject committees the option of examining instruments that seem to be of interest and which they might not even have known about.

Mr Ruskell: I very much support that view. Thinking about our discussions on the Environmental Assessment (Scotland) Bill, many elements of strategic environmental assessment practice will come under guidance, which we need to monitor carefully. I therefore support any opportunity to select appropriate guidance for us to debate. That will not be appropriate in all situations, but in some key areas we will want to look at issues in more detail, having already investigated them through our primary legislative scrutiny.

The Convener: The access code would be a good example. We had extensive discussion on the code, not only in our committee but in the Justice 2 Committee. That was a major follow-up to the passing of the Land Reform (Scotland) Act 2003. It is a matter of timetabling. I would not want us to turn everything into a statutory instrument, which might be too legalistic. The important thing is that we pick up the main issues concerning the implementation of a bill and get them aired.

Nora Radcliffe: It is fine to leave the negative procedure as it is, but practical difficulties can be caused. Instruments come into force after 21 days, yet we have 40 days in which to annul them. In practical terms, that means either taking the nuclear option, which creates an awful lot of difficulty for an awful lot of people, or not doing anything. There needs to be some tidying up. There should be a practical way of dealing with such instruments without causing an inappropriate amount of difficulty for people.

The Convener: We have managed to have a run round most of the issues that have arisen at the committee over the past few years. That gives us a good enough steer for the Subordinate Legislation Committee. That committee has invited me, as convener of this committee, to go along and discuss our experiences. I wanted to do that with the support of the committee and having

ensured that I had picked up members' comments. I do not think that it is our job to solve all the issues around subordinate legislation, but we should raise our committee's experiences.

I thank colleagues for that useful discussion. Next week's meeting will be our first evidence-taking session on the Environmental Levy on Plastic Bags (Scotland) Bill.

Meeting closed at 10:22.

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