OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 21 January 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 21 January 2020

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DELEGATED POWERS AND LAW REFORM COMMITTEE

3rd Meeting 2020, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
Jeremy Balfour (Lothian) (Con)
*Mary Fee (West Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)
George Burgess (Scottish Government)
Fergus Ewing (Cabinet Secretary for the Rural Economy)
John Kerr (Scottish Government)
David Maclennan (Scottish Government)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 21 January 2020

[The Convener opened the meeting at 11:30]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome everyone to the third meeting in 2020 of the Delegated Powers and Law Reform Committee. The first item of business is to propose that we take item 5 in private. Do members agree to do so?

Members *indicated agreement.*

Agriculture (Retained EU Law and Data) (Scotland) Bill: Stage 1

11:31

The Convener: For agenda item 2, we have before us Fergus Ewing MSP, Cabinet Secretary for the Rural Economy, to give evidence on the Agriculture (Retained EU Law and Data) (Scotland) Bill. Mr Ewing is accompanied by four Scottish Government officials: John Kerr, head of the agricultural policy division; George Burgess, deputy director of food and drink; David Maclennan, from the Scottish Government legal directorate; and John Brownlee, a member of the bill team. Welcome to the meeting. I understand that the cabinet secretary wishes to make a few opening remarks.

The Cabinet Secretary for the Rural Economy (Fergus Ewing): Thank you, convener. I thank the committee for giving me the opportunity to provide evidence on the Agriculture (Retained EU Law and Data) (Scotland) Bill. Last week, I gave extensive evidence to the Rural Economy and Connectivity Committee regarding the principles behind the bill and how the Scottish Government intends to use the powers that it contains.

Part 1 of the bill is set in the context of the United Kingdom's decision to leave the European Union. That is a decision that the people of Scotland have consistently opposed, but our duty as a responsible Government is to prepare to take the necessary powers to continue to support farmers, crofters and land managers. In brief, that part of the bill will provide stability and certainty for Scottish farmers during a transitional period of around five years after Brexit.

The Scottish Government intends to use the powers in that part of the bill, first, to provide stability to farmers and crofters by ensuring that the common agricultural policy can continue after 2020; secondly, to make simplifications and improvements to the CAP for the benefit of Scotland's farmers and crofters; and thirdly, to allow marketing standards and carcase classification rules to be adapted as may be necessary following EU exit.

The powers in part 2 will provide an updated legal mechanism for the collection and processing of agricultural data. Such data is a key tool for understanding and responding to the needs of Scotland's farmers and crofters. The powers will also ensure that there is a clear link to the principles of the general data protection regulations and the Data Protection Act 2018.

I understand that the committee wrote to my officials on 10 December with questions that relate to the delegated powers in the bill and that it seeks further clarification regarding some of the answers that officials provided in their reply of 19 December. I and, I suspect largely my officials, will provide the committee with such clarification as the convener and members require.

The Convener: Thank you very much. This session will be slightly different to the one that you had last week at the Rural Economy and Connectivity Committee. This committee is not driven by policy.

Fergus Ewing: Of course.

The Convener: The issues are far more technical. Feel free to chat to officials if that is needed. I will kick off and ask about the powers in sections 2(1) and 6(1). Section 2 is on the

"Power to simplify or improve CAP legislation"

and section 6 is on the

"Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations".

The Scottish Government has said that it does not intend to use the powers in those sections after 2024, but the bill has no time limit on the exercise of those powers. The Government states that putting a time limit in the bill would not allow the flexibility required. Is there a length of time that would be acceptable?

Fergus Ewing: Thank you for the question. I will make some remarks and then, if my officials feel that I have failed to address the question entirely, I will ask them to chip in.

It is important to know that the wording of sections 2 and 6 constrains ministerial powers quite deliberately. Sections 2(2) and 6(2) both state:

"The Scottish Ministers may only make modifications under subsection (1) that they consider would simplify or improve the operation of the provisions of the legislation."

There is a potential difference, convener, in the meaning of the provision. Had the provision said that ministers may "simplify or improve the legislation", that would have been a fairly broad power.

I contend that the wording, which is quite deliberate, constrains the power so that it applies only to those circumstances where that simplification or improvement will improve the operation of the provisions of the legislation. It is important to reflect, as I invite the committee to do, that the power is essentially an adjective provision, rather than a substantive power; it allows us to address and improve the process.

The common agricultural policy is fiendishly complicated and the administration of it is even more so. We know that farmers and crofters suffered delays to payments two years ago. I hope that that problem has now been substantially fixed. Were we to have to get powers under primary legislation to deal with matters to do with the operation of the processes, we would run the serious risk of not being able to pay out to farmers and crofters. That is why it is essential that we continue to have the powers provided in the bill.

Your specific question, convener, was about a time limit. I do not believe that a time limit is appropriate—indeed quite the opposite. It is essential that we do not put ourselves in the position that ministers have to seek to make primary legislation. We know how congested the schedule for primary legislation is and, in my view, that would not be the appropriate or necessary course of action.

Any suggestion that the power should be time limited came from the fact that our document, "Stability and Simplicity: proposals for a rural funding transition period", which was published in June 2017, envisaged that Brexit would be at a much more advanced stage by this time. It is not, of course, and the uncertainties regarding trade and tariffs in particular, remain. Were tariffs to be imposed, we might well have to make very rapid changes to the nature of subsidies to compensate for additional taxes, which could decimate, for example, the sheep sector. Equally, were trade measures not to prevent a flood of cheap imports of beef, we might have to act very quickly to support coupling payments by increasing them. Were we to have to go back to Parliament to make primary legislation in order to get powers to do that, our hands would be totally tied.

If we have given you the impression that it would be appropriate for the powers to reach an end at some point, it is perhaps a fault on our part, which I accept. I do not think that it would be sensible or prudent to introduce a time limit on the powers at all.

Finally, we are always subject to parliamentary scrutiny. Last week, I was before the Rural Economy and Connectivity Committee for two and a half hours. That is quite a session of being accountable, although I am not complaining about that. Two and a half hours in front of a committee is accountability, is it not? It is right that Parliament is always able to hold me to account—and has done so for hundreds of hours—in both committee and plenary.

I wanted to make it absolutely clear that, from a policy point of view, any move to constrain powers may have unintended consequences and, from the point of view of farmers and crofters, potentially very deleterious consequences indeed.

I do not know whether officials want to add anything of a technical nature. Twenty years ago, I was a member of the precursor to this committee, the Subordinate Legislation Committee, and I know that the committee is concerned with process and not substance. I do not know whether my officials think that I have answered all the points.

John Kerr (Scottish Government): A point of clarity is that "Stability and Simplicity" was published in 2018.

The Convener: Your view is that there should be absolutely no time constraint on the powers—that you should have them forever.

Fergus Ewing: Ministers need to be able to act swiftly. As a general proposition, the idea that ministers will not need to act at the occurrence of a certain date seems to me to be for the birds. Ministers require to be able to act to do our job, and to do so in recognition of our mandate. As I say, we are happy to be subject to the scrutiny of Parliament at all times, but if ministers are hamstrung by having to go back to Parliament unnecessarily, we are, in my respectful view, not doing ourselves any favours at all. That has been my experience as a minister for 13 years. That is not to disrespect Parliament or to diminish or delete the ability of Parliament to hold us to account. Plainly, that happens all the time, and it is absolutely welcome. It is right that that is part of the democratic process. However, the proposition that ministers need to stop doing something at some future date seems to me to be a very weak and thin premise.

Mary Fee (West Scotland) (Lab): The Government has stated that it does not intend to use the powers in sections 2(1) and 6(1) after 2024. Is that still your intention?

Fergus Ewing: I have no current intention to do so, but I cannot eliminate the possibility that such an eventuality will arise.

Mary Fee: I am slightly puzzled, cabinet secretary. If you say that you do not intend to use the powers after 2024, why is there no provision for a sunset clause?

Fergus Ewing: I do not believe that there should be provision for a sunset clause. Such a clause may be damaging, because we do not know what the future timetable for the full implementation of Brexit will be. There are suggestions from some quarters that it may take rather longer than until 2024 to fully implement post-Brexit changes. A specific example is the National Audit Office critique of the UK Government's environmental land management proposals that was published in, I think, the summer last year. That set out very clearly that some matters may take 10 years fully to adjust. There are vital matters relating to climate change that we need to get on with now.

The point is that to fully embed a brand new system takes an unspecified length of time. I appreciate your point. I do not intend to use the powers, but the possibility may arise where I or my successor may require to use those powers. My point is that if we were unable to use those powers because we had to go back to primary legislation to get them, that would be a problem.

There is another factor here. Let us say that a future Administration took a different view about climate change from this Administration. Let us say that it was either opposed to dealing with climate change or was dragging its feet. It could use the fact that we did not have the powers to act quickly to drag its feet and then postpone the implementation of primary legislation to tackle what we would regard in this Administration as a lacuna. "Beware of what one wishes for" is sometimes a useful maxim.

The Convener: Section 2(2) says:

"Ministers may only make modifications ... that they consider would simplify or improve the operation of the provisions of the legislation."

In response to a question from this committee, you said that you would use the power to make only modest changes that are "predominantly minor in nature".

However, that contrasts with the statement on page 1 of the policy memorandum that

"This Bill is intended to provide the Scottish Ministers with regulation-making powers to amend or replace the ... CAP ... elements of retained EU law in Scotland",

which sounds much wider. Will you clear up what your intention is?

11:45

Fergus Ewing: As set out in sections 2 and 6, our intention is to have the power to make modifications that we

"consider would simplify or improve the operation of the provisions of the legislation."

I suppose that there is a value judgment as to whether one characterises such changes as modest or immodest, or wide or narrow. I am focusing on what is in the bill, which I know is the committee's remit, and the bill is, I think, pretty clear. We are absolutely ready to hear any recommendations that this committee and the Rural Economy and Connectivity Committee may have, but it seems to me that the wording is particularly felicitous in that it defines to a reasonably clear extent the nature of the powers and why they are sought.

To put it in context, in the evidence that I gave last week to the Rural Economy and Connectivity Committee—which was at some length, on this particular point as well as on everything else—I referred to the report of the simplification task force. If the committee is interested in the sort of measures that we might implement in order to simplify the process, they are set out in those documents. That might give members a clearer idea of some of the measures that are proposed.

For example, in no particular order of importance, the recommendations are for improved mapping; mapping stability during the single application form window; proportionate approaches to penalties; an inspections charter; the standardisation of capital grant rates; improving appeals processing performance; and improving communications to customers about scheme applications so that there is less risk that they are non-compliant. I am sorry for going through those so swiftly. I do not mean any disrespect, but each of them covers a large area of technicalities. In the past three years, I have spent more or less every Wednesday, barring holidays, speaking to officials about those technicalities.

We need to be able to act quickly. If we cannot, we risk a situation in which farmers and crofters do not get the money to which they are entitled and that Parliament wishes them to get. I hope that I am explaining for the benefit of the committee how I see this operating. I see us taking forward the work of the simplification task force as we go through the period ahead in order to simplify the operation of the process of the CAP schemes.

The Convener: Simplifying processes is always a good thing, but I am still not clear whether you intend to use the power just to make minor—

Fergus Ewing: I have no intention—

The Convener: Hang on—you have not heard the question.

Fergus Ewing: I apologise.

The Convener: I am still not clear whether you intend to use the power just to make minor changes rather than major ones, although I accept that there is a value judgment to be made on that. What you are saying is not clear.

Fergus Ewing: I think that I answered that by reference to what is in the bill, but I do not know whether my officials want to add anything.

John Kerr: The key point is that, as Mr Ewing said, we have the powers to simplify and improve the legislation in so far as that would

"improve the operation of the provisions of the legislation."

Our intention is to be able to use the powers in the bill to bring in the sort of improvements that Mr Ewing talked about. Although the numbers of different applicants and the various subsidies are reasonably broad in scope, the types of changes that we envisage making are within the context of something that everybody will still recognise as a support payment to farmers and crofters and to the one or two other land managers in Scotland that receive support that we give, such as forestry planting grants. We need to be able to make the necessary changes in order to continue to have current schemes that operate well. Increasing the number of trees that are planted is an example of something that we might do that is within the current framework of the existing support structure.

The Convener: We will move on to another area of questioning.

Mary Fee: My question follows on from the convener's questions. My main concerns are about the lack of a sunset clause and the breadth of the proposed powers for ministers.

I accept the explanation that you have given, cabinet secretary, which is based on how you intend to use the powers in the bill. However, there is no time limit on those powers, which are fairly broad in scope. I come back to the convener's point that whether a change is major or minor is a value judgment. Is there a potential risk that a future Government could use the powers in the bill to make substantial changes? Is there any way in which you could prevent that from happening?

Fergus Ewing: I appreciate the concern that Parliament and stakeholders have expressed regarding the perceived breadth of the powers in question, which I do not take lightly. I understand that it is one of the committee's functions to give serious consideration to such concerns, and we will consider the comments that the committee makes as the bill progresses to stage 2.

The drafting of a bill is a long process. Several teams of policy and legal officials spent a long time carefully considering and deliberating on how the bill might be formed to best achieve its purpose. A lot of thought has been given to delivering the policy intention that is set out in "Stability and Simplicity", which I referred to earlier, through secondary legislation, and to maintaining sufficient flexibility to address the unforeseen challenges that are inherent in the ever-changing Brexit process. I imagine that nobody here is sure what will happen with regard to trade and tariffs when Brexit takes place. Ergo, we really need flexibility—and any successor of mine would have to have such flexibility.

I again make the point that we will consider very carefully any measures that any committee suggests that we should consider at stage 2; we do that as part of the process on any bill.

However, there is a fundamental principle involved here, which is that we need to be able to act swiftly to correct things, particularly in relation to the administration of payment and support schemes, and a requirement to use primary legislation would prevent us from doing that.

As I understand it, we are accountable to Parliament to a greater extent than appears to be the case at Westminster in relation to the scrutiny of subordinate legislation there.

Mary Fee: There is almost a contradiction here, because the Government has said that the relevant provisions would be used only to make modest changes that are "predominantly minor in nature", yet the powers are quite broad. Could the bill be future proofed in some way in the event that any changes that the Government wanted to make were more than minor or modest changes? Could some checks and balances—a form of consultation, perhaps—be put in place to make sure that a major change could not be put through under the bill?

Fergus Ewing: Above all, it is important that we should not bind the hands of a future Government in that way. As I have stressed, through reference to the phrase,

"the operation of the provisions of the legislation",

the power has been drawn in such a way as to ensure that it does not give ministers carte blanche. Therefore, it is not an unconstrained power anyway, but the provision is not so restrictive that it would prevent a future Government from using the power effectively.

Stuart McMillan (Greenock and Inverclyde) (SNP): My question, too, is on section 2(1); it is on the appropriate procedure for the use of the power for which section 2(1) provides.

You mentioned in your evidence to the Rural Economy and Connectivity Committee last week that an example of how the power could be used would be to liberalise the penalties regime to make the system more proportionate. Do you consider that that might be a matter that would be more appropriately scrutinised by Parliament under the affirmative procedure?

Fergus Ewing: As that is largely a legal question, I ask Mr Maclennan to answer it.

David Maclennan (Scottish Government): From a legal perspective, I start by saying that a lot of the exercise of the power is likely to be highly technical in nature. It is a power that would allow ministers to modify the CAP legislation as defined in the bill. A lot of the simplification improvements are likely to simplify and improve how the legislation works as legislation as opposed to doing anything that will have a massive effect on the ground. Anyone who has read any of the CAP legislation will be aware that it is complicated and difficult to read. Exercising the proposed powers to simplify how it works as legislation would result in an improvement, and the fact that there would not necessarily be an on-the-ground effect means that the higher level of procedure would not be merited.

John Kerr: That is exactly the advice that was taken from legal colleagues when we were thinking about the level of scrutiny that would be appropriate for the things that we seek to do. As David Maclennan has set out, there are quite a lot of technical things that we could improve with regard to the way in which the schemes are run from a housekeeping perspective, and it would not necessarily be of significant value to stakeholders to engage with that. We might not want to tie up time with the additional requirements that would be afforded to the use of the affirmative procedure if there is no merit in doing so.

Stuart McMillan: Could the additional requirements that the affirmative requirement involves have a negative effect on the delivery of policy?

John Kerr: Yes, because they would potentially add significant time to the process, which could constrain how the process works.

Stuart McMillan: You mentioned that the issue involves the procedural elements and that the proposed powers would not effect major policy changes. Is that correct?

John Kerr: We do not intend to bring about significant policy changes in the bill. That would be a matter for future legislation.

Fergus Ewing: I do not that think that the bill permits major policy changes, which you can see if you go back to the provisions that I quoted earlier. The phrase "simplify or improve" refers to the operation of the process. The power is constrained by the meaning of those words.

Stuart McMillan: In relation to sections 2(1) and 3(1), the committee asked the Scottish Government whether it would be appropriate to insert a requirement on the Scottish Government to report periodically to Parliament. The response to the committee's questions indicated that the Scottish Government would reflect on how best to keep the Parliament informed on the use of the powers. Have you reflected any further on how best to keep the Parliament informed?

Fergus Ewing: I have been doing a few other things since then so I have to admit that, to be quite candid, I have not spent any time reflecting on that particular question. However, with respect, as I understand it, the role of parliamentary committees is to consider whether there should be any reporting. I fully expect that amendments—

even probing amendments—are likely to be lodged to deal with such matters at stage 2. I think that that would provide a fuller opportunity to explore the issues.

I hope that I am correct in saying that I have sought to keep, and have in practice kept, the Rural Economy and Connectivity Committee informed about matters of importance affecting the rural economy. For example, we periodically report to that committee on how the CAP payment system is working, because of the great controversy that was engendered three years ago, prior to our largely having fixed the problems. You can check with the clerks to that committee, but I think that it is a matter of record that, in practice, we try to be proactive in informing and reporting to Parliament.

12:00

I have one final point. If acts of Parliament contain numerous ad hoc and, some might say, random measures about reporting to Parliament, future ministers might say that, in the absence of a statutory duty, they should not report to committees. The absence of a duty on a Government to report to Parliament on a particular matter could be abused by that Government. That would be an unfortunate hotchpotch.

My duty is to tell Parliament about matters of importance. I have to report every month, I think, on performance in relation to pillar 1 and pillar 2 payments to farmers. If that causes me difficulties, that is too bad for me—I have to face the music. Fortunately, from my point of view, the music has been particularly harmonious over the past year or so. We should not try to hamstring ministers, because doing so may have the opposite effect to that which Parliament intends.

Let me emphasise the point: I take the view that we should take a proactive approach to reporting information to committees, and that will apply to any exercise of these powers. Therefore, I am very open to listening carefully to specific arguments that might be advanced at stage 2, should any member wish to pursue such a proposal.

The Convener: You are open to that.

Fergus Ewing: I do not think that, in this case, it is necessary, and there are risks involved. On the first occasion that I exercise the powers in the bill, I intend not just to report to Parliament but almost certainly to advise the Rural Economy and Connectivity Committee in advance that we are thinking of doing that. On the early occasions of the exercise of any new power, that would be a sensible approach to take, and that is what I would do as a minister. I appreciate that that is perhaps not relevant to the role of this committee, which is to set out the legal framework and to scrutinise ministerial use of powers.

For the reasons that I have tried to set out, I am not sure that a specific statutory duty would be sensible. It would beg the question in what circumstances are there no statutory duties on ministers, and could that be taken advantage of in ways that might not be in the mind of any member of the committee?

The Convener: The other argument is that whoever takes over from you might not be as open or transparent as you are. They might take an entirely different approach and might not be as accommodating of committees. Getting something in legislation could help.

Fergus Ewing: The REC Committee routinely asks us to provide information that it wants. There has to be a reasonable facility for free engagement in practice. That is how it works.

Of course, Parliament will have the opportunity to scrutinise any use of the powers in sections 2 and 3 when secondary legislation is laid before it. There would not be a vacuum; there would rightly be the opportunity for Parliament to scrutinise any secondary legislation, whether it is laid under the negative procedure or the affirmative procedure.

I know that committees do not want to overburden themselves with the affirmative procedure, because you have to prioritise your workloads, and, as I understand it, every committee is already fairly busy. An element of proportionality and judgment must be applied, but we will listen carefully to any views that are put forward at stage 2.

Tom Arthur (Renfrewshire South) (SNP): My question relates to section 8, and specifically the penalties for breaching marketing standards. The maximum penalties, which are set out in section 20(4), are imprisonment for up to five years on conviction on indictment and up to 12 months on summary conviction. My understanding is that the policy intent would be for a much more lenient approach, commensurate with existing provisions for breach of marketing standards, for which I understand the maximum penalty is a level 5 fine of £5,000. Is there a need to reduce the maximum penalties in the bill so that, for breaches of marketing standards, they would not include the possibility of imprisonment for five years?

George Burgess (Scottish Government): In our letter, we gave a number of examples of the penalties that are imposed under the existing marketing standards regulations. As you say, the maximum penalty that is allowed in practice by the regulations is a level 5 fine on summary conviction. It would be entirely possible, as you suggest, to amend section 20, which provides a general power to create penalties for offences, so

as to constrain it in relation to marketing standards. As we said in the letter, we will consider that. However, the existing marketing standards regulations, which have set the maximum penalty for offences at a level 5 fine, were made under the European Communities Act 1972, which itself allows for maxima of up to two years' imprisonment, an unlimited fine on conviction on indictment and a level 5 fine on summary conviction. Within the freedom that is provided by the 1972 act, the practice has been to set a much lower level of penalty for breaches of marketing standards, of the sort that we outlined in our letter.

Although powers in primary legislation might allow a higher maximum to be set in regulations, in practice that has not been done. The short answer to your question is that, although it could be done, there is no need to refine the bill in the way that you are suggesting.

Tom Arthur: Okay.

Section 8(5) states that, before making regulations to make offences and set penalties, the Scottish ministers need to consult representative persons. Can you set out the nature of that consultation and engagement?

George Burgess: Section 8(5) is a statutory requirement for the Scottish ministers to consult

"such persons as they consider are representative of the interests of persons likely to be affected",

which could mean producers, processors, other parts of the industry and, potentially, consumer groups.

It may be helpful to understand the context. In many areas, the marketing standards are not simply a creation of ministers, nor indeed of the European Commission; rather, they reflect internationally agreed marketing standards. For example, the UN Economic Commission on Europe, UNECE, is very active, particularly in the field of fruit and vegetables. A lot of the hard work is done at an international level. There is relatively little flexibility when it comes to what is done at the moment by the Commission and in future by ministers. The extent of the flexibility to maintain alignment with international standards is rather narrower than the powers in the bill might at first sight suggest. If there were to be changes, perhaps to reflect changes at international level, there would be consultation with those who are affected. Part of that consultation could well cover enforcement powers, including any offences and penalties.

It is probably worth adding that we have checked back and can find no record, in the past five years at least, of any prosecution having been taken under any of the marketing standards provisions. Although it is absolutely right that the committee considers the offence provisions, it is perhaps a slightly academic issue.

Tom Arthur: Thank you.

The Convener: If there have been no prosecutions, why do we still need to retain this rather high maximum penalty?

George Burgess: As with many offences in a regulatory environment, the principal purpose is as a deterrent. We are not out to catch lots of people for committing an offence and hit them with a very high fine. Rather, the deterrent effect of having the offence in place makes it quite clear that a particular action or, in some cases, inaction, is not appropriate. As we can see from practice, that is effective in preventing people from failing to follow the marketing standards.

The Convener: It is a deterrent, rather than something that you think would be used.

George Burgess: Yes.

The Convener: The fact that it is there prevents people from committing offences.

George Burgess: That is certainly the evidence from the past five years, at least, for which we have checked the records.

Bill Bowman (North East Scotland) (Con): You have acknowledged that section 8(1) could allow radical changes to be made to marketing standards and enables the creation of offences. Could you expand on why the affirmative procedure is not considered to be more appropriate?

George Burgess: I think that it—

Fergus Ewing: On you go, George.

George Burgess: Apologies, cabinet secretary. I was being presumptuous.

In my previous answer, I was outlining that, although the powers may appear broad, if we are looking to maintain consistency within the UK and internationally, the room for manoeuvre is much more limited than it might at first seem. In practice, many of the standards are developed at an international level. Although, in theory, the power could be used to make radical changes, common sense dictates that, in practice, the changes will be rather more limited.

In section 8, which you might wish to compare with the provisions in the UK Agriculture Bill, we have included a requirement to consult those who are likely to be affected by any changes to the marketing standards. That requirement is not present in the UK bill. That ensures that the people who are really interested in the subject and who need to be involved have the chance to be

involved and to have their say before any changes to standards are made.

Bill Bowman: To use your earlier line of argument, you do not think that the affirmative procedure would be a deterrent to ministers abusing the process.

George Burgess: Ministers are always in line with the law, so they need no deterrent to prevent them from taking wrong action. As I say, common sense means that we will be looking for alignment with other parts of the UK and with the international community. Although there is a broad power, the room for manoeuvre is much more limited.

The Convener: If you are going to use legislation to create an offence, surely that should be subject to a greater level of parliamentary scrutiny than the negative procedure.

George Burgess: Potentially.

The Convener: That is a yes.

George Burgess: However, if we consider the examples that are cited in the letter, that potentially leads towards a no. The examples cited in our letter were all made under the European Communities Act 1972, they all created offences with a level 5 fine and they were all made under the negative procedure. Existing practice has been to use the negative procedure in relation to marketing standards regulations.

The Convener: That does not mean that existing practice is right—and that is what we are here to scrutinise, of course.

George Burgess: The 1972 act provides a choice of procedure, and an affirmative procedure can be followed. I am not aware of any example among any of the marketing standards that have been made since devolution where there has been any suggestion from parliamentary committees that the affirmative procedure should have been followed, rather than the negative.

The Convener: There are no further questions from the committee. That was a slightly easier—or at least shorter—session than our session last week. I thank the cabinet secretary and his officials for attending.

12:13

Meeting suspended.

12:14

On resuming—

Instrument subject to Affirmative Procedure

Fuel Poverty (Enhanced Heating) (Scotland) Regulations 2020 [Draft]

The Convener: Item 3 is consideration of an affirmative instrument. The regulations set out three enhanced heating regimes and specify the types of household to which an enhanced heating regime will be applied for the purposes of measuring fuel poverty.

In regulation 2, the defined term “benefits” ought to have been

“benefits received for a care need or disability”,

to mirror the definition in the Fuel Poverty (Targets, Definition and Strategy) (Scotland) Act 2019. Does the committee therefore wish to draw the draft regulations to the Parliament’s attention under the general reporting ground?

Members *indicated agreement.*

The Convener: Does the committee wish to welcome the Scottish Government’s commitment to amend the draft regulations by correction slip?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Local Government Pension Scheme (Increased Pension Entitlement) (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/438)

12:15

The Convener: Item 4 is consideration of negative instruments. Scottish statutory instrument 2019/438 ensures continuity of an affected member's pension at its current rate where incorrect guaranteed minimum pension data has been applied to the annual indexation of that pension.

Regulation 1(2) provides that the regulations have effect from 8 April 2019, subject to the exceptions in paragraph (3). However, exceptions are also specified in paragraph (4). Therefore, regulation 1(2) should refer to the exceptions in both paragraphs (3) and (4), and not just those in paragraph (3). Does the committee therefore agree to draw the draft regulations to the Parliament's attention on the general reporting ground?

Members *indicated agreement.*

The Convener: Does the committee wish to welcome the Scottish Government's commitment to correct that error by amending instrument?

Members *indicated agreement.*

The Convener: No points have been raised on the following three instruments.

Royal Conservatoire of Scotland Amendment Order of Council 2020 (SSI 2020/3)

Foods for Specific Groups (Infant Formula and Follow-on Formula) (Scotland) Regulations 2020 (SSI 2020/6)

Foods for Specific Groups (Medical Foods for Infants) and Addition of Vitamins, Minerals and Other Substances (Scotland) Amendment Regulations 2020 (SSI 2020/7)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

12:17

Meeting continued in private until 12:18.

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