SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 September 1999
(*Morning*)

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CONTENTS

Tuesday 21 September 1999

SUBORDINATE LEGISLATION COMMITTEE
5th Meeting

CONVENER:

*Mr Kenny MacAskill (Lothians) (SNP)

COMMITTEE MEMBERS:

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)
*Trish Godman (West Renfrewshire) (Lab)
Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)
*Bristow Muldoon (Livingston) (Lab)
*David Mundell (South of Scotland) (Con)
*Ian Welsh (Ayr) (Lab)

*attended

COMMITTEE CLERK:

Alasdair Rankin

ASSISTANT CLERKS:

Claire Menzies

Anne Peat

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 September 1999

(*Morning*)

[THE CONVENER *opened the meeting at 11:17*]

The Convener (Mr Kenny MacAskill (Lothians) (SNP): Good morning. We have apologies from Ian Jenkins. We will press on with agenda item 1.

Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 (SSI 1999/43)

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I raised a number of points about the regulations at our previous meeting and we have now had the benefit of the response from the Executive, the supplementary response and some excellent, lucid and comprehensive legal advice.

That advice begins with the statement that the Executive has given a full response but that the replies do not appear to be wholly satisfactory. I share that view. In particular, the Executive has not explained why it has taken two years and six months to implement the European directive relating to the Environmental Impact Assessment (Forestry) (Scotland) Regulations or why the implementation was six months late. There is no acceptable explanation as to why the Executive went on to break the 21-day rule. If they took two years and six months, one would have thought that an additional 21 days would not have been the end of the world.

There seems to be no logical justification for the proposition that the regulations, which are a mirror of those that will apply in England, need to be introduced on the same date. I thought we were supposed to have devolution—or perhaps I imagined it. The fact that the directive was implemented after a delay of two years and six months, without giving Parliament the opportunity to scrutinise the detail of the regulations, is quite appalling. It is a precedent that we must not allow to stand. I fully endorse the suggestion that the committee should draw the regulations to the attention of the Parliament.

The reasons for doing so are made all the more cogent by the fact that the consultation exercise that has been undertaken is at best incomplete. The supplementary memorandum, which we received only this morning, states that there were two general consultation exercises. One concerned the central principles, the other concerned the policy approach. Neither exercise concerned the actual text of the regulations.

I note that the Law Society of Scotland—which I now see is represented at this meeting in the shape of Michael Clancy who is, I am sure, most welcome by all of us—was not consulted about the impact of the regulations, although the Court of Session—not the sheriff court for some reason—is said to have jurisdiction to consider actions about wee plots of trees of more than either one or five hectares. It seems that we will wait in vain for hundreds of years before a crofter or small farmer will litigate in the Court of Session about any of these matters. I would have thought that the Rural Affairs Committee should have had the opportunity to examine substantive issues of that nature in detail.

I could say a lot more about possible issues that concern me greatly, but the consultation exercise has not concerned the text of the regulations. I think that it should have done, and I hope that the committee will share the views that I have expressed about the importance of drawing the regulations to the attention of Parliament.

Trish Godman (West Renfrewshire) (Lab): I agree with most of what Fergus has said, although I do think that we have devolution. We should perhaps argue that in another place.

I am particularly concerned about the delay in implementing a directive from the European Union. We may not agree with all the directives, but as we are in the European Union, the directives have to be implemented. People need to be alerted if that is happening in another place. We will not put up with the process taking two and a half years.

I thought that there was some European Union rule stating that if we did not implement directives by a certain time, we would be in shtook anyway. Implementation could happen in other places, but I agree with what Fergus says about the Executive response not being satisfactory. I think that we should continue the process of challenging what the Executive has said.

David Mundell (South of Scotland) (Con): I agree with that, although I am coming from a very different perspective from Fergus on the devolution issue. I do not accept the argument that Scottish and English regulations have to be implemented on the same day. That sets a dangerous precedent concerning the 21-day rule. There is not a shred of evidence that the introduction of the regulations without using the 21-day period would make any difference to anyone. I do not want us to be rushed through

things in this Parliament because they have been implemented on a particular day in England and Wales. We have to make it clear that we do not accept the logic of that argument.

We regard the periods of time for laying regulations before the Parliament as very important. They should be breached only in the most urgent of circumstances.

The Convener: I think that we have consensus on that point.

I note from the supplementary memorandum that we received this morning that the letter from the Forestry Commission, which admittedly only relates to one aspect of the consultation, went out on 27 August 1998, and that the consultation process was to have ended on 10 October 1998. It appears that something has not been happening for a year and, all of a sudden, something has happened far too quickly without adequate consultation. We can only speculate as to how that came about, but it appears that there is too much haste, and individuals in the forestry industry may suffer the consequences.

Alasdair, are you satisfied with the general thrust of what the committee is trying to convey, in particular the points raised by Trish and Fergus?

Alasdair Rankin (Committee Clerk): I will incorporate them in the committee's report.

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 (SSI 1999/48)

The Convener: We have received extensive legal advice on the Executive's response to this order. Do members have any comments? I see no one does. As a practising member of the Law Society of Scotland, I should declare an interest in this item.

The instrument does not appear to address the issues satisfactorily. The legal advice makes it clear that there are three problems. First, there is a lacuna in respect of trials where no witness is sworn, which constitutes defective drafting. Secondly, there is the question of whether the provision constitutes

"an unusual or unexpected use of powers conferred by the parent statute".

A trial starts when a trial starts. If the sheriff or judge believe that a trial has started, why does the Scottish Legal Aid Board not take the same position? Thirdly, it would have been clearer to include a transitional provision.

The third point is probably not as important; however, the lacuna and the use of the powers should be drawn to the attention of the Parliament.

I also received a telephone call from the Law Society confirming that, while it wants a lot of the content of the statutory instrument to go through—it is not opposed to it in whole—it is worried about those two aspects. I believe that we should flag them up.

David Mundell: I also declare an interest, as a member of the Law Society.

I was concerned that the Executive's response included the suggestion that, because there may be a problem in a small number of cases where trials proceed without witnesses, a meeting should be held once the instrument has been passed. I would have thought that the issue should be sorted out before the instrument is passed. To say that an instrument may cause a number of problems and that a meeting should be held to sort them out after the instrument has been passed is a dangerous precedent to set. That is not the way in which I want the committee to proceed.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) Partial Revocation (Scotland) Order 1999 (SSI 1999/49)

The Convener: According to legal advice, no points arise on this order. Can I take it that we can proceed? That is agreed.

National Health Service (General Dental Services) (Scotland) Amendment (No 2) Regulations 1999 (SSI 1999/51)

Scottish Dental Practice Board Amendment Regulations 1999 (SSI 1999/52)

The Convener: A minor matter has been flagged up on SSI 1999/52 that the committee may want to raise. Do we want to ask why it was thought necessary to include a definition of the term "health board"? We do.

Margaret Macdonald, our legal adviser, has also asked me to make a general point about instruments relating to the national health service. There may be a question of general competence in dealing with the professions, as they are a reserved matter, although the NHS is a devolved matter. The Executive appears satisfied that this matter is within its competence and I do not have any doubts that if we can run the NHS, we can regulate the professions that operate within it. However, anyone who wants to flag up the issue with the Executive should let me know so that we can consider whether to do so. If not, let us

proceed.

The legal advisers have also raised a point about the amendments to the regulations. Does any member wish to comment about the numerous amendments being made to the regulations?

11:30

Trish Godman: We should have a rule of thumb; perhaps five or six amendments would be acceptable, after which there should be consolidation. One piece of regulation has had seven amendments, which makes it impossible to go through the legislation to examine what has been changed.

The Convener: Do we agree to ask the Executive to consider having, as a general principle, a rule of thumb about consolidation? "That should be done in the spirit of last week's questions—more in sorrow than in anger." Consolidation would benefit not only us, but people who need to keep track of the legislation that is coming in apace. Members are agreed to do so.

The committee also wonders why regulation 3(a) was necessary in SSI 1999/52, given section 11 of the Interpretation Act 1978. As I do not think that that issue is as substantive as the general principle, perhaps we should just write to the Executive for clarification.

Bristow Muldoon (Livingston) (Lab): We should bring the matter to the Executive's attention to ensure consistency in interpretation. Sometimes we receive redefinitions; sometimes we do not.

National Health Service (Service Committees and Tribunal) (Scotland) Amendment Regulations 1999 (SSI 1999/53)

The Convener: To some extent, the legal advice on this order is the same as the advice on the preceding instrument and concerns the number of amendments. Should we raise the matter with the Executive? That is agreed.

National Health Service (General Medical Services) (Scotland) Amendment (No 4) Regulations 1999 (SSI 1999/54)

The Convener: Although the point about the need for consolidation has also been raised about this instrument, this appears to be only the fourth amendment to the regulations. The principal regulations have been amended even more times than those already mentioned. This appears to be a legal guddle. Should we deal with this matter in a general letter or do we want to individualise it?

Trish Godman: Because the principal regulations have been subject to many amendments, we might want to flag up this instrument as an example.

The Convener: We could also note our cause for concern.

Ian Welsh (Ayr) (Lab): Who would be responsible for the process of consolidation? We can express concern about the number of amendments all we like, but what is involved in the process of consolidating such a range of amendments?

The Convener: The matter would go back to the lawyers, who, instead of lodging an amendment to the legislation, would start afresh and try to redefine the regulations. Perhaps now, at the start of the new Scottish Parliament, is the time to work out how we wish to regulate our health service within the devolved structures. That cannot be done across the board, because the lawyers would be snowed under. It is a matter for the Executive, which should perhaps start to consider things afresh instead of tinkering with them.

Fergus Ewing: Are we still considering SSI 1999/54?

The Convener: Yes.

Fergus Ewing: These seven or nine statutory instruments about the health service concern changes in nomenclature following the re-organisation of the health service. However, although I have to confess that I have not made a detailed study of the issue, I note that the regulation covers a number of entirely unrelated, substantive and intriguing matters such as contraceptive service, erectile dysfunction, Parkinson's disease and prostate cancer. Obviously, such matters are not being taken into account because of health service reorganisation.

The serious point is that this regulation contains technical amendments consequent upon reorganisation, and also substantive issues. That should buttress the case for consolidation. It might not be important if the regulations were concerned purely with nomenclature and formal matters. It is, however, very easy to miss the more important matters in the regulation.

David Mundell: The next regulation on the agenda is being amended for an eleventh time. That cannot be satisfactory from anyone's point of view. I see that that regulation has the benefit of introducing a definition of Viagra.

The Convener: Ian, did you want to raise a point?

Ian Welsh: No.

The Convener: Fergus's point is a good one. The more amendments and other matters that are included in an instrument, the more things spiral off. Before I was elected to Parliament, the bane of my life as a practising solicitor was the situation where subordinate legislation meant for the care and protection of children was mixed up with legislation for the monitoring of offenders. That was ludicrous. The two should have been separated and different regulations made. That is a separate anecdote, but the point is that—whether it regards Viagra or something else—new matters are being addressed. That is not simply an amendment. If ever there was a case for consolidation, this might be it.

National Health Service (General Ophthalmic Services) (Scotland) Amendment (No 2) Regulations 1999 (SSI 1999/55)

The Convener: David flagged up that these regulations are on their eleventh amendment. From legal advice and from the committee's comments, that appears to be the only matter that we want to raise.

Health Act 1999 (Fund-Holding Practices) (Transfer of Assets, Savings, Rights and Liabilities and Transitional Provisions) (Scotland) Order 1999 (SSI 1999/56)

The Convener: The legal advice on this instrument makes a technical point about definitions and we want to ask the Executive to clarify that. It has also been pointed out that it is difficult to see where in the order the defined phrases could require an alternative meaning. We will also raise that matter with the Executive.

National Health Service (Pharmaceutical Services) (Scotland) Amendment Regulations 1999 (SSI 1999/57)

The Convener: There are no points flagged up by the legal advisers. I take it that we can proceed to the next item.

Smoke Control Areas (Exempted Fireplaces) (Scotland) Order 1999 (SSI 1999/58)

The Convener: As with the previous instrument, there are no points to raise.

Road Traffic (Permitted Parking Area and Special Parking Area) (City of Glasgow) Designation Order 1999 (SSI 1999/59)

The Convener: The legal advice on this instrument raises some points. The problems appear to be the result of defective drafting. I have every sympathy for those who drafted the instrument—doing that is doubtless a nightmare—but we should ask the Executive to reconsider it because there appears to be a gap in the regulations.

Fergus Ewing: People may get off paying their parking fines. [*Laughter.*]

The Convener: Glasgow can experience what we have in Edinburgh.

Road Traffic (Parking Adjudicators) (City of Glasgow) Regulations 1999 (SSI 1999/60)

The Convener: The legal note advises us that if a person is appealing against the imposition of a parking penalty and asks for an extension of time to do so, it is possible that the time limit will be extended but that the appellant will not be advised.

Trish Godman: Not a bad try.

The Convener: There is also the question of the missing footnote referred to in the definition of a proper officer. We will raise those matters with the Executive.

Road Traffic Act 1991 (Amendment of Schedule 3) (Scotland) Order 1999 (SSI 1999/61)

The Convener: There is nothing raised there. Is that acceptable? That is agreed.

Parking Attendants (Wearing of Uniforms) (City of Glasgow Parking Area) Regulations 1999 (SSI 1999/62)

David Mundell: The idea of the Scottish Executive having the power to order people to wear uniforms is alarming. As long as it is restricted to parking attendants I am sure it is okay.

The Convener: I think that we will probably be satisfied with that for the moment.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 1999 (SSI 1999/63)

The Convener: Do any points arise from that? That is agreed.

National Health Service (Optical Charges and Payments) (Scotland) Amendment (No 2) Regulations 1999 (SSI 1999/64)

The Convener: Again, no points arise. That is agreed.

Public Finance and Accountability Bill

The Convener: A substantial amount of information was sent out to the committee by the clerks but regrettably we did not receive the memorandum from the Executive until this morning. My view is that the committee is expected to work under considerable pressure in terms of the volume and amount of information that we have to read. To be expected to speed-read a two-and-a-half-page memorandum on an extremely technical, complicated and major item of legislation is unfair. How do other committee members feel about that?

Bristow Muldoon: We need to consider very carefully any major bill that brings in a range of new powers to introduce subordinate legislation. Since we only received the Executive explanation of those powers today, I agree with Kenny that we should delay our consideration for at least a week. I think that will still fit the agreed time scale.

David Mundell: As this is the first such bill to come before us, we should draw to the Executive's attention that we require any report within a reasonable time scale if we are to play our proper part.

The Convener: I agree. We can draw it to the Executive's attention that we meet every Tuesday, that we like to get our papers out on Fridays, which is why we said last week we needed an intimation on Thursday. Although yesterday was an Edinburgh holiday, the Executive ought to have been aware that the committee was meeting this morning and would require prior sight of the memorandum. We will give that due consideration next week.

Presiding Officer (Letter)

The Convener: The letter from the Presiding Officer is in response to points raised by Bristow and Fergus and communicated last week.

Bristow Muldoon: The Presiding Officer says that he does not think that the bulletin is the appropriate place for statements from the Executive. We might include in our next report the view of this committee that it is an error, or shows a lack of regard for the scrutiny process, to submit legislation that either has been given very little time between being laid and coming into force or, on some occasions, has come into force before the Parliament has had it laid before it. It is a fundamental issue of concern for this committee.

We might also draw the matter to the attention of other MSPs and write again to the Scottish Executive asking it to ensure that, when statutory instruments are brought forward in the future, sufficient time is given, except when there is an extreme and urgent need to do otherwise.

Fergus Ewing: I note the letter from the Presiding Officer, which was supplied quickly, unlike some of the responses from the Executive. The Presiding Officer agreed with the importance that we placed on this issue. The two matters were that several instruments had breached the 21-day rule, and that others had come into force before they were laid before Parliament—the gap was, I believe, about seven days in the case of the statutory instruments on amnesic shellfish poisoning and the Belgian foodstuffs regulations.

Fergus Ewing: That is unacceptable. Before this Parliament came into being, there was a lot of talk about pre-legislative scrutiny. If the 21-day rule has been breached and committees have been denied an opportunity to scrutinise legislation, it makes a mockery of pre-legislative scrutiny.

There are two serious points of principle. I was pleased that the Presiding Officer shared the sense of importance that we felt. The question is what we do now. Certainly, as Bristow has suggested, we should draw this matter to the attention of the Executive again. Because points of principle exist, it is important that all members of the Parliament should be made aware of the arguments, in a simple way. This committee should consider some means of doing that, such as a special report, a statement in the business bulletin, or some similar method.

Secondly, a wider issue is raised of how we make the meaning of subordinate legislation clear to all members of the Parliament. Perhaps a seminar or training session in "Subordinate legislation made simple"—if that is possible—would help all members in their work of examining subordinate legislation in detail in committees.

The Convener: Are there any other comments?

We were advised that the clerks are considering this, so there is at least some opportunity to flag matters up. Is it fair to say that this committee wishes the clerks to take on board our worry that statutory instruments may not be getting proper consideration in other committees—perhaps through no fault of members—and that we would like that matter to be addressed and brought to the attention of members? That is agreed.

Meeting closed at 11:47.

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