

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 April 2000
(Morning)

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SUBORDINATE LEGISLATION COMMITTEE

12th Meeting 2000, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tw eeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

*Trish Godman (West Renfrewshire) (Lab)

*Bristow Muldoon (Livingston) (Lab)

*David Mundell (South of Scotland) (Con)

*attended

WITNESSES

Mr John Paterson (Scottish Executive Bill Team)

Ms Trudi Sharp (Scottish Executive Bill Team)

CLERK TEAM LEADER

Alasdair Rankin

ASSISTANT CLERKS

Alistair Fleming

Anne Peat

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 4 April 2000

(Morning)

[THE CONVENER *opened the meeting at 11:22*]

Ethical Standards in Public Life etc (Scotland) Bill

The Convener (Mr Kenny MacAskill): Good morning. This is the 12th meeting of the Subordinate Legislation Committee. The first item on the agenda is the delegated powers scrutiny of the Ethical Standards in Public Life etc (Scotland) Bill. Last week we made representations on the bill to the Executive, from which we received a response. We are joined today by Trudi Sharp, John Paterson and Joanne McDougall of the Executive, who may wish to make additional comments before members put questions to them.

Ms Trudi Sharp (Scottish Executive Bill Team): My name is Trudi Sharp and I am the bill team leader. I hope that the letter that we sent to the committee clerk has been helpful in setting out the Executive's position on the subordinate legislation under the bill. My colleagues and I will be happy to answer your questions and to report to ministers anything that members wish to say.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): We have a concern about section 7, which relates to the standards commission for Scotland. The section permits the Executive to add duties to the functions of the commission that are set out in the bill. The committee is concerned about the lack of opportunity for parliamentary scrutiny of the exercise of that power.

The Executive's response says that

"the Executive notes the Committee's comments and accepts in principle that there should be greater scrutiny".

It goes on to say that

"the Executive would wish to give further consideration to whether all the sorts of additional duties which it might from time to time conceivably wish the Commission to carry out . . . can readily and sensibly be conferred only by statutory instrument."

We welcome that general response, but could you spell out in a little more detail any options that you might consider to confer greater powers of scrutiny to the Parliament?

Ms Sharp: We envisage that the power will confer additional functions relating to the conduct of members of councils and devolved public bodies. We expect that those functions will be at the margins rather than huge new areas. For example, ministers might want to require the commission to inspect the registers that will be set up under section 6.

We are grateful for the committee's comments on this. We have said that we will think a little harder about whether a statutory instrument would be appropriate. We have not considered any options other than what is set out in the bill and your suggestion of a statutory instrument. We will consider whether your proposals deal satisfactorily with all the possibilities that are likely to arise under this power.

Fergus Ewing: The power seems to be very widely drawn. There is a parallel with those provisions in the Standards in Scotland's Schools etc Bill that confer powers to the Executive in relation to the General Teaching Council. Those provisions allow the Executive to require the GTC to set up new committees but do not give any indication of how and in what circumstances those powers would be used—they would be blanket powers. That is a comparative illustration.

Although you have helpfully said that the power under section 7 of the Ethical Standards in Public Life etc (Scotland) Bill would be used at the margins, that is not what the bill says. The bill could constrain how the power is exercised in the way in which you describe, but it does not.

Ms Sharp: Section 7(2)(b) states that the power would relate to the

"conduct of councillors and members of devolved public bodies",

so it is not very broad.

Mr John Paterson (Scottish Executive Bill Team): Section 50 of the Standards in Scotland's Schools etc Bill confers on ministers the power to require further committees to be set up and to specify who will be members of those committees.

The power under section 7 of the Ethical Standards in Public Life etc (Scotland) Bill is fairly different in terms and is restricted, as Trudi Sharp said, to adding functions relating to the

"conduct of councillors and members of devolved public bodies".

The power would be used at the margins, where it was felt that there was a need to grant an additional function to the commission. I submit that the power is not broad. Although we have provided only one illustration, it is envisaged that the power would be used only to deal with any lacuna that is identified.

The Convener: Why does section 22(3), which provides for adjustments to schedule 3, adopt a negative rather than an affirmative procedure?

Ms Sharp: Section 23 relates to restrictions on legislation governing the conduct of members. The power is necessary to ensure that any statutory provisions or other pieces of legislation are consistent with the provisions of the bill. We envisage that that power will be transitory. It will allow a changeover from the current schemes that may apply to members of devolved public bodies to the arrangements that are provided for under the bill.

We note that the committee is concerned that we have not carried out a review of existing legislation. As schedule 3 contains more than 30 categories of organisations and as a large number of amendments may be required, a thorough review is needed to ensure that we identify all the relevant current legislation. That will take time. The amendments that are likely to be necessary will be minor consequential changes to allow for consistency and to ensure that nothing in existing legislation gets in the way of the provisions of the bill. A negative procedure is appropriate because those amendments will be minor changes.

11:30

The Convener: Do you accept that there would be no great inconvenience if an affirmative procedure were used?

Mr Paterson: Our position is that it would be unnecessarily onerous to make this procedure affirmative. Section 22(2) provides that ministers can add bodies to the list of bodies that are subject to the standards commission. Section 22(3) allows for amendment of existing legislation to facilitate the integration of those bodies into the scheme of the bill.

The Convener: I understand that, but why would there be an increased work load if the procedure were affirmative rather than negative?

Mr Paterson: There would be an increased work load for Parliament rather than for officials.

As amendments will probably relate to restrictions on members of a devolved public body that are in some way inconsistent with the scheme under the legislation, I submit that they would not merit parliamentary time for debate.

Fergus Ewing: Another concern that has been identified for the committee is about section 16, "Hearings before Commission". The section deals with disciplinary action against or investigation into councillors or members of devolved public bodies. Where legislation provides for a form of disciplinary procedure, there is usually a provision requiring rules to be made on the detail of the

procedure for the hearings. In the present instance there is no requirement for rules to be in place before a hearing. That strikes me, as a lawyer, as rather odd.

The Executive replied that it would be difficult to draft rules of procedure that made provision in advance for all possible contingencies. Is it intended that rules will be in place before there are hearings or that such hearings could take place without rules?

Ms Sharp: Section 16 provides that the standards commission will broadly—within the constraints that are set out in the section—be able to decide on its own procedures. In effect, once it has done that, it will have rules of conduct. As we said in our response to the committee, we think that the flexibility for which the bill provides is appropriate.

We are setting up a single commission, which is not likely to be large and which is not likely to hear a huge volume of cases a year. It may even be that the same three people will hear every case. We think that in practice it would be reasonable for those people to draw up their own procedures.

There is a precedent in the way in which the Accounts Commission deals with hearings. Schedule 8 to the Local Government (Scotland) Act 1973 provides for the Accounts Commission to regulate its own procedure.

Fergus Ewing: That precedent was drawn to our attention. Of course, it is 30 years old. Your answer seems to indicate that there could be disciplinary hearings without there being written rules that could be promulgated to the person facing the disciplinary action. Do you think that that would comply with the European convention on human rights?

Mr Paterson: The commission would be expected to draw up broad rules for hearings. In section 16, subsections (2) to (9) set out the fundamental rules that will apply to hearings of the commission, and subsection (1) allows for a degree of flexibility. It is felt that it would not be appropriate to draw up, or to have the standards commission draw up, long, detailed rules that are similar to sheriff court rules, which seek to provide for every possible circumstance. The standards commission will be expected to draw up its own rules of procedure for hearings, but it will be able to finesse them in particular hearings.

Fergus Ewing: I appreciate that there are difficulties and that the standards commission may not hear many cases. I am not without experience of having been disciplined and I think that I can safely speak for anyone in that situation by saying that one is acutely aware of the rules of natural justice. Any matter that goes before the standards commission would be bound to be a matter of

huge controversy and probably public interest—it would therefore be a matter of sensitivity. That is why I emphasise the need to establish compliance with rules of natural justice by putting in place properly promulgated rules, rather than having no rules, or having a set of rules that can be finessed—that does not seem desirable in the public interest.

Ms Sharp: I recognise that we are here to answer rather than to ask questions, but I wish to ask one question of clarification. You speak about the need to have agreed rules. Would it be appropriate for the commission to write those rules, or should they be statutory and provided for by subordinate legislation?

Fergus Ewing: I am no constitutional lawyer and am certainly not the Executive. I would have thought it desirable that rules were prepared by the Executive in consultation with members of the standards commission. Any body that draws up its own rules has a desirable flexibility, but it may be shoring up difficulties and dangers for itself if those rules are adjudged later to be in any way unfair to those to whom justice is being dispensed. Therefore, it would be sensible if the rules were drawn up by the Executive. We have rules for governing disciplinary bodies. The Executive must have a great pool of precedent from which to draw in order to carry out the difficult task of establishing a fair set of rules for a new body that is seized with responsibility for a new task.

Bristow Muldoon (Livingston) (Lab): I concur with Fergus. My experience of dealing with industrial tribunals is that, in the interests of natural justice, they would look unfavourably on a major employer that did not have clear rules or did not follow rules in a disciplinary case. We are yet to see Executive amendments on an appeals procedure, so we do not know what it will be like, but I imagine that anyone who is accused of a misdemeanour under the bill would understand the rules clearly and that the rules would be applied fairly and consistently. It would be desirable if the Executive were to put such rules in place.

Ms Sharp: We shall take receipt of your views and consider them.

The Convener: Do you see any ambiguity between section 23(1) and section 23(3)? The bill seems to suggest that no further legislation is necessary, yet subsection (3) gives the power to make modifications.

Perhaps I should be more specific. Section 23(1) states that whenever a code is made, any provision in any other enactment that makes similar provision, or is inconsistent with the code, or would, apart from the section,

“continue to regulate the conduct of the member of the devolved public body . . . thereupon ceases to have effect”.

One interpretation would be that that seems to suggest that no further legislation is necessary, yet section 23(3) empowers ministers by order to make modifications to existing legislation. Perhaps that is just the way in which we are interpreting it.

Mr Paterson: Subsection 23(1) relates to a provision of an enactment or instrument, whereas subsection 23(3) appears to relate to consistency with the members’ code.

Ms Sharp: It might be easiest if we take this matter away and look at it properly, and then write to the clerk.

The Convener: Do committee members have any more questions?

11:45

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): We appreciate the difficulties and the complicated nature of the matter. You acknowledged several times in your letter that there were problems and that they would be examined. Please do not feel that we are trying to get at you; we want only to explore the nature of the difficulties.

The Convener: Thank you very much for coming. The committee will consider what we have heard and report on it.

We have had the benefit of the witnesses’ written and oral responses and I do not know what, if anything, we should report. You raised points under section 7, Fergus. Were you satisfied by the evidence?

Fergus Ewing: I was heartened by the fact that the witnesses seemed to be taking serious note of the points that were raised and that they will mull them over. The lead committee should pursue the points that have been raised by members.

Bristow Muldoon: It was during Fergus Ewing’s line of questioning that I started to recognise the significance of section 16. I am also a member of the Local Government Committee, and that committee has been pursuing issues such as natural justice and rights of appeal. This committee should probably draw the issues surrounding section 16 to the attention of the Local Government Committee—the lead committee—because they relate to questions of natural justice and to the process as a whole.

The Convener: On section 22(3), although I appreciate the Executive’s endeavour not to overburden the committee unduly, I would prefer that the decision was for this committee and that the affirmative rather than the negative procedure was used. Although I take cognisance of the fact that the Executive is saving us from onerous tasks, this should be a matter for us. I would prefer

to draw to the lead committee's attention the fact that the committee would prefer the use of the affirmative procedure, which would enable us to handle things more simply. Do members concur?

Members indicated agreement.

The Convener: Section 23 has been taken away for consideration, as it were. In it there is a possible ambiguity, which will be reflected on. The other matters pertaining to the Ethical Standards in Public Life etc (Scotland) Bill were addressed in the written response.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) Partial Revocation (No 6) (Scotland) Order 2000 (SSI 2000/75)

The Convener: Item 2 on the agenda relates to responses from the Executive to points raised on the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) Partial Revocation (No 6) (Scotland) Order 2000 (SSI 2000/75). We have received an apology for a previous failure to submit a map. The committee notes that. We are grateful for the acknowledgement of the oversight, for the subsequent apology and for the provision of a map.

Bristow Muldoon: We should also note the extremely appropriate name of the member of the Scottish Executive rural affairs department, Mr Ian Farmer.

Ian Jenkins: He does not get on with Mr Wildgoose.

Valuation Timetable (Scotland) Amendment Order 2000 (SSI 2000/76)

The Convener: Do you want to flag something up about the Executive's response, Fergus?

Fergus Ewing: The question that the committee asked was simple—we wanted clarification on why the date by which appeals could be made against the revaluation assessment had been brought forward from 15 December to 30 September. The reply was disingenuous—it said that the period being granted was longer than that which had been granted in the previous revaluation. However, that pays mere lip service to the fact that the short period that was granted in the previous revaluation had to be extended to 15 December. A revaluation is for five years—although not for life—and it is, therefore, essential that businesses, especially small ones that cannot afford expensive advice, are made aware of the deadline. The

Executive must consider extending the deadline until 15 December.

Bristow Muldoon: I agree that we need to ensure that the deadline is publicised widely. If there were a large number of late appeals, I hope that the Executive would consider extending the deadline. At this stage, however, I am comfortable with the 30 September deadline. As Fergus Ewing said, we should try to ensure that businesses are aware of the deadline—that would satisfy me.

Fergus Ewing: Would it be in order to draw the matter to the attention of the Local Government Committee?

The Convener: It might be difficult to do that through this committee, but you could do so informally, Fergus.

Are we agreed on the matter?

Members indicated agreement.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2000 (SSI 2000/79)

The Convener: We drew the Executive's attention to drafting errors in the instrument and the lack of an explanatory note. Those points have been accepted. Shall we inform the lead committee and allow it to take action?

Members indicated agreement.

Special Grant Report No 4—Grant In Aid of Expenditure on Rural Public Passenger Transport for 2000-01 (SE/2000/17)

The Convener: No points arise from this report.

Special Grant Report No 5—Grant In Aid of Expenditure on South Fife to Edinburgh Rail Services for 2000-01 (SE/2000/34)

The Convener: Footnotes are missing from the report. We should draw that to the Executive's attention in the usual fashion.

Non-Domestic Rates (Levying) (Scotland) Regulations 2000 (SSI 2000/92)

The Convener: There are some typographical errors in the document.

Fergus Ewing: Last week, we raised a point about the assertion in the Executive's note that non-domestic rates provide around £1.5 billion annually. I have pointed out that that estimate seems to be imprecise. In another Government publication, "Serving Scotland's Needs", future rates income is estimated to the nearest £1 million. Last week, I said that I wanted the Executive to explain why the precision of its estimates has gone from being within the nearest £1 million to being within the nearest £500 million. The committee is still waiting for an answer—I hope that we will not have to wait for too much longer.

The Convener: I am informed that there has been no time for the Executive to respond. The matter can only be flagged up again at this point.

Fergus Ewing: Perhaps that might encourage the Executive to respond.

The Convener: We will see what arises and we will draw the Executive's attention to the typographical errors.

Food Safety (General Food Hygiene) (Butchers' Shops) Amendment (Scotland) Regulations 2000 (SS1 2000/93)

The Convener: The next item is the Food Safety (General Food Hygiene) (Butchers' Shops) Amendment (Scotland) Regulations 2000. Members have received copies of the letter from the Scottish Retail Consortium.

Bristow Muldoon: I would like to record an oblique interest in this item, as I am a member of the Co-operative party—which is a sister organisation of the Co-operative Wholesale Society. The Co-operative party was involved in drafting the response from the SRC. Having put that on the record, I would like to raise one or two issues. Many issues relate to policy and are, therefore, not necessarily for the committee to take up with the Executive. However, I would like the committee to draw issues to the attention of the lead committee, which is the Health and Community Care Committee.

First, the term "butchers' shops" could be regarded as representing the whole premises. In large premises such as a supermarket, only a small proportion of the shop is used as a butcher's shop. The consortium believes that the definition is too widely drawn and could incur additional costs to such businesses. It recognises the importance of the regulations following the 1996 E coli outbreak and of ensuring that everything that is possible is done to avoid such an outbreak in the future. However, the Health and Community Care

Committee might want to consider whether it is necessary to have such a broad definition of a butcher's shop.

Secondly, there are inconsistencies throughout the instrument in the use of the term "proprietor". In schedule 1A, on page 5, the reference in paragraph 5(3) is to

"the holder of the licence."

For reasons of consistency, it might be better to refer to that person as the proprietor.

Thirdly—moving on to areas of policy—concern has been expressed over the suspension or revocation of licences and the appeals procedure, because that procedure does not allow for appeal to an independent third party. The consortium suggests that when a licence is revoked there should be a right of appeal to a sheriff.

Those are the issues that I would like to raise, but, as I said, they would probably be better addressed by the Health and Community Care Committee.

Fergus Ewing: I support Bristow Muldoon's point that there should be a right of appeal. It seems odd that there is no right of appeal—

Bristow Muldoon: There is a right of appeal, but not to an independent third party.

Fergus Ewing: I was going to say that it seems odd that there is no right of appeal to an independent third party.

The Convener: Let me clarify the situation. There is such a right of appeal. The Food Safety Act 1990 allows an appeal to the sheriff.

Fergus Ewing: We all recognise the need for effective regulations to prevent recurrence of the tragedies of the recent past. At the same time, I am uneasy about some aspects of the regulations. They are substantial and have huge cost implications—the figure of £2.5 million is referred to in the Executive note—and there are grave training implications for small businesses in particular, because of the provisions of regulation 5. Paragraph 5(2)(b) says that

"where practicable separate staff shall be used for the handling of raw meat."

I do not know whether the word practicable is defined, but that seems to be a rather curious provision.

I hope that the lead committee will consider the instrument very carefully—in the context of its impact on the small business community—and ensure that that £2.5 million will be allocated to the small business community to cover the substantial costs of training.

David Mundell (South of Scotland) (Con): I find the regulations exceedingly complicated and convoluted. The committee has made the point on other occasions that such regulations come not in a form that an unqualified person can easily digest. The Executive should consider that general point. As Fergus Ewing said, the regulations are not straightforward for an individual who runs a butcher's shop on his or her own without recourse to advice.

While advice will probably always be necessary for certain matters, we should try to make regulations as straightforward as possible. The explanatory note is particularly poor on the regulations that we are considering. I would have hoped for a better note than the rather short and vague one that has been produced.

12:00

Trish Godman (West Renfrewshire) (Lab): I agree with what has been said. If the regulations are so complicated, it is difficult to understand how the sole proprietor of a butcher's shop or anyone else could understand them—we might even need a particular type of lawyer to understand them.

I suggest that the correspondence that you have received, convener, should be sent to the lead committee. That committee will want to pick up on some issues that arise from it. The regulations are very convoluted, but they should not be, given that they apply to small businesses, to people running small shops and so on. They are not acceptable.

Ian Jenkins: Annexe C of the regulations says that

"costs will mainly fall on small businesses. In order to assist businesses, initiatives to help individual butchers to understand and implement effective food safety control systems are being carried out. These initiatives will include training, advice and practical guidance materials."

The regulations are there, and I presume that there will also be an explanatory note of sorts.

Fergus Ewing: The letter from the SRC indicates that its concerns about the draft regulations do not appear to have been addressed. The letter adds that SRC members

"feel very strongly that the Executive and the Scottish Parliament should make sure that the regulations are drafted in such a way as to make them administratively workable for food retailers and the enforcement authorities. This has already happened in the case of comparable legislation considered by the Ministry of Agriculture, Fisheries and Food and by the Westminster Parliament."

Far be it from me, as a nationalist, to say that we should learn lessons from Westminster. However, it would be sensible if the regulations that are referred to in the SRC's letter were made available to the lead committee. That committee could find out how regulations down south have been

altered, adapted and changed. That might reflect some of the concerns that the committee has expressed.

Trish Godman: It seems to me that food safety should be a United Kingdom matter. Regulations should not be different in Scotland from those that apply elsewhere in the UK.

The Convener: I should declare an interest. I had an aunt who was critically ill—allegedly because of cold meat that was purchased from a butcher's shop in Leith—during the E coli outbreak some three years ago.

We could pursue two avenues. We could take the normal course of approaching the Executive with some points—we may know what its response would be if we went with the SRC letter. The other option is to go directly to the lead committee. According to our legal advice, there seems to be a typographical error. There is also ambiguity regarding the use of the words "holder" and "proprietor".

I would also draw the lead committee members' attention to the points that are raised in the SRC letter. That might circumvent going backwards and forwards to the Executive. Would it be worth approaching the Executive in full, as it were, instead of drawing ministers' attention to a copy of the letter that is going to the Health and Community Care Committee?

Trish Godman: I am not sure about the Executive's response—the letter might be sent back to us. It should go to the lead committee.

I am concerned that the legislation in Scotland is different from that in England and Wales—perhaps we should point out our concerns about that to the Executive. The regulation is also convoluted.

The Convener: I presume that if we go to the Executive first—as we usually do—we will not be precluded from copying the SRC's letter in due course. That might also save the Health and Community Care Committee from being deluged with documents. Perhaps that committee might also take the view that it is the job of the Subordinate Legislation Committee to sift through such matters first. That would allow the Health and Community Care Committee to proceed with a clean sheet of paper.

We will raise with the Executive our concerns on the use of the terms "holder" and "proprietor" and on the English legislation and so on, and we will ask whether it has considered the points from the SRC. That will allow us to go to the lead committee with a full report.

David Mundell: Could we ask the Executive what steps are being taken to simplify legislation that applies to small businesses and to individuals? The same point has been raised

about different pieces of legislation on a number of occasions by all committee members. It would be useful to know that some thought is being given to that matter.

Fergus Ewing: Recently, the Executive set up a body called IRIS, which was referred to during a meeting of the Enterprise and Lifelong Learning Committee and which has the role of considering regulations from the business point of view. I would be most interested to know whether IRIS had the opportunity to consider these regulations before they were promulgated.

Trish Godman: What does IRIS stand for?

Fergus Ewing: I do not know—I was hoping that no one would ask me that.

The Convener: We should also simplify acronyms.

Registered Establishments (Fees) (Scotland) Order 2000 (SSI 2000/67)

The Convener: It has been pointed out to us that it might be difficult for an establishment that registered on 17 October 1988 to pay fees. I presume—with tongue in cheek—that we could ask the Executive whether it has considered that point, which might or might not apply. Perhaps no establishments registered on that date. Unless anyone is otherwise minded, we should put that point to the Executive.

Trish Godman: I do not think that that point will apply in this instance—I would be surprised if it did. However, the Executive has made that error before—it has not learned from its mistakes.

The Convener: Thank you. That was our longest ever meeting.

Meeting closed at 12:07.

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