SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 November 2000
(*Morning*)

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SUBORDINATE LEGISLATION COMMITTEE
33rd Meeting 2000, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

Godman, Trish (West Renfrewshire) (Lab)
*Macintosh, Mr Kenneth (Eastwood) (Lab)
*McLeod, Fiona (West of Scotland) (SNP)
*Bristow Muldoon (Livingston) (Lab)
David Mundell (South of Scotland) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Sheridan, Tommy (Glasgow) (SSP)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 November 2000

(*Morning*)

[THE CONVENER *opened the meeting at 11:21*]

Abolition of Poindings and Warrant Sales Bill

The Convener (Mr Kenny MacAskill): Good morning and welcome to the 33rd meeting of the Subordinate Legislation Committee. The first item on the agenda is scrutiny of the delegated powers in the Abolition of Poindings and Warrant Sales Bill, as amended at stage 2. I welcome Tommy Sheridan and Mike Dailly, his legal adviser. If Mike wants to speak, we will have to invite him to give evidence to the committee next week. The only person who is here to give evidence to the committee today is Tommy Sheridan. It has also been made clear that our role is not to examine policy; we are simply the Parliament's eyes and ears on subordinate legislation.

As initially drafted by Mike Dailly and Tommy Sheridan, the bill contained no references to subordinate legislation. Those references have been introduced by the Executive in sections 1A(2) and 3(1). Do you want to make any comments, Tommy, either in general or on those two sections specifically, before I open the discussion to the committee?

Tommy Sheridan (Glasgow) (SSP): I hope that it will be acceptable for Mike Dailly at least to prompt me when I answer any questions that members of the committee want to ask. I want to avoid the need for this committee to hold an additional meeting, so that the bill can progress to stage 3. I hope that members do not mind if Mike whispers in my ear or writes comments on a piece of paper. The drafting of the bill was Mike's brainchild and his assistance will be necessary.

The Convener: You can take that as read, Tommy. I also sit here with a legal adviser who whispers in my ear.

Tommy Sheridan: Having given Mike the credit for all the hard work, I would like to address the points that you raised, convener.

I disagree with the Scottish Executive's position that the original transitional provisions in the bill were not effective. In the original draft of the bill, the proposal was to keep sections 16 to 18, 23 and 26 of the Debtors (Scotland) Act 1987. That would have protected both the savings that the Executive refers to in relation to bankruptcy and to sequestration for rent. To claim that the original drafting was defective is simply wrong: it was not defective. We flagged up those two savings, the way around which was simply to exempt those parts of the 1987 act that referred to bankruptcy and sequestration for rent.

The provisions made for ministers to make transitional provisions and fuller savings are far too wide. They are unnecessary and vest an awful lot of power in Scottish ministers, enabling them to determine even exceptions from the bill—in respect of the right to allow poindings and warrant sales to be carried out for up to 12 months—or to make further provision for exceptions to the general principle of the bill. The original drafting dealt adequately with the cut-off time for implementation of the bill. If an intimation had been made to a debtor of the carrying out of a warrant sale, that warrant sale would have proceeded because the intimation had been made. If a poinding was carried out for which an intimation had not been made to a debtor, that warrant sale would not have been legally competent.

The Executive has assumed a very large power over determining transitional arrangements, and I question the necessity of that. In the course of the stage 2 debate, the former Deputy Minister for Justice argued that the Executive did not intend to impose exceptions—for instance, that local authorities should be exempt from the provisions of the bill for another year. The minister asked us to trust that that was not the intention of those wide-ranging powers. I say openly to him and to the committee that I do not trust ministers or the Executive on that. There has been well-recorded debate and battle over the bill and the Executive is clearly opposed to it. The Executive opposed the bill at stage 1 and the proposed amendments at stage 2 have tried to give far too much control to Scottish ministers.

The Executive has had enough time in which to identify other necessary savings. Paragraph 7 of the Executive memorandum says:

"The Executive has not identified any other necessary savings provisions"

but may bring forward others

"which have not come to light".

The bill has been in the public eye since last September, and the two savings that the Executive flagged up were flagged up in Mike Dailly's original drafting. It is therefore questionable that, although the Executive has not seen fit to bring anything else forward, it wants that power still to be reserved; it has had more

than enough time to examine the implications of the bill.

In summary, while claiming that the bill was originally defective, the Executive has been less than straightforward in its first amendment. It is also trying to assume far too much power over the transitional arrangements for the implementation of the bill.

The Convener: Thank you very much. It has been suggested to us that a meeting may be possible between the Executive's lawyers and you and your legal advisers. The advice that we are getting is that transitional provisions are required—that they are fundamentally necessary in the legislative process. The nature of those arrangements is obviously a separate matter, and I do not know whether consideration has been given to whether solutions could be hammered out. There is still the possibility of Executive amendments being lodged that would change matters as we approach stage 3. Has any thought been given to arranging a meeting with the Executive, to determine whether agreement can be reached?

Tommy Sheridan: We had a brief discussion prior to the stage 2 debate in the Justice and Home Affairs Committee, during which we tried to convince the Executive's advisers that what they were insisting on was unnecessary.

The problem is that the Executive's advisers said that section 1A, which deals with savings and transitional provision, is required in respect of bankruptcy and of sequestration for rent. We had already allowed for that. There is a concrete, fundamental difference of opinion between us and the Executive—it is not as if there could be a merging of ideas. We think that we have taken care of and flagged up those situations; the Executive's advisers think that we have not and so have insisted on section 1A.

Regarding the power that the Executive wishes to retain to decide when implementation takes place and the power to make any exemptions, we think that that is a political rather than a legal question. Politically, we do not think that that power is necessary; the Executive thinks it is. Unfortunately there is not much ground for negotiation. The matter is much more political than legal.

11:30

Bristow Muldoon (Livingston) (Lab): I want to clarify matters. Tommy Sheridan believes that the bill as introduced covered the situations outlined in section 1A(1), which deals with bankruptcy, sequestration for rent and other things. Even given that, does section 1A(1) in any way go against the principles of the bill as originally introduced? Does he foresee any problems with section 1A(1) as currently drafted?

Tommy Sheridan: I have consulted my legal adviser, Mike Dailly. The problem with section 1A is subsection 2, which gives the Executive unlimited powers to make exemptions in the future. Section 1A(1) is unnecessary, but we can live with it. Section 1A(1) is not required because the problem has already been taken into account. However, section 1A(2) is an additional power that will give the Executive the right to vary and basically impose exceptions at will. Effectively, that could abort and contravene the general principles of the bill. The general principle, which is to abolish poindings and warrant sales, was debated at length by three committees. Section 1A(2) effectively gives the Executive the power to circumvent the general principle.

The Convener: If no other members wish to make their views known, we must move on to consideration of matters—unless Tommy Sheridan has anything further to add.

Tommy Sheridan: Mike Dailly reminds me that the committee should notice that the Executive has in its amendment sought the most distant implementation date, which is 31 December 2002. The Executive argued that it needs time for alternatives to be brought forward. If problems arise in relation to the implementation of the bill, I am worried that, if the Executive gets its way, it will not allow the bill to be enacted until 31 December 2002. In the meantime, other legislation will presumably have been brought forward to take care of any of the necessary tidying up measures referred to. That is why I am worried about the powers that the Executive is trying to retain over the implementation of the bill.

The Convener: I understand your fears, given some of the things that have happened during the bill's progress. Our advisers, however, are distinct from the Executive's and they have said that transitional arrangements are common and that this one will

"become spent when all the past circumstances that it is designed to deal with have been dealt with".

Such arrangements, being transitional, should therefore fall by the wayside. The committee has been referred to the difficulties that Michael Howard got into in setting up a non-statutory rather than statutory criminal injury compensation scheme. That course of action was ruled as ultra vires in that Michael Howard went against the general will of Parliament. If the Executive were to fail to bring the act or any of its provisions into force, that case has been flagged up to the committee as a defence mechanism for what Tommy Sheridan is trying to achieve. It also ensures that the Executive's transitional measures

cannot be used to block or thwart Parliament's will. If the Executive tried to do that, similar action could be taken as that against Michael Howard. I do not know whether that has been considered.

Tommy Sheridan: Section 1A(2) of the bill says:

"The Scottish Ministers may, by order made by statutory instrument, make such transitional provision and further savings as they consider necessary or expedient in connection with the coming into force of any provision of this Act."

My worry—I do not suggest that this is the Executive's intention—is that if, for instance, the Executive decides that it wishes local authorities to have an additional 24 months before the legislation takes effect, would it be beyond the ability of the Executive simply to decide that those authorities will be exempt over that period? The transitional period could be elongated beyond 31 December 2002. I am worried about that and about the Executive's power over "any provision" of the bill.

The Convener: Our advice is that such a course of action would be open to challenge in the courts. That might not satisfy you. Another point that has been raised, however, is that if the committee were to accept the advice that transitional arrangements are probably necessary, the terminology could be made more specific and time constraints could be put upon the Executive. I do not know whether you would be prepared to accept that. The committee could, for example, recommend transitional arrangements, but say that section 1A(2) is far too loose and should be tightened up. Would that be acceptable?

Tommy Sheridan: That would be a worthwhile road to travel. I hope that the committee accepts, regardless of the principles behind the bill, that section 1A(2) is wide open to all sorts of interpretation. If a Conservative Government were elected between now and 31 December 2002—God forbid; I apologise to any Conservative members—it could use the provisions in section 1A(2) to circumvent an earlier decision of Parliament. Time-specific instructions on the use of the provisions would be much more helpful and effective.

Mr Kenneth Macintosh (Eastwood) (Lab): I understand your concerns. The committee cannot discuss policy, but the convener is trying to reassure you that the Executive cannot undermine the bill if it goes through. The Executive cannot activate any of the statutory instruments mentioned in section 1A(2) by itself—they would have to come before the committee. If the Tories get into power, the bill might not come into force or they might revoke it anyway. All sorts of things could happen, but the protection of the committee, as well as that of the courts, is always available.

Tommy Sheridan: Kenneth Macintosh and the convener have referred to the ability to challenge the Executive in court and indicated that I might not be happy with that alone. I am sure that, given his background, the convener realises that one of the biggest problems with poindings and warrant sales is that people do not know that a lot of protections are available to them, such as the right to go to court. To be honest, the assurance that it is possible to go to court if the provisions are used to overstep the mark is not good enough.

The bill is supposed to be tight and specific and to abolish a particular part of diligence. The Justice and Home Affairs Committee said that the bill was a model member's bill, because it was so specific and tight. The Executive then criticised it for not taking wider matters into consideration. I am caught between a rock and a hard place.

I accept that there are built-in mechanisms, but the problem is that they are not very effective. That worries me.

Bristow Muldoon: Kenneth Macintosh made the point that other protection is also available. It is a fair point that the provisions are too broad, and the committee should take that point forward.

Section 1A(3) contains provision for annulment by Parliament of any statutory instrument that is seen to be against the general interests of the bill. Support in Parliament for the general principles of the bill is clear and broad. If any minister tried to bring forward a measure that was seen to be contrary to the terms of the bill, it could well be defeated. That is a further safeguard that does not involve an individual going to court—any member of Parliament would be able to invoke it.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Everyone—individual members, committees, and the chamber as a whole—recognises where Tommy Sheridan is coming from and the principles behind the bill. I would like to think that he could feel confident. Having said that, we can still tweak the time limits. We could put that forward successfully.

Mr Macintosh: We could express our concern.

The Convener: Despite 20 years as a lawyer, I have never read Bennion on legislative drafting. I therefore bow to those with greater knowledge—especially our legal adviser, sitting on my right—who say that transitional arrangements are necessary. My concern is how we balance that with ensuring that the principles of the bill are not diluted. It has been suggested that we recommend that section 1A(2) be amended to be time-specific. It has been suggested to us that a provision could be included that says that no warrant sale could be carried out beyond a specific number of months after the passing of the bill. Or it could be time and issue-specific. It could simply be that no

organisation would be allowed to carry out a warrant sale after a period of time.

One possible opt-out, it would seem, is to accept transitional arrangements as necessary, but to require the Executive, either in discussion or by stage 3 amendment, to firm up section 1A. Would you be satisfied if section 1A was made time and issue-specific? After all, the intention of the bill is for all warrant sales to cease by a certain date. That position would prevent local authorities, or a certain section of society, from having different powers from those of a private individual.

11:45

Tommy Sheridan: That would be very helpful. If the metaphor for the passage of the bill is a tug of war, the bill has clearly been pulled into the Executive's quarter. It is important for the committee to pull it back into the possession of the Parliament.

As members have said, the committee has a brief to watch over legislation. The Executive would, I hope, accept the committee's suggestion of imposing time scales on the transitional provisions and savings. Everyone would be reassured that, regardless of its intentions, the Executive could not overstep the mark again. I would be pleased if we could do that because section 1A is drafted far too widely just now and gives the Executive too much power.

Ian Jenkins: I do not disagree with the principle of what Tommy Sheridan is saying, but I am reluctant to accept that the passage of the bill is a tug of war. I do not think that the Executive is against the principles of the bill; it sees practical problems and does not want to tie itself too much. The tenor of the discussion today shows that the committee supports Tommy Sheridan's position. The Executive amendment has been drafted loosely so as to give a bit of elbow room, not to thwart what Tommy is trying to do in the long run. Perhaps I am now straying into talking about policy.

The Convener: I am not sure whether committee members are reaching a consensus on our recommendation to the lead committee. It seems that, given the legal advice that we have received, our advice is to be that transitional arrangements are required and that the amendment proposed by the Executive is necessary, but that that must be balanced by the worries of the bill's proponent, which we share.

We will recommend that the Executive's amendment would benefit from tightening up the terminology. That would make the bill more specific; not nebulous and open to court challenge at some time in the future. We would welcome steps being taken to make that section of the bill more specific, by adding time constraints, and any other constraints to the amendment.

Tommy Sheridan: Thank you for the opportunity to appear before the committee, and especially for my being able to have Mike Dailly on hand. Given the legal character of discussions such as these, I hope that the committee will allow advisers to be present in future. For members not to have an adviser on hand—particularly for a member's bill—would be extremely difficult. I hope that we have set a wee precedent for anyone else bringing forward a member's bill.

One final word—although I know, as Ian Jenkins pointed out, that the committee cannot discuss policy. My position is based on the Executive's opposition to the passage of the bill in the first place. I hope that you bear that in mind. Thank you.

The Convener: Thank you.

We could call the Executive to appear before the committee, but it might be better to find out what it proposes to do. Are we able to write to the Executive, given our decision today?

Bristow Muldoon: How much time is there?

The Convener: The clerk advises me that there is enough time to discuss the matter next week.

Bristow Muldoon: In that case, it would be useful to write to the Executive and possibly to invite representation.

Mr Macintosh: That would not do any harm.

The Convener: If there is a clear Executive response, we will not need to guddle up the agenda with a request for evidence. We could be flexible and write to the Executive indicating our position and asking it to provide a written response expeditiously. We could then e-mail committee members to get agreement on whether it is necessary for someone from the Executive to come before us.

The clerk has suggested that the Executive might want to put its position on record and that the committee might therefore simply ask someone from the Executive along. We can then ask whether the Executive is prepared to accept a time-specific amendment.

Welfare of Farmed Animals (Scotland) Regulations 2000 (SSI 2000/draft)

The Convener: The next item on the agenda is Executive responses.

The committee raised the point about draft orders being withdrawn and the possible cost of that in respect of the regulations and the Scotland Act 1998 (Modifications of Schedule 5) Order 2000 (SI 2000/draft). We received a satisfactory response and should simply draw the matter to Parliament's attention, unless anybody is otherwise minded. It appears that no cost was incurred by anyone apart from in terms of time.

Education (National Priorities) (Scotland) Order 2000 (SSI 2000/draft)

The Convener: Various points were raised about the order and various responses have come back, including the definition of "lesser used".

Fiona McLeod (West of Scotland) (SNP): The more that we look into the draft order, the worse it gets. The explanations add to the confusion. I am not quite sure where we go with the matter. As a former member of the Education, Culture and Sport Committee, which helped to steer the Standards in Scotland's Schools etc Act 2000 through Parliament, I think that the order is so important to the act that we should draw it to the attention of the Parliament and the lead committee that the order will not achieve what was hoped from the act. We must also bring it to the Executive's attention that it cannot use woolly language such as "lesser used languages", even for aspirational priorities, because you ain't gonna reach anything.

The Convener: I am in favour of that. I would not mind being a fly on the wall when the order is considered by the lead committee.

We should also refer the order to the lead committee on the ground of insufficient specification of enabling powers and remind the Executive that it is correct practice to include a specific reference to enabling powers. We will also draw the defective drafting of article 3 to the attention of Parliament and the lead committee.

Dairy Produce Quotas Amendment (No 2) (Scotland) Regulations 2000 (SSI 2000/391)

The Convener: The regulations contain minor defective drafting, which the Executive has acknowledged, and we should therefore draw them to the attention of the lead committee and Parliament.

The European Commission appears not to have commented on the regulations, despite the prerequisite that it do so. That is a fundamental matter, which we will draw to the attention of the lead committee.

Divorce etc (Pensions) (Scotland) Amendment Regulations 2000 (SSI 2000/392)

The Convener: There are various problems with the regulations, relating to the relevant date for establishing the value of matrimonial property on divorce and to charging for valuations of pension rights.

Bristow Muldoon: We should draw the regulations to the attention of the lead committee. The Executive's response is not acceptable, because it appears that the Executive still intends to amend the dates defined in the parent act without having the power to do so. Basically, that is ultra vires.

The other matter that we should draw to the attention of the lead committee is that there appears to be a misunderstanding in the original drafting about the Department of Social Security's intentions in regard to the valuation of benefits and so on and whether charges would be incurred as a result of such valuations. Those are quite fundamental issues which the lead committee should consider.

Adoption (Intercountry Aspects) Act 1999 (Commencement No 4) (Scotland) Order 2000 (SSI 2000/390)

The Convener: The main problem with the instrument concerns the non-revocation of the instrument that it supersedes, SSI 2000/223. The committee is not satisfied that matters were made clearer by the somewhat disingenuous answer given by the Executive. I raised the matter myself at the previous meeting. Revocation should have taken place.

Another problem is the undue delay in the making of the corrective instrument, which others flagged up at the previous meeting. A considerable time seems to have passed before the Executive decided that instrument SSI 2000/223 was in error.

The Executive says that the previous instrument has been revoked but one has to read both items before one can work out that that is the case.

Ian Jenkins: The Queen's Printer in Scotland will put a special wee mark on SSI 2000/223 that will stop you having to read it all.

The Convener: We hope.

Ian Jenkins: Perhaps we could design the logo for it as well.

Fiona McLeod: The principle is not about footnotes in annual editions but that legislation on the statute book should be in the correct form, format and order.

The Convener: It would be very easy, if one was in some law library, to lose the second instrument and not realise that the first had been superseded. The committee is minded to draw the instrument to the attention of the Parliament on the basis that as a matter of principle instruments that have been superseded should always be revoked.

Fiona McLeod: Speaking as a librarian, I can say that that matter of principle is also a professional nightmare to sort out.

Mink Keeping (Scotland) Order 2000 (SSI 2000/400)

The Convener: We have only one affirmative instrument for consideration under item three. No points arise in relation to the instrument.

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001 (SSI 2001/draft)

The Convener: The fourth item is consideration of draft affirmative instruments. We have had our attention drawn to some minor typographical errors and to the questionable practice of renumbering divisions within the instrument. We will draw the Executive's attention to that to see whether we can get it to adhere to agreed practice, for the benefit of those considering the instrument. We are advised, however, that the legal validity of the instrument is not affected.

Potatoes Originating in Egypt (Amendment) (No 2) (Scotland) Regulations 2000 (SSI 2000/393)

The Convener: We are advised of some minor matters of definition and practice and we shall draw those to the Executive's attention in an informal letter.

National Health Service (General Dental Services) (Scotland) Amendment (No 3) Regulations 2000 (SSI 2000/394)

National Health Service (Optical Charges and Payments) (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/395)

National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/396)

Advice and Assistance (Scotland) Amendment (No 2) Regulations 2000 (SSI 2000/399)

The Convener: The committee will draw issues of drafting and good practice arising under the instruments to the Executive's attention.

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (No 2) (Administration of Justice (Scotland) Act 1972) 2000 (SSI 2000/387)

Mr Macintosh: The committee has considered similar rules before. Under prescriptions on service in chapter 3, the rules read:

"If it is likely that the premises will be occupied by an unaccompanied female, and the commissioner is not female, one of the people accompanying the commissioner shall be female."

We discussed on a previous occasion our uncertainty as to why that restriction is there, and why it specifies only single women, and not people from ethnic minorities, or children, or people with learning difficulties. The restriction comes across as patronising—or possibly chivalrous—or as something rather old-fashioned, rather than anything to do with equality of the sexes. We should draw the provision to the attention of the Court of Session.

The relationship between the committee and the court is rather unclear, and I would welcome an opportunity to explore informally the court's view of its relationship with the committee and the Parliament in general.

The Convener: I would welcome that. Members of the judiciary are, in any event, non-compellable witnesses—an informal chat is the only way in which we would achieve a meeting. It would be in all our best interests to work out how the court sees our role and what we could do to interact better.

Act of Sederunt (Child Care and Maintenance Rules) Amendment 2000 (SSI 2000/388)

The Convener: No points arise on the instrument.

That brings the meeting to a conclusion.

Meeting closed at 12:01.

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