

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 30 January 2001
(*Morning*)

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SUBORDINATE LEGISLATION COMMITTEE

4th Meeting 2001, Session 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Gordon Jackson (Glasgow Govan) (Lab)
*Ms Margo MacDonald (Lothians) (SNP)
*Bristow Muldoon (Livingston) (Lab)
David Mundell (South of Scotland) (Con)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 30 January 2001

(Morning)

[THE CONVENER *opened the meeting at 11:23*]

Item in Private

The Convener (Mr Kenny MacAskill): Good morning and welcome to our fourth meeting in 2001. The first matter is to decide whether we want to take item 10, which relates to the paper on the effectiveness of committees, in private. Apparently, most other committees are doing so. I do not think that there is anything untoward about that; it seems to be standard practice and will not take too long. Are we agreed to take the item in private?

Members *indicated agreement.*

Regulation of Care (Scotland) Bill

The Convener: We received a response from the Executive on the Regulation of Care (Scotland) Bill. We have another week to consider matters and we have focused on points that we might wish to discuss. The simplest way forward might be to ask the Executive to send witnesses along next week so that we can clarify matters about which there is some doubt. Is that agreed?

Members *indicated agreement.*

Convention Rights (Compliance) (Scotland) Bill

The Convener: The item is continued from last week and we have had the benefit of a legal briefing. Does anyone wish to raise any points that we should talk to the Executive about?

Gordon Jackson (Glasgow Govan) (Lab): To say that I have worries would be too strong, but I wonder about some points. In the earlier sections of the bill—the part that deals with the Parole Board for Scotland, for example—there are regulations to do with appointments. It would be nice to see at least a draft of those regulations before the bill was passed. I have a vague memory of asking for that at another committee and we were told that we would be given something, albeit in draft form.

The difficulty that I have is with the remedial power, which seems to be sweeping. If the Executive wants to amend existing legislation to make it compliant with the European convention on human rights, the remedial power means that it can do so by regulation. I have a lot of sympathy for that; there are certain situations in which that procedure would be absolutely right. The policy memorandum details such situations. For instance, a Scottish or English court might say that a piece of legislation or a function of the Scottish ministers was incompatible with the ECHR. If that happened, no one would think it wrong of the Executive to amend that law or function by regulation because the game would be up. However, the final situation in which the remedial power might be used relates to

“Any provision in legislation or any function of the Scottish Ministers which is thought to be incompatible”.

The Executive would decide whether legislation or a function of the Scottish ministers was “thought” to be incompatible. If I understand that correctly, that means that we will never have a bill like the Convention Rights (Compliance) (Scotland) Bill again, as it will not be needed.

To ensure ECHR compliance, the bill suggests changes to the Parole Board and how we deal with life prisoners—matters that will be debated by the Scottish Parliament. However, the proposal for the remedial power would mean that such debates would never happen again because, no matter how important or sweeping a change might be, if it had to do with ECHR incompatibility, it would be made by regulation. That is a huge power. In our legal briefing, we had the benefit of hearing what a House of Lords committee said about that power in England. It referred to it as a Henry VIII power, which I take to be a big power. I worry about that kind of thing, not because I do not love all

members of the Scottish Executive dearly, but because there will be other Executives in the future. The power will be in place for a long time. I do not suggest that the present Executive will ever abuse it, but the strength of the power makes me wary, as does the fact that the bill does not indicate what its limits would be.

The super-affirmative procedure allows for discussions, redrafting and debates but the bottom line is that, after all that, the Scottish Parliament cannot amend what is being done. That could put the Parliament behind the eight ball—it might see the need to amend the old legislation or to fine-tune it, but it would have no power to do that. The Executive has given a concession by promising that it will not use the power to create criminal offences with a penalty of more than two years in jail. However, if you were the man going to jail for six months, you would think that that was a serious matter.

I do not know what the answer is. When we took evidence in the Justice 1 Committee we ran out of time and did not discuss the matter with the Executive officials. It is just a wee worry, but it is a terribly sweeping power.

The Convener: Next week we will have witnesses on the Regulation of Care (Scotland) Bill, but I am advised that we have time for witnesses on the Convention Rights (Compliance) (Scotland) Bill. Otherwise, all we can do is flag the issue up to the lead committee or raise it by way of a letter to the Executive. However, we may not find out much more with a letter, given that—except under questioning—the Executive will not flesh out its intentions much beyond its explanatory note.

I agree with Gordon Jackson that a balance must be struck on legal aid. In this case—unlike student finance, where I think that greater detail should have been in the bill—I am probably with the Executive. Many legal aid matters are so procedural that they could be dealt with by subordinate legislation. The situation is fluid and will not affect fundamental rights to the same extent. We can invite witnesses from the Executive to discuss the latter part of the bill, which is what is causing concern.

Ms Margo MacDonald (Lothians) (SNP): I have a question on procedure. Will the bill go to one of the justice committees?

11:30

Gordon Jackson: The Justice 1 Committee has taken evidence from officials in the justice department, but we did not get as far as the remedial order. I would like to question witnesses from the Executive on the sweeping power, although I am not sure whether the convener of

the Justice 1 Committee intends to have them back. If they do come back, members of this committee can go along and question them. I am on both committees, but I have no great wish to question the officials twice. At one committee or the other, however, I would like to ask them specifically about the sweeping remedial power. I am comforted in my view of the power by the House of Lords report, which called it a Henry VIII power. Even my limited knowledge of history tells me that that is quite serious.

The Convener: We are coming at it from a different angle so we are perfectly entitled to have witnesses before us who have already given evidence at the Justice 1 Committee. Although it would mean having two sets of witnesses next week, we will be able to focus on why we have asked Executive officials to attend and what evidence we seek from them. It should not necessarily be too heavy a session. We can intimate to the officials what our line of questioning will be. Fundamentally, it will be on the remedial powers, not whether the balance on legal aid has been rightly struck.

Gordon Jackson: Will that be next Tuesday morning?

The Convener: Yes.

Gordon Jackson: I may have mentioned that I have a fortnightly clash between the Justice 1 Committee and this committee—I am not sure whether there is a clash next Tuesday.

The Convener: I am afraid that all that we can do is to sort out the agenda, according to the time scale. We are duty-bound to meet next week, as we have two sets of witnesses coming and other matters on the agenda. If it is of any assistance, I am sure that Alasdair Rankin can discuss whether we make the issue the first item on the agenda or the last.

Budget (Scotland) (No 2) Bill

The Convener: Unless anybody is otherwise minded, no matters arise on the item.

Sexual Offences (Amendment) Act 2000 (Commencement No 2) (Scotland) Order 2000 (SSI 2000/452)

The Convener: We have on-going correspondence with the Executive on our concerns. Does anybody wish to comment?

Gordon Jackson: It is rather amusing that, when we begin saying that the Executive might be right, it responds that it might be wrong. Until then, it was stalemate; the minute that we tell it that its

position is quite good, it says, "Maybe we're wrong—we'll go and look at it again." That may be a tactical method of getting through such matters.

The Convener: We can welcome that development and allow a report to be made to the Parliament.

Local Government Finance (Scotland) Order 2001

The Convener: Witnesses were available for the item, but we have dispensed with them. For the record, we thank them for having taken the trouble to come. Unless anybody is otherwise minded, no points arise on the item.

Budget (Scotland) Act 2000 Amendment (No 2) Order 2001/Draft

The Convener: Similarly, witnesses were due to attend for the item. Again, no points arise, so we extend our thanks to them.

Special Grant Report No 1 Special Grant for Scotland Asylum Seeker Assistance: Report by the Scottish Ministers (SE 2001/60)

Special Grant Report No 2 Special Grant for Scotland Kosovan Evacuees: Report by the Scottish Ministers (SE 2001/61)

Smoke Control Areas (Exempt Fireplaces) Scotland Order 2001 (SSI 2001/16)

The Convener: No points arise on the instruments.

11:35

Meeting continued in private until 11:39.

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