

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 30 October 2001
(*Morning*)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

29th Meeting 2001, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
Colin Campbell (West of Scotland) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Gordon Jackson (Glasgow Govan) (Lab)
*Bristow Muldoon (Livingston) (Lab)

*attended

WITNESSES

Gery McLaughlin (Scottish Executive Health Department)
Mark Richards (Office of the Solicitor to the Scottish Executive)
Peter Stapleton (Scottish Executive Health Department)
Thea Teale (Scottish Executive Health Department)

CLERK

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 30 October 2001

(Morning)

[THE CONVENER *opened the meeting at 11:25*]

Delegated Powers Scrutiny

Community Care and Health (Scotland) Bill

The Convener (Ms Margo MacDonald): Good morning. I welcome everyone to the 29th meeting of the Subordinate Legislation Committee in 2001. The first item on the agenda is evidence from the Community Care and Health (Scotland) Bill team. I apologise for the fact that I have lost my voice.

The normal procedure is for witnesses to introduce themselves and, if they wish, to make an initial statement, after which the committee questions them. If witnesses would prefer to move straight to questions, that would be fine too. Can we hear who is who, please?

Thea Teale (Scottish Executive Health Department): Good morning. I am Thea Teale, the head of the community care division of the Scottish Executive's health department. I am responsible for general community care policy, including the issues that are addressed in the Community Care and Health (Scotland) Bill. On my left is Mark Richards, our solicitor, who has been instructing our draftsmen on the bill. On my right is Gery McLaughlin, our bill team leader, who is charged with ensuring that the bill is correct. On his right is Peter Stapleton, a member of the bill team who has knowledge of some of the specific issues that you have asked about.

The bill addresses several key issues. The first is the provision of powers to follow up the recommendations of the care development group on the provision of free nursing and personal care for older people. Ministers have committed themselves to accepting the recommendations of that group and to putting into legislation such powers as are needed to implement those recommendations. There are also sections concerning joint working between local authorities and the national health service, following through a commitment made in October 2000 by Susan Deacon, the Minister for Health and Community Care, to the establishment of closer links, joint working and pooled budgets between local authorities and the NHS.

The sections concerning carers are the product of consultation on the proposals of the carers legislation working group. That independent group was chaired by the Executive and considered carers' issues throughout Scotland. The bill also contains provisions to extend the possibility of direct payments in relation to community care services, which was another commitment made by Scottish Executive ministers in 2000. This is the first opportunity that we have had to legislate on those issues.

The final part of the bill concerns health board lists. It contains provisions to tighten up the listing of general practitioners in the health service, mainly as a result of the difficulties that arose from the Harold Shipman case. It was found that the registration of non-principal GPs was not as tight as it might be and the provisions in the bill are intended to provide additional lists of non-principal GPs.

The bill follows through commitments made by Scottish Executive ministers since they came to power in 1999. I invite Gery McLaughlin to address the specific questions that the committee raised regarding powers in the bill.

11:30

Gery McLaughlin (Scottish Executive Health Department): In your letter, you said that you had specific concerns about specific sections. Does the committee want to expand on those, in case our answers do not address members' specific points?

The Convener: As we said in our letter, the committee feels that the width of the delegated powers is surprising and that no specific explanation is given of the way in which they are to be exercised. The committee has questions on specific aspects of the bill, but that is our general concern.

Bristow Muldoon (Livingston) (Lab): One of the primary issues that arose concerned the section that mentions definitions of social care and accommodation that is chargeable. Some members of the committee felt that either subordinate legislation should be introduced by the affirmative procedure all the time, or the first such instrument in that section should be introduced by the affirmative procedure, with any subsequent amendments introduced by the negative procedure, because of the importance of the definitions that would be contained in such regulations.

The Convener: There is a choice. If definitions are going to be made by regulation rather than appear in the bill, then perhaps, as Bristow Muldoon says, a belt-and-braces method would be better.

Gery McLaughlin: The regulation-making power in sections 1 and 2 will allow the Executive to deliver the commitment made to free personal and nursing care. The bill must be read in the context of the care development group's report. The Executive has said that it will implement that report and have regard to its conclusions in utilising sections 1 and 2. I note the point that has been made about the affirmative procedure, but at the moment the bill provides for the negative procedure.

Shall I say something about section 14 as well?

The Convener: Is the committee happy that the bill provides for regulations to be made only by negative resolution?

Bristow Muldoon: Can we ask whether the Executive envisages any difficulty in the provisions in sections 1 and 2 allowing regulations to be made subject to the affirmative procedure, and, if not, whether it would consider a subsequent amendment to the bill?

Gery McLaughlin: That question should be put to ministers rather than officials. We can note your suggestion and inform ministers of the committee's view; but the answer to that question is a matter for ministers.

Bristow Muldoon: I would not anticipate any delay or additional work in the introduction of statutory instruments as a result of the Executive's accepting that suggestion. Would you envisage any technical difficulties?

Gery McLaughlin: Technical questions are a matter mainly for lawyers. My understanding is that the procedure would be different and might take longer to complete, and that it could take longer to get regulations approved by the affirmative rather than the negative procedure. That is not in itself a problem, but subjecting regulations to the affirmative procedure may make it more difficult for the Executive to deliver on its commitment to free personal care by April 2002. We have not thought about that, so I cannot give you a precise answer. I would not want to characterise the affirmative procedure as a problem.

Mark Richards (Office of the Solicitor to the Scottish Executive): It is a question of timing and whether the affirmative procedure would alter the timing. It may not, but it would need to be considered. As Gery McLaughlin has said, it is a matter for ministers to decide whether that would be a way forward. The committee's points will be taken on board and can be addressed by ministers.

The Convener: The committee, from its perspective, must be concerned about parliamentary time. Although the affirmative

procedure takes up parliamentary time, if it is considered of sufficient importance, that should not affect the implementation of the Executive's measures. However, as you rightly say, it is a matter for the committee and we can say what we think.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): The committee is concerned about the principle of giving ministers considerable powers. We are not criticising the bill specifically, although that is obviously what we are discussing today. We are saying that when those powers are open-ended we need some guidance—if that is not in the bill—about what the territory is and how it is going to be approached.

In other cases we have asked for a list of things to be done first-off as positive action. We do not want to hinder the Executive's flexibility in making sensitive and difficult choices, but the principle is that we ought to see as much as we can about where the Executive is going before we allow the powers to be used without further comment. My comments are a wee flag-up. When the bill comes before the Parliament, something that the minister or other members say in the debate could contribute to our comfort about allowing those powers to be used without more scrutiny.

Thea Teale: We have undertaken to the Health and Community Care Committee that the draft regulations will be available before the end of stage 2 of the bill so that the committee will be able to examine the detail of the draft regulations before the bill completes its passage.

The Convener: You read my mind. That was my next question, because I know that promises were made. Will that happen before the end of stage 2?

Thea Teale: Yes.

Ian Jenkins: Do you realise that we consider the delegated powers now unless there is new subordinate legislation? We would come back to those powers only if there was new subordinate legislation.

Thea Teale: I was trying to reassure the committee that the Parliament would have an opportunity to examine the content of the regulations that are provided for in the bill before the passage of the bill is complete.

Gery McLaughlin: The committee is really talking about the context in which the Executive will use the delegated powers. There is a fair amount about that in the policy memorandum, which is one of the accompanying documents to the bill. The memorandum states that the section 1 and 2 delegated powers are used will be used to help to implement free personal care.

As I said, there is a commitment over and above

that to use the powers to implement the conclusions of the care development group. Considering the delegated powers in context provides the kind of reassurances that the committee seeks.

Ian Jenkins: The fact that you are here to tell us that is also good. I appreciate that and thank you.

The Convener: Is there anything else that members want to ask?

I want to ask about section 5(1)(b). Will the arrangements that a local authority makes under that section need to comply with the regulations under section 5(1)(a)? If they do not, what effect will the Social Work (Scotland) Act 1968 have on such arrangements?

Gery McLaughlin: That is essentially a legal question, which I will ask my legal colleague to answer.

Mark Richards: Regulations that are made apply only to section 5(1)(a), not to section 5(1)(b). Will you clarify what your concern about the effect of the Social Work (Scotland) Act 1968 is?

The Convener: Does section 5(1) have any European Union implications?

Gery McLaughlin: We have moved back on to policy. I ask Peter Stapleton to explain the background to the section.

The Convener: The section is intriguing.

Peter Stapleton (Scottish Executive Health Department): The policy background to the section is that cross-border placements take place within the United Kingdom. Scottish local authorities place people in other parts of the UK, but with some difficulty. The lack of a clear legal basis for that creates administrative barriers to local authorities doing what the Executive believes that they should properly be able to do—enable people to live close to their relatives.

The purpose of section 5(1) of the bill is to put current practice on a secure legal footing and to remove the barriers to choice that exist within the UK. It does not cover placements outside the UK because that was not seen to be an issue in the same way.

The Convener: The bill specifies the Isle of Man—who would want to go there? It also specifies the Channel Islands, which are a bit better. What about the south of Spain? If we are talking about social policy and moving people around we have to start taking the European dimension into account. We were intrigued when we read that people could be moved to or parked in the Isle of Man.

Gordon Jackson (Glasgow Govan) (Lab): You could go to the south of Spain.

The Convener: I am quite serious, Gordon.

Gery McLaughlin: Current arrangements and policy are such that social care is provided within the UK. If people wish to make arrangements to be in the south of Spain, that is up to them.

The Convener: Is there a parallel with what is happening in health services as regards obtaining treatment when it is needed and where it can be provided?

Gery McLaughlin: We are aware of the European court's decisions on health services. The European court has not decided whether those apply to the bill. We are in touch with colleagues who are dealing with that and with Whitehall. The provisions of the bill relate solely to the UK.

The Convener: You will let us know if we can go somewhere really nice.

Murdo Fraser (Mid Scotland and Fife) (Con): I am not sure that I follow the provisions in section 5(1)(a) and section 5(1)(b). If, under section 5(1)(b) ministers direct local authorities to make arrangements, do local authorities need to follow the regulations that ministers make under section 5(1)(a)? That is not specifically stated.

Mark Richards: The answer to that is no. Under section 5(1)(a) the regulations set the framework within which local authorities' discretion may be exercised. When Scottish ministers direct local authorities to make arrangements, that is in accordance with the direction of Scottish ministers—not in accordance with the regulations. Although the direction will take account of the regulations that are made by Scottish ministers, local authorities will not be bound by those regulations under section 5(1)(b).

The Convener: What happens to the modification of the Social Work (Scotland) Act 1968?

Peter Stapleton: Are you talking about the regulations that are made under section 5(2)?

The Convener: Yes.

Peter Stapleton: It is fairly clear from Mark Richards's answer that they do not bite in the case of directions under section 5(1)(b). Again, as Mark was suggesting, regulations are there to set restrictions on local authorities' flexibility under the main provision. The intention is that direction by Scottish ministers would attempt to mirror many of the provisions of the regulations in setting conditions.

The Convener: Would members like to pursue that because I have not got a clue what it means?

Murdo Fraser: It would be better if reference were made in section 5(1)(b) to the regulations

that ministers make. There is no reason why that should not be put in.

Peter Stapleton: There is no technical reason why that should not be in the bill. We can take that back to the Minister for Health and Community Care for consideration if that is the view of the committee.

The Convener: Is that the view of the committee?

Gordon Jackson: I am not sure. I do not understand what the advantage is either way. Maybe that is just me—I am tired.

The Convener: No, I do not understand either.

Gordon Jackson: What would the advantage be of making the regulations bite? I do not know what we have in mind.

Thea Teale: It would mean that the direction that Scottish ministers make would have to be in accordance with the regulations, as opposed to being whatever the ministers decided to direct. If the Parliament has approved the regulations and the regulations bite in section 5(1)(b), they would in some way circumscribe the situations in which Scottish ministers can make directions.

11:45

Gordon Jackson: That tells me what the regulations do. It does not tell me why that is an advantage. For all I know, the ministers might be able to say that there is an advantage in the regulations not biting in section 5(1)(b). I understand what the section would do, but I do not know whether that is better or worse.

The Convener: I do not know whether this will clear things up, but is not there a question about whether it is right to have a regulation enabling a minister to override an act?

Murdo Fraser: By direction.

The Convener: Yes.

Gordon Jackson: I genuinely do not know the answer to that. Once the committee and the minister think about it, it might turn out that there is an advantage in not having section 5(1)(b) circumscribed by other regulations, although it might be that that is entirely appropriate. I am not being critical, but I do not think we have had a clear answer as to why one way is better than the other. The Executive is telling us what the section does, but we understand that. I would like to have a handle on the policy advantage in doing it one way or the other.

The Convener: We are also concerned about setting precedents. There is a question that should not only be answered in terms of the advantages but whether or not—

Gordon Jackson: The reasoning behind it.

The Convener: Yes, the reasoning behind it.

Bristow Muldoon: I am moving away from Gordon's point to the circumstances in which the power would be used. I am looking for clarification, but it seems to me that the power would only be used in extreme circumstances where appropriate care for the individual could not be provided anywhere in Scotland. The power would therefore be used infrequently and only in circumstances where a local authority decides not to resource such a place for financial reasons. It would give Scottish ministers the power to direct the resourcing of such a place. If that is what is intended, it is perfectly fair.

Thea Teale: Yes. It is the kind of situation where a local authority might feel that they have other priorities, which would be detrimental to the position of the individual.

Gordon Jackson: Although regulations are generally a good thing, I fear that if those regulations are brought in, there could be a situation where the local authority wants to do something but is prevented—for whatever reason—by the regulations. It might be a one-off situation and a total impasse, but someone might end up not being cared for. Although I agree that, normally, we should let the Parliament know what is happening, there might be a rare case where the regulations would not be helpful. I am not sure that we want to put a fetter on that rare situation. Someone in the Executive should work out more concrete examples to explain what I am trying to get at. Could the witnesses put some flesh on the bare bones of the section?

Thea Teale: Yes, we will do that.

The Convener: A general comment was made about the bill being skeletal in its presentation and drafting. We are not being awkward; we are just being nosy.

If we have exhausted section 5, we will move on to section 14, which is a variation on the same theme as section 5. The committee wonders whether section 14 allows Scottish ministers to avoid the scrutiny that would be attracted under section 12 of the bill by the device of requiring local authorities and NHS bodies to delegate functions to one another. It might be said that that would deliver the flexibility of service at which we are aiming.

Gery McLaughlin: It is necessary to set section 14 in the context of the other powers in the bill relating to joint working and the Executive's policy on that. The Executive takes the approach of enabling joint working to happen, rather than prescribing what should happen. Existing powers enable local authorities and the NHS to work

together. Sections 10 to 13 provide new additional powers for joint working. That has flowed from the work of the joint future unit and its report on joint working, which said that more powers are needed. The general policy is therefore to enable that joint working to happen.

Ministers have also said that they wish to have a clear enforcement power to make joint working happen in cases where they consider that services are not being properly delivered. In some ways, section 14 is a backstop for all the rest. Ministers want to encourage joint working to develop in line with the needs of particular areas and communities. Section 14 is there so that ministers can enforce joint working where there is a problem. The section is non-specific because it is designed to apply, not just today and tomorrow, but in the future, because joint working is a developing process. Joint working will develop even further with the new powers. We are seeking to provide a power that will apply once those new powers have been taken up. That is why the section is skeletal, as you have said. We must see what the future brings before a decision is taken on how to use those powers.

The Convener: Perhaps we are allowed to be sceptical, because the Scottish ministers would have a wider ability to exercise their powers of direction. If we are talking about joint working, is the balance tilted in favour of the Executive rather than those who deliver the service?

Thea Teale: The provision is subject to consultation with the local authority and the NHS before ministers can take a view on whether they would make a direction. A formal, tripartite process would therefore have to be gone through before a direction was made. That is a safeguard against ministers suddenly deciding to impose a joint working relationship on people. We hope that we never, or rarely, get to the point where a direction has to be made. The fact that there is a possibility for the Executive to start a process of consultation with local authorities and the NHS gives it a locus that it would not otherwise have and enables it to bring both sides together.

Gordon Jackson: I might not be suspicious enough, but it seems all right to me.

Mark Richards: It might be helpful to add that, unlike section 5, any direction given under section 14 will be subject to the regulations that will be made pursuant to section 12. There is a distinction between the two scenarios.

The Convener: That probably covers the points that were raised at last week's meeting.

Gordon Jackson: It might be too late for the committee to do anything about it, but can we get information from the Executive as to how it sees the flesh on the bones of why it would be

advantageous for cross-border circumstances not to be circumscribed by the regulations? It would be nice to know the answer to that.

Thea Teale: We will take that question back to the ministers and ask the Minister for Health and Community Care to write to the committee with that information.

The Convener: We thank you for attending the committee this morning.

Thea Teale: Thank you. I hope your voice returns to normal soon.

The Convener: You are probably the only one.

Now that the witnesses have left us, we can talk about them. Do members want to discuss the evidence that we have just received, and decide on any follow-up questions for the Executive, or do you want to wait until we have received the letter of explanation?

Bristow Muldoon: What is the time scale for submitting our report?

The Convener: I am advised that, as we still have a few opportunities to consider the issue, we are not under any huge pressure.

Gordon Jackson: When I asked for that final piece of information, I did not realise that we had time. I was asking only out of interest, but if we have time—

The Convener: I was going to suggest that we take that course of action. That is the logical sequence.

School Education (Amendment) (Scotland) Bill

The Convener: We have received the Executive's response to our points on the bill. Are members agreed that the use of delegated powers in the bill is acceptable?

Members indicated agreement.

Police and Fire Services (Finance) (Scotland) Bill

The Convener: We raised several points on the bill, the stage 2 and stage 3 consideration of which takes place on Thursday. It has been a bit of a rush job, because the Executive wants to amend provisions for the financing of these services to allow them to carry forward money at the end of the financial year. Are members agreed that the use of delegated powers in the bill is acceptable?

Members indicated agreement.

Executive Responses

Potatoes Originating in Germany (Notification) (Scotland) Order 2001 (SSI 2001/333)

The Convener: We may wish to draw the lead committee's attention to the order. As we discussed last week, a footnote on page 1 contains references to irrelevant amendments of the enactment footnoted. We also found that regulation 2(3) was defectively drafted. However, the Executive has acknowledged the drafting error, which we will draw to the attention of the lead committee. The Executive has also clarified another point that we raised. In general, the Executive agrees with most of the points that we raised and thanks the committee for doing so.

Feeding Stuffs and the Feeding Stuffs (Enforcement) Amendment (Scotland) Regulations 2001 (SSI 2001/334)

12:00

The Convener: Does the committee wish to draw the lead committee's and the Parliament's attention to the defective drafting of regulation 17(h), which has been acknowledged by the Executive? The Executive has also clarified a point that we raised.

Ian Jenkins: The response is helpful and we should draw it to the lead committee's attention.

Members *indicated agreement.*

National Health Service (General Dental Services) (Scotland) Amendment (No 2) Regulations 2001 (SSI 2001/368)

Ian Jenkins: There is a similar problem with these regulations.

The Convener: The committee raised a couple of points with the Executive. Is the committee satisfied with the response? If it is, should we simply draw the lead committee's attention to the defective drafting, as Ian suggests?

Members *indicated agreement.*

Argyll and Clyde Acute Hospitals National Health Service Trust (Establishment) Amendment Order 2001 (SSI 2001/338)

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West Lothian Healthcare National Health Service Trust (Establishment) Amendment Order 2001 (SSI 2001/365)

Yorkhill National Health Service Trust (Establishment) Amendment Order 2001 (SSI 2001/366)

The Convener: It is suggested that we could draw the lead committee's and the Parliament's attention to the orders, which concern the health service. Article 1(2) of each instrument is unnecessary. The Executive has said that another approach could have been taken. The lead committee might want to hear an explanation from the Executive as to why it chose its method of drafting. Is that agreed?

Members *indicated agreement.*

Draft Instruments Subject to Approval

Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2001 (Draft)

The Convener: Would somebody who knows about the order care to say something?

Murdo Fraser: The instrument is acceptable as it stands.

The Convener: No points arise on the instrument—brownie points and gold stars all round.

Small Claims (Scotland) Amendment Order 2001 (Draft)

The Convener: No points arise on the order.

Murdo Fraser: A few points could be raised in an informal letter, but there is nothing of any substance to be raised.

Instruments Subject to Approval

Food Protection (Emergency Prohibitions) (Paralytic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Order 2001 (SSI 2001/387)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 9) (Scotland) Order 2001 (SSI 2001/388)

Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (Orkney) (Scotland) Order 2001 (SSI 2001/391)

The Convener: I will not tell the committee where the paralytic shellfish poisoning is—I will keep members in suspense. No points arise on the orders—lots of sore tummies, but no points.

Instruments Subject to Annulment

Processed Animal Protein (Scotland) Amendment Regulations 2001 (SSI 2001/383)

The Convener: The regulations caused some amusement because, as members will remember, there was a mistake in the drafting. The regulations suggested that feedstuffs for animals should be prepared alongside foodstuffs for human consumption. That mistake has been corrected. However, considering that the regulations concern BSE, they seem to have taken a long time to come back to us. As the matter is serious, should we send a nice letter to ask the Executive to explain the delay?

Ian Jenkins: I have a nice stylistic point. The regulations state that premises prepare food, but that is not normally the case; people in the premises prepare it and the food is prepared in the premises.

The Convener: That is a reasonable point for an English teacher to make.

Abolition of the Intervention Board for Agricultural Produce (Consequential Provisions) (Scotland) Regulations 2001 (SSI 2001/390)

The Convener: The regulations deal with a cross-border agency—the Intervention Board for Agricultural Produce. Westminster will literally dispose of the matter, because the board is going to come to an end. Once again, there is a question as to why section 2(2) of the European Communities Act 1972 will be used, rather than domestic legislation.

The regulations allow Scottish ministers to make arrangements for the board's functions to be carried out by the Secretary of State for Environment, Food and Rural Affairs. Members might think that that is contrary to section 93 of the Scotland Act 1998, which makes specific provision for such arrangements. This is not the first or the last time that cross-border agencies will have to be changed so we should ask the Executive why it has chosen to take this route instead of the route advocated by the Scotland Act 1998. Do members want to comment?

Bristow Muldoon: The issue is a bulwark against the slippery road to independence.

The Convener: In that case, we should forget it. No, that is a bad idea—please forget that remark.

Bill Butler: On that basis, we should definitely ask the question.

The Convener: As everyone is talking about Sewel motions, it is a good idea to clear up why the Executive chose that route.

There are a couple of minor points on the regulations—I bet that that members do not know that there is a Home-Grown Cereals Authority. The way in which the regulations are drafted is not as precise as we would have wanted. For the purpose of the Scotland Act 1998, that authority is a cross-border public authority for which the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999 (SI 1999/1747) makes specific provision. The imprecise drafting is not a major problem, but it is worth while raising it with the Executive. We will ask for an explanation by letter.

Legal Aid (Employment of Solicitors) (Scotland) Regulations 2001 (SSI 2001/392)

The Convener: No points arise on the regulations.

Instruments Not Laid Before the Parliament

Legal Aid (Scotland) Act 1986 (Commencement No 4) Order 2001 (SSI 2001/393)

The Convener: We can be nice to the Executive and say nothing or we can say informally that the order contains unnecessary detail. As no members feel niggly, we will say nothing. That concludes the meeting.

Meeting closed at 12:09.

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