

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 15 January 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting 2002, 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

CLERK

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERK

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 15 January 2002

(Morning)

[THE CONVENER *opened the meeting at 11:27*]

Delegated Powers Scrutiny

Education (Disability Strategies and Pupils' Records) (Scotland) Bill

The Convener (Ms Margo MacDonald): Good morning and welcome to the second meeting in this year of our Lord 2002 of the Subordinate Legislation Committee.

The first item on the agenda is delegated powers scrutiny. We have discussed aspects of the bill, formally and informally. Does anyone have anything to say on the regulations for accessibility strategies? Questions were raised about whether the regulations are prescriptive enough or whether they are drafted in the interest of greater flexibility. As a committee, we see the sense of the latter, but the regulations have not been spelled out enough.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): The bill is concerned with strategies for dealing with disabled pupils. The Executive might want to keep the regulation-making powers and their definitions reasonably wide, to allow it to consider individual cases and to respond to them in regulations. A balance must be struck between being prescriptive by defining tightly terms such as "education" and "an associated service" and restricting good practice on the ground. Therefore, I am inclined to think that it is reasonable for the definitions to be fairly wide and then to have regulations that are more specific.

People being what they are, and with the variety of situations that come up in these matters, one would not want the definitions stuck forever in primary legislation. That would mean that particular circumstances could not be dealt with because the primary legislation had too tight a definition. The issue is about achieving a balance. I would be inclined to allow the Executive the flexibility not to define terms too fully in the bill.

The Convener: I agree, but a right is involved as well.

Ian Jenkins: I accept that.

The Convener: As a committee, we must be careful about the rights of vulnerable groups. The Executive said that we will see the draft regulations. There will also be guidance for local authorities.

I have a question for Bristow Muldoon. We talked a lot about this matter before he got here this morning. Has the Executive struck the right balance in not defining this area more closely in the bill and leaving it as flexible as possible? The Executive has done that because the accessibility strategy is to be introduced in a rolling way as and when—I presume—local authorities change their provision of service and facilities to facilitate mainstream education for children with disabilities.

11:30

Bristow Muldoon (Livingston) (Lab): To be honest, I have not gone through the bill in detail, so I do not know that I am in a position to give you strong guidance about whether I feel that that balance is appropriate. Perhaps we should draw the issue to the attention of the Education, Culture and Sport Committee, which will consider the bill in detail. That committee will be able to assess whether it feels that the particular types of provision should be dealt with under delegated authority as opposed to being in the bill.

The Convener: One cannot help agreeing with what Ian Jenkins said. The European convention on human rights also comes into this, so the belt and braces might be already there. It might not be necessary to have the core definition included in the bill—which is what we want. However, I think that it is worth while mentioning to the Executive that we think that, as a general point of principle, it is not a good idea to leave core definitions out of bills.

Mr Jackson is looking troubled. Are you not bothered?

Gordon Jackson (Glasgow Govan) (Lab): No, not at all.

The Convener: The clerk advises me that we could write to the Executive and ask it why it has chosen this method. I think that the Executive will tell us that it did so to allow for maximum flexibility. We understand that. However, I think that we can write to the Executive and ask that question. Do members agree?

Members indicated agreement.

The Convener: Fine. That takes us on to the regulations concerning pupils' records. Does any member want to raise anything on this matter? The Executive has said that there will be a public consultation on the draft regulations, but I do not know where, when, how, why or with whom.

Colin Campbell (West of Scotland) (SNP): I worry a little about the suggestion that there will be a charge for supplying pupil records to parents who request them. Whether that is to cover necessary costs, whether those costs will be consistent throughout the country, or whether parents should be charged at all is probably not for us to decide.

The Convener: No. That is one of the matters that we can mention to the lead committee.

Gordon Jackson: As Colin Campbell hinted, that is the substantive principle of the bill, rather than one of the technicalities.

The Convener: Do members want to mention the cost of receiving records? According to the regulations, the cost to the parent or whoever should not exceed the cost of producing that record—which will vary from authority to authority. The regulations do not say whether that is an individual charge. It would only really make sense if it were that. Do members want to mention the money?

Ian Jenkins: We must be careful that we do not deal with policy, but we can point out to the lead committee, of which I am a member, that the bill is not clear about the principle of charging. We are entitled to say that the bill is not clear and that the lead committee should consider that issue further. We can present that sort of argument.

The Convener: That is fine. The other question that we could put in writing to the Executive is whether it has a charging regime. We do not take issue with the regulations, which are flexible. However, we are asking how the Executive thinks that they will work.

Ian Jenkins: Yes.

The Convener: The other issue is the business that I raised about consultation. Should there be a formal requirement to consult? If so, should that appear in the bill?

Ian Jenkins: Does not it say in the legal brief that a consultation is taking place anyway?

The Convener: No one seems to be particularly interested.

Gordon Jackson: My personal view is that, as a general rule, where consultation is a good thing and where a Government says, "We intend to consult", I tend to want that intention to be specified in the legislation. As I have said before, Governments come and go, but bills sometimes go on forever. If consultation is the right thing to do, I can never understand what harm it would do to specify in a bill that the Government of the day shall consult before it does something. That would cover the situation when, 20 years down the road, someone says, "Ach—Ah'm no bothered." I have

never understood why, if everyone thinks that a requirement to consult is a good thing, that requirement should not be specified in the statute.

The Convener: That means a letter to the Executive and to the lead committee.

Executive Responses

Local Government Pension Scheme (Scotland) Amendment Regulations 2001 (SSI 2001/460)

The Convener: We come to another lulu: the Executive's response to our questions on the regulations, which concern the pension rights of people who were transferred from Scottish Homes to the Scottish Executive. We are not arguing that those staff should not have been accommodated—of course that should have happened—but there may be a doubt over whether the Executive has used the correct powers. I cannot recollect the specific power under the Scotland Act 1998 that would allow the Executive to issue an appropriate order, but it has interpreted the legislation as allowing it to do so. However, the area of civil service pensions is wholly reserved, so the question is whether the Executive can do what it has done.

Murdo Fraser (Mid Scotland and Fife) (Con): It would be fair to say that our legal adviser is still concerned about the vires of the regulations. Although we have already raised the issue and have received a response from the Executive, we need to put our concerns on record.

The Convener: We are out of time, because the 20 days will expire two weeks from today. In any event, we do not have time to revisit the issue properly. We must put on record at least our query whether the matter has been dealt with correctly, because the regulations deal with public servants' pensions and therefore must be transparently and absolutely right. For that reason alone, we should say to the Executive that its responses have not absolutely convinced us that it has dealt with the matter in the best way.

Colin Campbell: This is a constitutional grey area.

The Convener: Yes.

Bill Butler (Glasgow Anniesland) (Lab): It is a possible constitutional grey area.

The Convener: No—it really is a difficult area.

Colin Campbell: I am not stirring it.

The Convener: I am not going for anyone, but there are difficulties with lots of issues in these regulations. There are always ways of getting round those difficulties and we are wondering whether the Executive has done so in the best possible way.

Bill Butler: Okay.

Bristow Muldoon: We should also note that, from our legal briefing, it would seem that the proposals may benefit the people affected. The

Executive is not eroding their pension rights and the intention of the regulations is worthy. The only question that has been raised is whether the regulations are legally watertight and, obviously, the Executive believes that they are. We note that the intention is honourable and that the Executive believes that it has the power to allow certain people to remain members of the local government pension scheme. The Executive is not transferring civil servants into that scheme—it is allowing people who were previously employed by Scottish Homes to remain in that scheme.

The Convener: That is not in our remit.

The knock-on effect of the regulations is that two lots of civil servants are now working for the Scottish Executive, and the interests of some of them have been protected by the transfer, while others were not lucky enough to work for Scottish Homes and do not have the same level of provision.

Bristow Muldoon: In any other circumstance in which members of staff transfer with higher pension rights, one would not expect—and the Parliament would not want—an erosion of their rights.

The Convener: I am not arguing for a levelling down of pension rights.

Colin Campbell: We are all perfectly agreed that we want the best for the employees. All that we are saying is that there appears to be a mildly constitutional grey area that bothers our legal adviser. If I were to raise a constitutional issue, I would hit members with it head on—I would not foulder about with it.

Gordon Jackson: All that we can do is to ensure that the Executive is alive to the problem that has been suggested, although it might say, "Yes—thanks very much. We have thought about and are alive to it"—

Colin Campbell: But, "and we are ignoring you."

Gordon Jackson: No—"and we think that, for the following reasons, technically we are okay." To be frank, half the time it is beyond us to know whether, technically, the Executive is right or not. I defy any member who says that they are an expert on such statutory interpretation—I certainly know that I am not. All that we can do is to point out the problem and acknowledge that the Executive has made up its mind. If someone challenges the regulations, the decision will be made in another place. I do not think that we have the competence to turn round and say, "Well, we've made up our minds—you're wrong." Perhaps we could do so sometimes, but certainly not in a situation such as this one. *[Interruption.]* What is wrong?

The Convener: Nothing—we are absolutely amazed at how eruditely you put that point.

Gordon Jackson: I am amazed that you are amazed.

The Convener: This is not the first time that we have raised a query over how something has been done, and it will not be the last time. In fact, it is probably the committee's job to point out that this is another of those times.

**Housing (Scotland) Act 2001
(Commencement No 3, Transitional
Provisions and Savings) Order 2001
(SSI 2001/467)**

The Convener: Do we wish to draw the order to the attention of Parliament on the ground that it does not follow good drafting practice? The explanatory note that accompanies the order is not adequate.

Members *indicated agreement.*

The Convener: Good. People should be able to read the explanatory note.

**Ethical Standards in Public Life etc
(Scotland) Act 2000 (Commencement No 2
and Transitional Provisions) Order 2001
(SSI 2001/474)**

The Convener: We need raise no points on the order as the Executive's response to our inquiries was helpful. Do members agree?

Members *indicated agreement.*

Instruments Subject to Annulment

**Panels of Persons to Safeguard the
Interests of Children (Scotland)
Regulations 2001 (SSI 2001/476)**

**Curators ad Litem and Reporting Officers
(Panels) (Scotland) Regulations 2001
(SSI 2001/477)**

**Children's Hearings (Legal
Representation) (Scotland) Rules 2001
(SSI 2001/478)**

The Convener: We now come to instruments that are subject to annulment. Three regulations were deferred from our meeting last week, in addition to a commencement order that we will come to later. We received the Executive's response, but there are still points that concern us. At the moment, we will not bother about the minor typographical and grammatical points. However, there is a series of important points. Do members wish to say anything?

11:45

Murdo Fraser: I will assist.

The Convener: Yes please.

Murdo Fraser: I was afraid that you would say that.

The basis of the Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001 (SSI 2001/476) and the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001/477) is the same, so the same points apply to both instruments. We raised a number of points by letter, but the Executive's response does not deal adequately with some of them. The regulations contain some typos, but there are more significant points, which I will run through briefly. Regulation 3(2) of both instruments creates confusion about the number of panels that there will be in each area.

The Convener: The Executive response states that regulation 3(2)

"allows for more than one panel for each area to be established and this is intentional."

Murdo Fraser: That is not clear, because if more than one panel is established in each area, the present panels will have to be reconstituted.

The Convener: Yes. The Executive stated that it does not intend to do that. We are not accusing anyone—we understand the intentions, but we think that they are not spelled out properly.

Another point is whether, in addition to judicial review, there is a right of appeal against a local authority's decision under regulation 7(3) of both instruments. We are not sure about that, but that is important.

The regulations that are revoked by regulation 11(1) of both instruments were made under section 103 of the Children Act 1975, which has not yet been repealed, although it will be. The regulations are not correct at present, but the situation will change, so we do not have to concern ourselves with that point.

There is an issue about the payment of legal representatives. In both instruments, regulation 11(2) appears to exclude persons who are appointed under the old regulations from acting under the Children (Scotland) Act 1995 and from payment under regulation 10(2). Is that the Executive's intention?

Bill Butler: Panel members and safeguarders are allowed fees and allowances, but regulation 10(2) seems not to allow fees and allowances for legal representatives. That seems doubtful. We should sort out those two groupings.

The Convener: Another point that can be fixed is that the Curators ad Litem and Reporting Officers (Panels) (Scotland) Regulations 2001 (SSI 2001/477) has not been drafted in gender neutral terms.

I am advised that the issues that we have raised must go into the committee's report because we do not have time to write to the Executive. The points concern important aspects of the legislation. They will appear in the report, because we cannot do anything else. There are many typos in the regulations, so we should include in our report the general observation that, for such definitive legislation, the drafting is not as tight as it might have been.

Ian Jenkins: There is also an issue about the choice of panel members. One would expect some members of the panel to have legal qualifications, and although that might be what happens in common practice, it is not stipulated in the regulations. That matter ties in with representing children in other ways. If panel members are to represent children, we would want some of them to have legal qualifications. That hole in the regulations should be drawn to the Executive's attention. Again, I imagine that it is not the intention to leave a loophole. Perhaps it is okay to trust that people will have the good sense to ensure that some panel members have legal qualifications. However, we ought to draw the gap to the attention of the Executive.

The Convener: Is it a lacuna?

Ian Jenkins: Absolutely.

Gordon Jackson: Lily of Lacuna.

Colin Campbell: The convener is too young to remember that.

The Convener: Do members know the second verse?

Ian Jenkins: Behave.

The Convener: Do members want to mention anything else about the regulations that should appear in our report? Regulation 11 of both instruments might raise vires issues.

Ian Jenkins: There are many technicalities; it is difficult to discuss them without confusing ourselves and anyone who is listening. We should ask the clerks to use the legal brief as the basis for the points in the report.

The Convener: The points that we have discussed—formally and informally—will be incorporated in the committee's report.

I am amazed that so many points are not quite right. For example, it is possible that the wrong powers might have been cited in the Children's Hearings (Legal Representation) (Scotland) Rules 2001 (SSI 2001/478). There seem to be many serious mistakes in the drafting of all three instruments. Do members agree to include all those points in the report?

Members indicated agreement.

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No 3) Amendment (No 2) Regulations 2001 (SSI 2001/483)

The Convener: The regulations contain some minor typos. Do members agree to send an informal note to the Executive?

Members indicated agreement.

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2001 (SI/2001/3917)

The Convener: The order is going to be revoked, so we need not concern ourselves with it.

BSE Monitoring (Scotland) Amendment Regulations 2002 (SSI 2002/1)

The Convener: No points arise on the regulations, other than to thank the Executive for the helpful explanatory note.

Instruments Not Laid Before the Parliament

Children (Scotland) Act 1995 (Commencement No 4) Order 2001 (SSI 2001/475)

The Convener: No points arise on the order because another commencement order will be made to correct a defect that the committee pointed out to the Executive.

Act of Adjournal (Criminal Procedural Rules Amendment) (Convention Rights (Compliance) (Scotland) Act 2001) (SSI 2001/479)

Police Act 1997 (Commencement No 8) (Scotland) Order 2001 (SSI 2001/482)

The Convener: No points arise on the instruments.

Act of Adjournal (Criminal Procedural Rules Amendment No 2) (Terrorism Act 2000 and Anti-Terrorism, Crime and Security Act 2001) 2001 (SSI 2001/486)

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Terrorism Act 2000) 2001 (SSI 2001/494)

The Convener: I still do not know what an act of sederunt is—I really must find out about them. Gordon, do you know about acts of sederunt? I know that we are talking about the Terrorism Act 2000. [*Interruption.*]

I am sorry—I seem to have omitted to mention the act of adjournal. No, I think that I did mention it. Did I not?

Colin Campbell: The legal secretary of the Lord President has written us a letter, correcting a mistake in the act of adjournal.

The Convener: Yes, the mistake has been corrected. I forgot to mention that because I was so excited by the act of sederunt, on which no points have been noted.

Does the clerk wish to give the committee any information about next week's meeting?

Alasdair Rankin (Clerk): It is likely that there will be three bills on next week's agenda, including the Land Reform (Scotland) Bill, which has many subordinate legislation provisions. As a result, it will be a full meeting with a full legal briefing beforehand.

Murdo Fraser: There goes the legal adviser's weekend.

The Convener: And we will start on time next week. Thank you, everyone.

Meeting closed at 11:57.

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