

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 5 February 2002
(Morning)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE

5th 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

WITNESS

Gery McLaughlin (Scottish Executive Health Department)

CLERK TO THE COMMITTEE

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton

Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 5 February 2002

(Morning)

[THE CONVENER *opened the meeting at 11:20*]

Delegated Powers Scrutiny

The Convener (Ms Margo MacDonald): Welcome to the fifth meeting in 2002 of the Subordinate Legislation Committee. We have two bills to consider this morning.

Community Care and Health (Scotland) Bill (as amended at Stage 2)

The Convener: First, we are considering the Community Care and Health (Scotland) Bill at stage 2. We raised with the Executive our serious concerns about the bill at stage 1, in particular sections 1 and 2 of the bill, which provide flexible powers to regulate charging for social care. We were concerned about the scope of those powers and about definitions that can be changed.

I welcome three members of the bill team to the meeting. I ask our guests to turn their name-plates round so that we know who they are.

There is pressure on everyone concerned with the bill to move to stage 3, as that will be discussed in Parliament tomorrow. Therefore, the committee will probably not question you much, but we might impress upon you our concern that the amendments that have come back to us do not meet our concerns about the wide scope of the powers that sections 1 and 2 confer, or about how definitions can be changed.

We realise that there is great pressure of time, so we thought it fair that we should give you as much notice as possible of our concerns. Is there anything that you want to say to us?

Gordon Jackson (Glasgow Govan) (Lab): I take it that all amendments have been lodged for stage 3 and that we have passed the stage of changing the bill?

The Convener: Yes.

Gery McLaughlin (Scottish Executive Health Department): The deadline for amendments has passed.

Gordon Jackson: That is all right.

Gery McLaughlin: I believe, however, that there is still scope for manuscript amendments because of the changes that were made to standing orders last Thursday.

The Convener: Is there anything that you want to tell the committee?

Gery McLaughlin: We understood the committee's points about the scope of the powers. We tried to explain why the scope was so wide. Since we gave our earlier evidence to the committee, the care development group's report has been examined and the Health and Community Care Committee's stage 1 report asked us to lodge amendments to the bill that would define more precisely what free personal care means. We lodged amendments at stage 2 to make the broader powers in the bill more specific, and introduced the new parts of section 1 that define the care that will not be charged for, which is personal care, personal support, nursing care and the items listed in the schedule.

The Executive lodged those amendments, which narrowed the scope of the bill, on the basis of the Health and Community Care Committee's stage 1 report—we responded to the points that the committee raised during its consideration of the bill.

The Convener: We appreciate that some effort has been made to address the comments and objections raised by the Health and Community Care Committee and by the Subordinate Legislation Committee. However, as you said, very little can be done now—the substance of sections 1 and 2 cannot be changed. The provisions do not appear to be clear.

There was another issue that we wanted to raise. The Executive has issued sample regulations, which are rather basic. We understand that they are samples and that they will be reconsidered. However, we would prefer them to be more defined.

Gery McLaughlin: The regulations were provided to the Health and Community Care Committee during stage 2 simply to give an indication of how the Executive would use the regulation-making power to implement the conclusions of the care development group. The figures of £145 and £65, which relate to free personal and nursing care, and the qualification that free personal care should be available to those over 65 years old are in line with the conclusions of the care development group, which ministers are committed to implementing. The regulations were not intended to be fully drafted—in a technical, legal sense—but were drawn up to flesh out the bare bones of the bill and to indicate how the regulation-making power would be used to deliver the policy agreed by ministers.

Colin Campbell (West of Scotland) (SNP): Does the figure of £145 relate to an amount of money per year or per month?

Gery McLaughlin: It is intended to be per week.

The Convener: I know that it is nit-picking, but we need to know what exactly that refers to.

There are no other points that we want to raise with the witnesses at this late stage.

Gery McLaughlin: Are there any specific points to which the committee would like a formal response in writing? If there are, we could respond either this afternoon or tomorrow morning, so that the Executive's responses to any points raised will be available to members before the debate on the bill.

The Convener: Yes. That seems reasonable, given that the debate is to be held tomorrow. Perhaps you could respond to the point about the scope of the powers.

Gery McLaughlin: Perhaps I can speak to the clerks afterwards to agree what question about the scope you would like us to answer.

The Convener: It is so late in the game that I would not want to say that we want answers to A, B, C and D—that seems unreasonable. If you speak to the clerk afterwards, that should be okay.

Gery McLaughlin: I have it in mind that other members might find it helpful to have something in writing from the Executive about the points that the committee has raised.

The Convener: Thank you for that offer.

The Executive has taken note of many of the points raised by the committee and we should record our appreciation of that.

There is a problem with the definition of "accommodation". When we considered the Marriage (Scotland) Bill there was a similar issue in respect of the definition of "a place". The key definitions in the bill are to be consigned to subordinate legislation, subject to the affirmative procedure. I feel that I am on a roundabout here—we keep saying the same things.

11:30

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Sometimes we put it more strongly. It is a principle that we must explore every time it comes up. A similar problem arises in respect of the Protection of Wild Mammals (Scotland) Bill, which is the next item for consideration.

Colin Campbell: It is a pity that the procedure is so compressed—we are considering this today, but stage 3 of the bill is tomorrow. That makes it

hard for the people involved.

Bristow Muldoon (Livingston) (Lab): I recognise some of those points, but I echo the convener's initial comment that the Executive has gone some way to addressing the concerns of the Subordinate Legislation Committee and the Health and Community Care Committee. We should welcome the shift towards the affirmative procedure in particular.

The Convener: Yes, that is true.

Protection of Wild Mammals (Scotland) Bill (as amended at Stage 2)

The Convener: Now for today's doozie: the Protection of Wild Mammals (Scotland) Bill. I am sure that I am not the only member of the committee who, having read the bill, is confused about what offence the bill is concerned with—it seems to be full of get-out clauses and contradictions. It may be that I have misread it, but I suspect not.

The purpose of our consideration of the bill is to consider the amendments that have been lodged. Members have copies of the written explanations of the amendments from David Mundell, Fergus Ewing and Murray Tosh.

Ian Jenkins: We are considering the amendments only because they relate to subordinate legislation.

The Convener: Yes.

Bristow Muldoon: Are the members who lodged the amendments attending today's meeting?

The Convener: No. That is why they have provided written explanations. I am very pleased that they have provided those explanations, because that will allow us to concentrate on the subordinate legislation elements. The bill itself is a distraction.

Colin Campbell: Spoken as a subordinate legislation purist.

The Convener: David Mundell's amendment refers to excepted activities under section 1C. We must set aside any suspicion that there might be other agendas and consider whether the powers that the amendment would confer on ministers would allow the principles of the bill to be undermined. David Mundell's amendment would provide a power for ministers to make an order to add further exceptions. He agrees that such an order should be subject to the super-affirmative procedure, which would mean that there would be consultation and all the rest of it. Do we agree that subordinate legislation is suitable for such purposes?

Murdo Fraser (Mid Scotland and Fife) (Con):

The fact that an order would be subject to the super-affirmative procedure is helpful. If I understand the procedure correctly, there would have to be a debate in Parliament.

The Convener: Yes.

Ian Jenkins: That safeguards against any misuse or misapplication.

The Convener: We also have to consider whether the power is technically perfect or imperfect. If we have decided that subordinate legislation is suitable, do we want to dispose of the question today, or do we want time to think about it and consider it again next week? We have another week with the bill.

Bristow Muldoon: I am concerned that the suggested power would provide the opportunity for some of the principles of the bill to be undermined by subordinate legislation. I suspect that that might be the intention behind the amendment, although we cannot guess that.

The Convener: That is what I am saying.

Bristow Muldoon: The committee does not normally approve of the ability to undermine the principles of a bill by subordinate legislation. We would normally expect there to be further primary legislation to change the principles of a bill that Parliament had passed. We might wish to pursue that with the author of the amendment. It seems to me that this is different from what the committee would normally approve.

The Convener: You are so right, Bristow. Does that mean that we invite David Mundell to come and talk to us about the amendment next week?

Bristow Muldoon: We could do that.

The Convener: Are members so minded?

Colin Campbell: Is that to explore his intent or the legalities of the power?

The Convener: His intent has nothing to do with it.

Colin Campbell: I know, I know.

Bill Butler (Glasgow Anniesland) (Lab): It is merely for elucidation.

The Convener: What a treat we have in store next week. Are you all right with that, Colin?

Colin Campbell: Why not? David Mundell is a nice chap.

Murdo Fraser: I am sure that he will be delighted to return to his old committee.

Ian Jenkins: He enjoyed the committee when he was here. We certainly miss him.

The Convener: Are you not content with inviting

David Mundell to the committee, Ian? The rest of the committee is content.

Ian Jenkins: If the committee believes that that is the right thing to do, that is fine. I do not think that there is any great need for it, but I am happy if the committee is.

The Convener: Everybody else on the committee is happy with that. The clerk will invite David Mundell to come and be questioned on his amendment.

Section 7(1) would be affected by Fergus Ewing's amendment. He wants a further definition of pests. As he pointed out at the relevant committee meeting, had the bill been drafted 100 years ago, mink would not have been included because they had not been introduced to Scotland. Presumably, we have to make allowances for someone introducing the North American gopher. The amendment seems to be sensible. Does anyone disagree?

Bristow Muldoon: The one question that I would raise is that there is only a power for ministers to add species to the list specified in the definition. There is no possibility for ministers to delete species from it. For example, even if one of the species on the list were to become an endangered species, it would, under the bill, still be listed as a pest species.

The Convener: Is not there other legislation that covers that? I think that there is. Sorry, Bristow, good try. Other legislation looks after sick, small furry animals.

Colin Campbell: Six small furry animals?

The Convener: No, sick, small furry animals. Six is too wee a number. Fergus Ewing suggests that the negative procedure should be used to add species to the list without any provision for consultation. Once again, that would change the bill, so perhaps the committee might agree that the negative procedure is not the correct one to use and that the affirmative procedure might be more sensible.

Bill Butler: That would seem very sensible, convener.

Colin Campbell: Do we need the super-affirmative procedure, rather than the affirmative procedure? I am not advocating it; I am just asking.

Murdo Fraser: I think that the affirmative procedure is sufficient.

The Convener: Will we go for the affirmative procedure?

Members indicated agreement.

The Convener: Section 9(2) would be affected by the amendment lodged by Murray Tosh. Once again we must lay aside motivation or inspiration and consider whether the power is a correct use of subordinate legislation. The power would allow ministers to postpone indefinitely the implementation of the legislation, which seems to subvert the whole idea, but I may be wrong.

Bristow Muldoon: I agree with what you said, convener. It is inappropriate to put in place a power by which ministers could indefinitely delay the commencement of a bill, particularly given that the Protection of Wild Mammals (Scotland) Bill is a member's bill. I refer to the precedent set by the Abolition of Poindings and Warrant Sales Act 2001. Ministers have the power to make a commencement order, but there is also a sunset provision in the section, which says that if that power is not exercised by a certain date, the bill will come into force on that date. That was a protection against a move—by any Executive—to ignore the will of Parliament and not implement a bill that had been passed.

The Convener: Do we think that there has to be a sunset provision?

Bristow Muldoon: I would think so.

The Convener: It is perhaps sensible to have that in. That would allow the ministers to decide when to implement the bill, but there would be a definite stop on their consideration.

Colin Campbell: I agree with that. The Abolition of Poindings and Warrant Sales Act 2001 has disappeared into limbo and we cannot have that if the Parliament is supposed to exercise some power.

Bristow Muldoon: The point with that bill is that it will have to be implemented by a set date. I cannot recall exactly what that date is; it might be later this year.

Colin Campbell: It will get there.

Murdo Fraser: As we are inviting David Mundell, perhaps we should also invite Murray Tosh to come and speak to the committee about his amendment.

The Convener: That will be a laugh. Let us invite Murray Tosh as well.

Ian Jenkins: I think that that is fair.

The Convener: Yes. What he has done is very ingenious, but we saw through it. We decided that it did not meet the standards of subordinate legislation that the committee would normally endorse. We must question him on it.

Draft Instruments Subject to Approval

Forth Estuary Transport Authority Order 2002 (Draft)

The Convener: I do not know whether this is to annoy us, or whether the Executive has forgotten, but we are considering the order once again. I do not know why we cannot call the Forth estuary the Firth of Forth at this stage.

Colin Campbell: Perhaps the Executive is being obtuse.

The Convener: No, we are being correct.

Colin Campbell: No, I said that the Executive was being obtuse.

The Convener: I do not know, but we can request that it considers the order again and ask why it persists—

Bristow Muldoon: The term flows from the Transport (Scotland) Act 2001, which refers to estuary crossings. Perhaps that is where the pass was missed.

The Convener: We shall mention it anyway.

We had so many concerns about the previous draft order that it was withdrawn and we are now considering another draft. It is unfortunate that there are still some difficulties and we might want to draw those to the attention of the drafters.

Article 6 and schedule 1 are on setting up the new board and making rules. However, that does not appear to be permitted by the enabling power. The power that the Executive has appears to be confined to specifying the constituent authorities of the board. We have to go back to the Executive about that, because it is fundamental to the power that the minister would have.

The power in sections 69(1) and 69(2) appears to be restricted to dissolving the board and transferring its functions to a new board on which new functions can be conferred.

There is doubt about the vires of article 11(1), which relates to tolls. The enabling power is very wide, but the provision is not effected as a textual amendment of existing legislation. Tolls normally require a specific authorising power in parent legislation that the Transport (Scotland) Act 2001 does not contain.

11:45

We drew the Executive's attention to the provision for penalties in schedule 3, and although that provision has been removed, the provision relating to exemptions has been retained, as has

the extension of the toll period. Neither of those provisions appears to be related to the transfer of functions to the new board. Given that the law requires that powers to provide for the charging of tolls must be specifically conferred in the parent legislation—a test that the Transport (Scotland) Act 2001 does not fulfil—there must be doubt about the vires of paragraphs 2 and 3 of the draft order.

That is quite serious stuff. How will we deal with it?

Bristow Muldoon: When do we have to report on the order?

The Convener: We have enough time to write to the Executive saying, “Thank you very much, but we must draw this to your attention” and to consider the order again next week.

Bristow Muldoon: In that case we should put those questions to the Executive and ask it to respond.

The Convener: The inadequacy of the enabling power underlies all the difficulties that we have spotted.

Ian Jenkins: We will write to the Executive on those points.

The Convener: We must write to the Executive. It will have the power to make byelaws, but it does not have the power to ensure that they are enforced. That is a weakness.

Bristow Muldoon: We do not want a Robbie the Fifer campaign.

The Convener: We will write to the Executive on the points that we want to raise and consider the order again next week.

Budget (Scotland) Act 2001 (Amendment) Order 2002 (Draft)

The Convener: Article 2(4)(b) makes a textual amendment to punctuation that is contrary to good drafting practice. Did anyone notice that? I read the order and I can see where it comes in. It is the first time since I became convener that punctuation has determined what will be the law of the land.

Colin Campbell: We must query it.

Public Finance and Accountability (Scotland) Act 2000 (Consequential Modifications) Order 2002 (Draft)

The Convener: Do any points arise on the order?

Colin Campbell: It seems okay.

Special Grant Reports

Special Grant Report No 1—Special Grant for Scotland Asylum Seeker Assistance: Report by the Scottish Ministers (SE 2002/52)

The Convener: Perhaps the clerk can tell us whether the special grant report is meant to be for public consumption. We could have commented a bit more on it, as the language is not terribly clear. It is clear to a lawyer—it is very legalistic. I do not know whether there are any accompanying notes.

Alasdair Rankin (Clerk): There are not usually accompanying notes to special grant reports. They spell out the amount of assistance that the Executive has in mind for a purpose.

The Convener: I read the report and it was fairly clear, but as I am not a lawyer I had to concentrate hard. I thought that I would mention in passing that although it is a supposedly public document, the language would exclude many people from it.

Instruments Subject to Annulment

National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2002 (SSI 2002/17)

The Convener: There is a particularly helpful explanatory note with the regulations. We should thank the people who supplied it.

Scottish Commission for the Regulation of Care (Consultation on Transfer of Staff) Order 2002 (SSI 2002/18)

The Convener: No points arise on the order.

Import and Export Restrictions (Foot-and-Mouth Disease) (Scotland) (No 3) Amendment Regulations 2002 (SSI 2002/21)

The Convener: No points arise on the regulations.

Cattle Identification (Notification of Movement) (Scotland) Amendment Regulations 2002 (SSI 2002/22)

The Convener: Do we want to ask the Executive, informally, why it has chosen not to remedy the defects in the principal regulations, which were acknowledged by the Executive and to which the committee drew attention in its 4th report in 2001?

Members *indicated agreement.*

Police Act 1997 (Criminal Records) (Registration) (Scotland) Regulations 2002 (SSI 2002/23)

The Convener: There was something odd in the regulations. Did anybody else notice it? Regulation 4(6)(a) relates to physically and mentally disabled people. I wondered about the civil rights of mentally and physically disabled people. We should perhaps ask for an explanation. Do members agree?

Members *indicated agreement.*

Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2002 (SSI 2002/30)

The Convener: Something may well be missing in the instrument. It is required by the guidance on the drafting of statutory instruments that the Scottish Committee of the Council on Tribunals be

consulted on the rules, but there is no indication that that has happened. We should ask the Executive whether that committee has been consulted. Also, the original rules were changed. Are these new rules to be made available free of charge to the people who bought the original rules? If they are, why does not the instrument say so?

Ian Jenkins: There are a couple of drafting errors. The enabling powers citation is not complete because it does not refer to section 103(3) of the Children (Scotland) Act 1995. Also, there is no footnote to the regulations that are referred to in rule 2. Those are technical matters that we should draw to the attention of the Executive.

The Convener: We have to ask about the consultation and the payments for the redrafted rules.

Ian Jenkins: Sorry, I thought that you had gone past that.

The Convener: We will draw the other matters to the attention of the Executive.

The letter that went to the Presiding Officer is inaccurate because it cites the wrong enabling powers, but that does not affect the essence of the instrument. We point that out because the rules breached the 21-day rule. That is understandable, however, as it happened because of the recess.

I believe that this instrument was brought forward with great speed, for which we should thank and congratulate the Executive. No other points arise.

Local Authorities' Traffic Orders (Procedure) (Scotland) Amendment Regulations 2002 (SSI 2002/31)

The Convener: I wonder if Murdo Fraser is up to speed on this one, if he will excuse the expression.

Colin Campbell: One wonders what power authorised the retrospection in regulation 3.

The Convener: Yes. That is right. Further, why was regulation 2 thought necessary, and why is regulation 1 headed, "Citation, commencement and extent", when the regulation does not appear to contain any provision that relates to extent?

Colin Campbell: Lastly, why has it taken three years, which seems an excessively long period, to bring forward the regulations?

The Convener: We will ask the Executive about those points. The important point is the one about the timing.

**Scottish Legal Services Ombudsman
(Compensation) (Prescribed Amount)
Order 2002 (SSI 2002/32)**

The Convener: Oh, aye—I read this.

Ian Jenkins: As opposed to the rest of us.

Colin Campbell: You read all of it.

The Convener: I remember some things more easily than other things. The explanatory note is not clear. I do not know what it means. Perhaps we can ask the Executive why the order did not take the same wording as the Executive note. No other points arise.

**Instruments Not Subject to
Parliamentary Control**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (No 4) (Scotland) Partial Revocation
(No 2) Order 2002 (SSI 2002/19)**

**Food Protection (Emergency Prohibitions)
(Amnesic Shellfish Poisoning) (West
Coast) (No 7) (Scotland) Revocation Order
2002 (SSI 2002/20)**

The Convener: No points arise on the orders, but I have a question. Does this mean that the shellfish are getting better?

Colin Campbell: Yes. It means that fishermen can fish for them, which is good for the economy.

Bristow Muldoon: It is not good for the shellfish.

Ian Jenkins: That is all right, because the shellfish are amnesic and have forgotten.

The Convener: I thank members for their attendance and ask them to remember to be back in the same places next week, as we will be taking evidence on the Protection of Wild Mammals (Scotland) Bill.

Meeting closed at 11:58.

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