SUBORDINATE LEGISLATION COMMITTEE

Tuesday 28 October 2003
(*Morning*)

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
10th Meeting 2003, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Stewart Maxwell (West of Scotland) (SNP)
*Christine May (Central Fife) (Lab)
*Alasdair Morgan (South of Scotland) (SNP)
Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Bruce Crawford (Mid Scotland and Fife) (SNP)
Alex Johnstone (North East Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)

*attended

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Joanne Clinton
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 October 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:30*]

Interests

The Convener (Dr Sylvia Jackson): I welcome colleagues to the 10th meeting this session of the Subordinate Legislation Committee. I have received apologies from Christine May, who might be a little late for today's meeting.

I also give apologies for myself for next week, when I will not be here to chair the meeting but Gordon Jackson will.

Gordon Jackson (Glasgow Govan) (Lab): I have reached the very top.

The Convener: The first agenda item is a declaration of interests from Alasdair Morgan, who has joined the committee.

Alasdair Morgan (South of Scotland) (SNP): I have no relevant interests to declare.

Delegated Powers Scrutiny

National Health Service Reform (Scotland) Bill: Stage 1

10:31

The Convener: Today we are considering the National Health Service Reform (Scotland) Bill at stage 1. The legal advisers have informed us of the changes that the bill will make.

Four sections in the bill will confer powers to make orders or regulations: sections 2, 6(1), 8(1) and 10. We will consider first section 2, which inserts new section 4A into the National Health Service (Scotland) Act 1978, to provide for the establishment of community health partnerships. As always, we are thinking about whether the balance between primary and subordinate legislation is correct, and whether the appropriate procedures are being used.

It is suggested that the balance is just about okay and that the negative procedure is appropriate for regulations made under new section 4A.

Are there any further comments?

Mr Stewart Maxwell (West of Scotland) (SNP): I have a comment, although it might not necessarily be about what you were just saying. I am curious about new section 4A(6), where there appears to be an illustrative list. We have discussed such lists before. When we took evidence from Executive representatives on another bill, we asked about illustrative lists. At that time and on that bill, the Executive's line was that such lists were not appropriate because they tend to become set in stone, rather than being illustrative. If that is the position, I am curious to know why it is okay to have such a list in this bill, when it was not okay in the previous bill. I believe that it was a health bill that we were discussing at the time.

The Convener: It was the Primary Medical Services (Scotland) Bill.

Mr Maxwell: It seems strange that such a firm line was taken against illustrative lists at that point, and yet here is one.

The Convener: What would you suggest?

Mr Maxwell: We should at least write to the Executive and ask for clarification.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: It has also been suggested that section 4A should require consultation before the making of regulations. Obviously, the issue is very

important and there is going to be a lot of debate on community health partnerships. What does the committee feel about that suggestion?

Murray Tosh (West of Scotland) (Con): I do not know what was discussed earlier, but it is inescapable that there must be local consultation. It might be a bit excessive, however, to put it in the bill that local consultation should be done and that the Executive should then further consult on orders that it is going to make. Is that routine in other areas?

This is one of the glories of the British constitution.

The Convener: I understand that the previous Subordinate Legislation Committee recommended that, where it was appropriate, that should be inserted in a bill.

Murray Tosh: Do you mean that there should be consultation by the Executive as well as at a local level?

Gordon Jackson: Who will be drawing up the regulations?

Murray Tosh: They will come from the Executive and will be for the community health partnerships, but they will have been devised by the health boards who will presumably have consulted the local stakeholders.

The Convener: As I understand it, the requirement for consultation is to be written into the bill so that the results of consultation would be taken on board before the regulations are made.

What we are suggesting here is that there should be consultation further down the line if changes were required to regulations that had already been made. Was that what you meant?

Murray Tosh: I am not sure what paragraph 13 of the legal briefing is suggesting. I am all in favour of consultation, but I wonder what kind of consultation and whose responsibility it will be, how often it will be done and what it is that the committee is being invited to request.

The Convener: I understand that the previous Subordinate Legislation Committee required that it be in the bill prior to the regulations being drawn up.

Murray Tosh: Required that what be in the bill?

Alasdair Morgan: Nothing is in the bill yet.

The Convener: Nothing is in the bill at all. The change that we are suggesting is that it should be in the bill that a consultation is required before regulations are drawn up.

Murray Tosh: A consultation by the Executive?

The Convener: Yes.

Murray Tosh: So we are not asking for a requirement that health boards should consult, but that the Executive should consult. Why?

The Convener: If we think that it is more appropriate that the consultation should be carried out by other bodies, we can suggest that.

Gordon Jackson: The bill says that every health board shall submit a scheme for the establishment of community health partnerships that the Executive will ratify, or whatever it is required to do. Why would it be difficult to insert a provision that the health board must consult the local stakeholders before they draw up their scheme? Is that what Murray Tosh means?

Murray Tosh: Yes. The health boards must do that before they can reasonably make any proposals. If that is to be done, that is where the onus of consultation should lie. Are we asking the Executive to go back and consult the local stakeholders to see whether they are happy with what has been done locally? That seems burdensome. I would have thought that we were being asked to charge the local health boards with performing the appropriate functions.

Gordon Jackson: That is not what the regulations are.

The Convener: To clarify, what is being suggested is with regard to section 4A(5), which states that

"Regulations may make provision in relation to—"

community health partnerships. It is in that area that more consultation might be required before regulations are drawn up.

Gordon Jackson: Murray Tosh seems to be speaking at cross purposes. We are concerned with the subordinate legislation. The regulations are nothing to do with the schemes that the health boards will have to draw up. Those schemes will be required under the statutory obligation under section 4A(1). However, the regulations that we are dealing with as the Subordinate Legislation Committee are nothing to do with that. The regulations that we are considering are provided for in section 4A(5), and only the Executive can consult on those regulations.

Alasdair Morgan: There might well be a requirement for the health boards to consult before they draw up their community health partnership schemes, but it is for the lead committee to put that in the bill; that has nothing to do with us.

The Convener: Absolutely.

Alasdair Morgan: However, if we assume that the health boards have consulted on the schemes—whether they have done it because it is required or out of the goodness of their hearts—are we really saying that when the Executive is

making regulations to give effect to the health boards' schemes, it has to consult again? Of course, a proposed scheme might not implement the regulations.

Gordon Jackson: I do not think that the regulations would deal with the content of a scheme that was submitted by a local health authority. Proposed new section 4A(5) makes provision for regulations to deal with the structure of schemes, not their content. The regulations would provide for the number, the staffing and the procedures of such schemes. I may be wrong on this, but I think that the scheme submitted by the local health authority would not itself be subject to those regulations. In other words, when the health board draws up a scheme and consults on it, that would not be dealt with by the Executive's regulations, which would be made under subsection (5). However, perhaps the regulations will deal with that.

Murray Tosh: It certainly seems that—

The Convener: Just two seconds, Murray. Please speak through the chair.

Murray Tosh: It certainly seems that section 4A(5) provides that the health authority will be required to set out the number of community health partnerships, the status of those and the functions that they will fulfil. Each health board will be required to make a complete proposal on how such partnerships will operate within that health board area. I agree that consultation within each health board area is absolutely crucial for getting that right. That is where the consultation should be.

The Convener: Okay. Is it worth writing to the Scottish Executive to clarify that point?

Gordon Jackson: Absolutely.

The Convener: We are basically asking whether the regulations are in some way separate from the plans that will be drawn up by the health boards. Is that the nub of the issue?

Gordon Jackson: Yes. What I am not clear on—I thought that I was, but I am no longer—is the relationship between the regulations in section 4A(5) and the proposals that are to be submitted by the health board.

Alasdair Morgan: We might phrase that by saying that it is not clear from the bill how exactly the content of the regulations will have been consulted on. We can leave it open as to the stage at which we expect that consultation to happen.

The Convener: Okay. I think that Alasdair Rankin has got that now.

That discussion was worth having. It will be obvious to Murray Tosh that we did not discuss the issue fully beforehand, so we could not answer his question.

Let us move on to section 6(1), which deals with the dissolution of local health councils and the setting up of the new public involvement structure. The legal advice suggests that it is reasonable to provide some flexibility in section 6 and that the negative procedure gives the proper degree of parliamentary control. Is that agreed?

Members *indicated agreement*.

The Convener: We move on to the more contentious area of ancillary provision, which is dealt with in sections 8(1) and 8(2). I gather from legal advice that quite a lot of work has been done on the issue down at Westminster. The House of Lords Delegated Powers and Regulatory Reform Committee examined the issue and, on 11 December 2002, produced a report that was somewhat critical of such provisions.

The relevant part of the bill is part 3 on page 5. Section 8(1) states:

"The Scottish Ministers may by order made by statutory instrument make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary".

The House of Lords committee took issue with the word "supplemental", which could allow very sweeping changes. That committee also said:

"the Government should, in the Explanatory Notes accompanying any new bill … offer an explanation of the reasons why a particular form of wording has been adopted in each case."

The explanatory notes for the National Health Service Reform (Scotland) Bill do not provide such an explanation.

Do members have any further comments?

10:45

Gordon Jackson: Supplemental does strike one as a blank-cheque word. Political expediency and political reality may mean that no Executive could actually abolish the health service by such a method, but it is not clear to me what supplemental means over and above the other words. What would not be covered by "incidental", "consequential", "transitional", "transitory" or "saving"? I cannot think of an example that would need supplemental as well.

Alasdair Morgan: That is a fair comment. Even had an example been given of what might come under the category of supplemental, that would not get round the fact that supplemental could include lots of other things as well. I suspect that the power is too strong.

Gordon Jackson: If we had been given an example, we might have been able to live with it,

but if anything that the Executive would legitimately be entitled to do is contained in the other words, why have the blank-cheque word?

Murray Tosh: The legal adviser's briefing makes the comment that section 8(1) is a common provision in the usual form. That is somewhat scary. That suggests that it is quite commonplace for such provisions to exist and to be used. Are legal advisers able to advise the committee by giving the kind of example that Gordon Jackson requested?

The Convener: The House of Lords committee report made the point that such powers are becoming more and more common. That committee was a little concerned that such provisions may be due to laziness—that is perhaps not the appropriate word—as they allow the Government to catch anything that has been missed.

Gordon Jackson: As I pointed out, I suspect that Executives of all hues and in all places do not actually abuse such powers because of the political reality that their opponents will not let them do that. However, I still do not see why supplemental should be included if it is not needed.

The Convener: This might be a good time to raise some of those points with the Scottish Executive. We could use the bill as an example and build on the work that has already been done elsewhere, which has already drawn attention to the difficulties that have been seen with such powers. We may like to pursue that in future.

Murray Tosh: I suggest that we could also flag up the issue to the Procedures Committee, which might want to consider the whole principle—mentioned in paragraph 19 of the legal adviser's briefing—of amending primary legislation by subordinate legislation. Such amendment appears to stand on its head the whole conceptual framework behind having primary and secondary legislation. It seems to be either a constitutional practice that exists and is not widely understood or a constitutional innovation that does not sit well with the consultative steering group's principles or with everything that this Parliament was intended to be in terms of scrutiny and proper practice. Perhaps, in subsequent phases of its work, the Procedures Committee will want to spend some time considering the issue.

The Convener: We will send two letters: one to Iain Smith of the Procedures Committee and one to the Scottish Executive. That is a good point.

Mr Maxwell: I agree with everything that has been said. I agree that the use of such powers is becoming too common and I have concerns about the scope of such provisions that could be used by an Executive or Government. At the same time, we need to accept that there must be flexibility in the legislation. There must be room for manoeuvre in subordinate legislation and in other matters for Government to do such things. We have to make it clear that our argument is about how often such powers are used and about the scope of the word supplemental; it is not about the principle of those powers as such.

The Convener: That is correct.

Gordon Jackson: No one would object to words such as incidental and consequential because one knows what they are. In a funny sort of way, those terms are easy to define. I think that that is what Stewart Maxwell is saying. No one objects to those words; the blank-cheque word is what we are worried about.

The Convener: Supplemental is the word that was picked up by the House of Lords committee.

I welcome Christine May, who has just joined the meeting. I gave her apologies earlier.

We move on to sections 10(1) and 10(2), which deal with the commencement and short title. No points arise on those.

Executive Responses

Agricultural Holdings (Consequential Amendments) (Scotland) Order 2003 (draft)

10:50

The Convener: We move to item 3, Executive responses. We raised points about four instruments. The first is the draft Agricultural Holdings (Consequential Amendments) (Scotland) Order 2003. We raised a drafting issue, to do with the naming of schedules. I recommend that we simply report the matter and that we keep the issue of this drafting principle alive. Our legal advice informs us that naming a schedule "Schedule 6" rather than "the Sixth Schedule", for example, notwithstanding the reference in the original legislation, should be common practice in the context of trying to modernise drafting procedures. It is not a big issue, but drafting procedures are important. Is that agreed?

Members *indicated agreement.*

Murray Tosh: Our legal advisers, having pursued the issue with the Executive, commented that they do not have a copy of the Executive's current guidance, which struck me as strange. I would have thought that, in the interests of transparency and co-operation, we ought to have that guidance. If we do not have it by now, we should make the proper approach through the appropriate mechanism to ensure that our people have the relevant guidance documentation before them.

The Convener: I have just been told by the clerk that we will ensure that we obtain the most recent copy.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No 2) Regulations 2003 (SSI 2003/460)

The Convener: We raised many points on the regulations. The Executive agreed that many amendments to the regulations are required, and it will address them at an early date. We have not listed each of the points in turn, but I think that we can be reassured that they will all be examined.

Murray Tosh: Given that we were quite critical of the Executive about the regulations at a previous meeting, it is good that it has come back with such a positive response. There is perhaps a lesson here for the Executive. If the Executive, for whatever reason, does not intend to amend regulations or other statutory instruments heavily at a certain point, but intends to do so shortly thereafter, it should perhaps simply tell us that, rather than waiting for us to write to Executive officials, asking them why they are not making the revisions at the time. It would be helpful to know about any intentions to carry out such amending work.

The Convener: The situation will hopefully improve with the earlier and more extensive informal contact that is provided for under our new arrangements.

Is it agreed that we refer to the lead committee and the Parliament the points that we made and the Executive's responses to them?

Members *indicated agreement.*

Feeding Stuffs (Scotland) Amendment (No 3) Regulations 2003 (SSI 2003/474)

The Convener: Members will recall that there was an issue about it being time for consolidation at the fifth substantive amendment to the regulations. The Food Standards Agency has indicated that the amendments to the regulations have so far been reasonably modest. However, there will be further amendments in future, particularly next year, in order to implement European Commission directive 2003/57/EC. The FSA foresees that there could well be a consolidation then.

Murray Tosh: The Food Standard Agency's response is a good one, but I repeat the point that its correspondence had to be written in response to a point from us. We have a trigger of five changes before consolidation should take place, and the Executive or the FSA know that we are likely to ask about that. If they have concluded that they will not make a consolidation at a certain stage, but will do so the following year, after further matters have come up, it could just tell us that up front, rather than having a ping-pong with the committee. If the FSA told us what the game plan was first, we would understand it reasonably quickly and would accept the good faith in which that was offered.

Having said that, although the FSA seemed to start off as the least tractable of the agencies that the Parliament has to deal with, the present degree of co-operation and good spirit from the FSA is very much to be welcomed.

The Convener: Exactly. Remember that we are awaiting a response to our letter to Richard Henderson, in which we raised all those points. We will hopefully get some good news in the near future—perhaps even next week, when Gordon Jackson is chairing the meeting.

Gordon Jackson: I think that this is a good week to be chairing the meeting. There is nothing much in it—that is the sort of week that I like.

The Convener: Are we agreed that we pass that information on to the lead committee and the Parliament?

Members *indicated agreement.*

Mr Maxwell: I back up what Murray Tosh said, but are we actually going to write to the Executive and recommend, as Murray suggested, that it should simply tell us in advance what its plans are when it comes to the fifth amendment to a set of regulations? If it did that, it would not waste time with correspondence getting sent backwards and forwards.

The Convener: I suggest that we await the reply from Richard Henderson, when we can return to the matter. I ask Stewart Maxwell to hold that point in his mind until then.

Protection of Animals (Anaesthetics) (Scotland) Amendment Order 2003 (SSI 2003/476)

The Convener: The order was not an easy one to understand. We are effectively dealing with both the consequential order, the Protection of Animals (Anaesthetics) (Scotland) Amendment Order 2003 (SSI 2003/476), and the affirmative order, the Welfare of Farmed Animals (Scotland) Amendment Regulations 2003 (SSI 2003/488). Are we happy with the explanation that we have been given? We are told that both the order and the regulations were intended to come into operation at the same time.

Murray Tosh: The answer to that has to be yes. The same point that I was making earlier arises again. When we asked the Executive about the matter, it had a perfectly good explanation, which the advisers deem "not unreasonable". I think that it is a bit better than that: it is quite a convincing explanation. The Executive knows that the instruments will come to the committee, and that we will ask about the 21-day rule.

Gordon Jackson: So why not just tell us at the time?

Murray Tosh: Yes, the Executive could tell us and give us the explanation in advance. Then, we would not waste time again.

The Convener: I ask Alasdair Rankin, the clerk, to keep a note of these points so that we can highlight them when we are next writing back. That covers the first point that we had to make on the order.

Our second point was the same as one that we raised on a previous instrument, about the references to the names of schedules, so we have dealt with it before.

The third point was about the footnote. It referred a lot to Wales, which it was agreed was not particularly relevant to our situation. Are there any further comments?

Murray Tosh: This was a technical knockout by our legal advisers.

Alasdair Morgan: Not only was it suggested by our legal advisers that such a footnote is of doubtful relevance; it is confusing to anyone reading the instrument who is not thoroughly in the know. One wonders why we should have such a footnote. Footnotes are meant to clarify, but the one in the order does precisely the opposite.

The Convener: Should we put that on our list of notes?

Members: Yes.

Mr Maxwell: Or we could make it a footnote.

The Convener: Well done, Stewart.

We will draw the attention of the lead committee and of the Parliament to the points that we have raised on the order.

Members *indicated agreement.*

Draft Instrument Subject to Approval

Proceeds of Crime Act 2002 Amendment (Scotland) Order 2003 (draft)

10:58

The Convener: The draft instrument subject to approval is the Proceeds of Crime Act 2002 Amendment (Scotland) Order 2003. No points arise on the order.

Gordon Jackson: No sooner does Margo MacDonald want to legalise it than the Government wants to tax it. [*Laughter.*] That is basically the principle of the order, as far as I can see.

The Convener: Anyway, no substantive points arise.

Instruments Subject to Annulment

Civil Legal Aid (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/486)

10:59

The Convener: There is a bit of confusion about what is understood by:

"so far as known to that applicant or assisted person".

There is a situation in which the change in circumstances in question can be known to the counsel or solicitor, but not to the assisted person or applicant. There is confusion about whether that is being taken into account.

Alasdair Morgan: I agree that there seems to be a contradiction

Murray Tosh: So we will write and get clarification.

The Convener: Yes.

Further and Higher Education (Scotland) Act 1992 Amendment Order 2003 (SSI 2003/487)

Condensed Milk and Dried Milk (Scotland) Amendment Regulations 2003 (SSI 2003/492)

Food (Hot Chilli and Hot Chilli Products) (Emergency Control) (Scotland) Amendment Regulations 2003 (SSI 2003/493)

The Convener: No points arise on the instruments.

Instruments Not Subject to Parliamentary Control

11:01

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Revocation Order 2003 (SSI 2003/494)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No 5) (Scotland) Revocation Order 2003 (SSI 2003/495)

The Convener: No points arise on the orders.

Meeting closed at 11:01.

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