SUBORDINATE LEGISLATION COMMITTEE

Tuesday 28 October 2008

Session 3

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SUBORDINATE LEGISLATION COMMITTEE
29th Meeting 2008, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)
Malcolm Chisholm (Edinburgh North and Leith) (Lab)
*Helen Eadie (Dunfermline East) (Lab)
*Tom McCabe (Hamilton South) (Lab)
*Ian McKee (Lothians) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Ross Finnie (West of Scotland) (LD)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Gery McLaughlin (Scottish Government Criminal Justice Directorate)
Gordon McNicoll (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 October 2008

[THE CONVENER *opened the meeting at 14:30*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the 29th meeting in 2008 of the Subordinate Legislation Committee. We have apologies from Malcolm Chisholm. Can everyone turn off their mobiles and BlackBerrys?

Item 1 is to consider whether to take in private item 9, which is consideration of evidence on the Sexual Offences (Scotland) Bill. We have discussed this with our advisers. The session will give us the opportunity to clarify issues that have been raised by the evidence, and to express views on the evidence to inform our report. It is appropriate that we do that in private. Are we agreed?

Members *indicated agreement*.

The Convener: Our witnesses for agenda item 2 do not seem to be here yet so, with the committee's permission, I will leapfrog to item 3. We will return to item 2 as and when.

Health Boards (Membership and Elections) (Scotland) Bill: Stage 1

14:31

The Convener: This is the committee's second consideration of the bill at stage 1. We wrote to the Scottish Government about a number of the delegated powers and we have received a response. As there are no comments on that response, are we content to welcome the Scottish Government's commitment to amend the bill to provide that election regulations and a pilot order or roll-out order, which contains modifications of enactments, will be subject to affirmative procedure? We might also wish to agree to review any amendments that are brought forward at stage 2. Is that a step in the right direction?

Members *indicated agreement*.

The Convener: Are members content with the Scottish Government's response to our question about the proposed use of paragraph 13(2) of new schedule 1A to the National Health Service (Scotland) Act 1978, as inserted by the bill?

Members *indicated agreement*.

The Convener: Are we agreed that we should invite the relevant Scottish Government officials to give evidence on the intended use of the powers conferred by the sections listed in the summary of recommendations, namely: sections 1(5) and 1(6), on the constitution of health boards; paragraph 13 of new schedule 1A to the 1978 act, which is about the power to make election regulations, and which will be inserted by section 2(2) of the bill; section 4(1), on the pilot scheme and elected members; and section 7(1), on roll-out?

Members *indicated agreement*.

The Convener: We now have an either/or question to answer. We can either report to the lead committee, or look for further evidence. Do we want to note in our report the arrangements for identifying persons who are entitled to vote and draw the attention of the lead committee to the question whether further explanation is required, or do we want to explore the issue further by taking more evidence? If we write to the lead committee, we will have fulfilled our duty, but we could bring officials before the committee and question them, although we would have to give due notice of those questions.

Jackson Carlaw (West of Scotland) (Con): I am inclined to draw matters to the lead committee's attention rather than take more evidence.

The Convener: Is that the committee's view?

Members: Yes.

The Convener: Okay.

Our witnesses will be with us in two minutes, so we will carry on.

Scottish Parliamentary Pensions Bill: Stage 1

14:33

The Convener: This is the second time that we have considered the bill at stage 1. Following our meeting on 7 October, we agreed to write to the member in charge of the bill to explore issues around the scrutiny of and accountability for the terms of resolutions that amend the pension scheme. Are we content to note the matters that the convener of the Scottish Parliamentary Pension Scheme Committee has raised with the Standards, Procedures and Public Appointments Committee? Are we also content to keep a watching brief on any proposed amendments to standing orders in connection with the Parliament's scrutiny of resolutions that are to be made under section 3 of the bill and to report to the Parliament accordingly?

Members *indicated agreement*.

The Convener: We might as well push on.

Scottish Government Response

Infant Formula and Follow-on Formula (Scotland) Amendment Regulations 2008 (SSI 2008/322)

14:34

The Convener: Following our meeting on 7 October, the committee wrote to the Scottish Government about the regulations, and we have now received its response. Are we content to draw the regulations to the attention of the lead committee and the Parliament on the ground that regulation 3 contains an error?

Members *indicated agreement*.

Draft Instrument Subject to Approval

Housing (Scotland) Act 2006 (Scheme of Assistance) Regulations 2008 (Draft)

14:35

The committee agreed that no points arose on the instrument.

Instruments Subject to Annulment

Notice to Local Authorities (Scotland) Regulations 2008 (SSI 2008/324)

Fish Farming Businesses (Record Keeping) (Scotland) Order 2008 (SSI 2008/326)

Justice of the Peace Court (Sheriffdom of Glasgow and Strathkelvin) Order 2008 (SSI 2008/328)

Stipendiary Magistrates (Specified Day) (Sheriffdom of Glasgow and Strathkelvin) Order 2008 (SSI 2008/330)

Bankruptcy (Scotland) Amendment Regulations 2008 (SSI 2008/334)

14:35

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

Dumfries and Galloway (Electoral Arrangements) Amendment Order 2008 (SSI 2008/325)

14:36

The Convener: Are we content to draw the order to the attention of the lead committee and the Parliament on the grounds listed in the summary of recommendations?

Members *indicated agreement*.

Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Adult Support and Protection (Scotland) Act 2007) (No 2) (2008) (SSI 2008/335)

The Convener: Are we content to draw the act of sederunt to the attention of the lead committee and the Parliament on the grounds listed in the summary of recommendations?

Members *indicated agreement*.

Bluetongue (Scotland) Amendment (No 2) Order 2008 (SSI 2008/327)

Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Commencement No 5) Order 2008 (SSI 2008/329)

The committee agreed that no points arose on the instruments.

Sexual Offences (Scotland) Bill: Stage 1

14:37

The Convener: I refer members to agenda item 2. I extend a warm welcome to our colleagues from the Scottish Government who are here to answer questions raised by our consideration of the bill at stage 1. Gery McLaughlin is the bill team leader and Gordon McNicoll is from the Scottish Government legal directorate.

We wrote to the Scottish Government about a number of the delegated powers in the bill, and after considering the Government's response, we agreed to explore further the intended use of those powers by holding an evidence-taking session, and that is why we are where we are today. We will address issues that relate to section 29, which confers a power to specify relevant offences for the purposes of section 29(2), and section 32, which confers a power to amend the definition of what constitutes a "position of trust" in respect of the offence of sexual abuse of trust at section 31.

We will begin with section 29. By way of setting the scene, could you set out the purpose of the ministerial power to specify relevant offences? I would be grateful if you could address the significance of the term "relevant offence" in relation to the defence that might be available to an accused person in circumstances where he or she has been charged with sexual activity involving a child. It would be helpful to have your comments on that.

Gery McLaughlin (Scottish Government Criminal Justice Directorate): Section 29 is, as you said, about the specification of relevant offences. Section 29(1) provides that there shall be a defence for an accused person who is charged in proceedings with an offence under sections 21 to 27 of the bill—which are concerned with sexual activity involving an older child, which is one aged between 13 and 15—that he or she "reasonably believed" that the child with whom he or she engaged in sexual activity

"had attained the age of 16 years."

Section 29(2) restricts that defence to those who have not

"previously been charged by the police with a relevant offence."

Section 29(5) provides that

"'a relevant offence' means such offence … as may be specified in an order made by the Scottish Ministers"

and the order-making power is subject to negative procedure by virtue of section 46(2) of the bill.

Now, as regards the relevant offence and its restriction, the defence in section 29(2) is restricted to those not

"previously … charged by the police with a relevant offence"

to prevent a serial sexual predator who relied on that defence on a previous occasion but was acquitted of all charges from using the same defence to evade conviction on a subsequent offence or offences.

If the defence in section 29(2) was restricted to those who were convicted of an offence, a person who may have been charged with previous offences but who was not convicted would be able to engage in sexual activity with a child aged between 13 and 15 knowing in advance that he or she could rely on the defence in section 29(2) to escape conviction. In each individual instance, the accused's claim of mistaken belief as to the child's age may appear to be reasonable. However, when considered together, the accused's behaviour would indicate that he or she was deliberately preying on children.

The approach is not a new one. A similar restriction is placed on the defence of mistaken belief as to the age of a child in section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995. That is the comparable existing offence that criminalises sexual intercourse with a girl under the age of 16.

Gordon McNicoll (Scottish Government Legal Directorate): I have two issues to raise, the first of which is the effect of relying on someone being convicted of an offence, particularly if the offence is specified in the bill, which is likely to be the case, as we indicated in our initial response. The first time that someone is charged with the offence and appears in court, they would rely on saying in their defence, "I have never been convicted of this offence." They would therefore not be convicted.

The second time that that person appears in court, the same argument would apply. They could again say, "I have not been convicted." Of course, we know that they were not convicted because they had previously not been convicted. The process could become rather circular. In terms of the offences under the bill, it is therefore not workable to have provisions that rely on conviction and not on charge.

The second issue is the purpose of the provision. Members may take a different view, but I suggest that this is not a get out of jail card, but more of a shot across the bows. Someone needs to be careful that they are unwittingly—or not unwittingly—engaging in sexual activity with another person who is under the age of 16. The effect of charging someone with the offence is that it effectively puts them on notice. In passing the

bill—if it is passed—the Parliament is saying that it has reached a view that that conduct is unacceptable. I see no real problem in using the word "charging" and not "convicting". In saying that, I am making the assumption that the purpose of the provision is to discourage people from engaging in this sort of activity.

The Convener: Thank you.

Jackson Carlaw: That is helpful. Other members may have questions on intent; I will focus on process. The committee wants to explore why the decision was made to prescribe some of the limits of the defence in subordinate legislation. We understand that the current law provides a defence in primary legislation, but that the bill will confer a power on ministers to set out those cases in which having previously been charged with a particular offence will prevent that defence from being available in a subsequent case. Why are you using subordinate legislation and not primary legislation, as is presently the case, to do that?

Gery McLaughlin: The Government did not include a list of relevant offences, either in Scotland or elsewhere, in the bill because it considers that it is more appropriate for those offences to be listed in a single order. There is a strong case for ensuring that a complete list of all the relevant offences is contained not in a mix of primary and secondary legislation but in a single order. By taking that approach, the Government can ensure that a single order always provides a complete list of all relevant offences as any previous order can be revoked when a new order is required to amend the definition of a relevant offence.

14:45

An order-making power also provides flexibility in that it can be quickly amended, revoked and replaced. That is advantageous, given that sexual offences legislation across the United Kingdom is frequently amended, with the effect that new offences are introduced on to the statute book.

Obviously, if we were amending primary legislation in Scotland we could, at the same time, amend any statutory list, but we need the flexibility to take into account changes in the law south of the border, which we would want to reflect in the list of relevant offences. By having that list in secondary legislation, we can react quickly and ensure that the full list is made in an order and not partly by way of an order and partly in primary legislation, which would give a less-than-complete picture.

Jackson Carlaw: I understand the point, but underpinning that is the suggestion that flexibility has been an issue in the application of the current law. Has that been the case?

Gery McLaughlin: It is not an issue at the moment, but we are conscious of the fact that, by legislating to put our sexual offences law in statute, flexibility may become more of an issue. We are spelling out our legislation in that way; previously it was more a case of common law. There have also been developments in England and Wales, where sexual offences legislation was recently renewed. As the committee is aware, there is a continuing focus on this area and there are regular developments in the law. That emphasises the need for flexibility.

Jackson Carlaw: I understand that. I am simply trying to understand in what way the matter had compromised the ability to apply the current law.

Gery McLaughlin: The issue is not any compromise in the ability to apply the current law, but that collecting all the relevant offences in a single place and not partly in primary legislation and partly in an order makes things easily accessible, understandable and comprehensible. Both are functionally capable of reacting to change, but they do not gather everything in the one place.

Jackson Carlaw: I think we have touched on my third question, convener.

The Convener: Yes. I will move to supplementary questions.

Ian McKee (Lothians) (SNP): I am not sure whether the question is sensible, but I am interested in knowing whether any element is retrospective. If someone is charged with an offence that is added to the list of relevant offences in later secondary legislation, can they no longer use the defence even if the offence was not on the list at the time that they were charged with the initial offence?

Gery McLaughlin: I ask Gordon McNicoll to answer.

Gordon McNicoll: Yes, is the short answer. We have to remember that the test is whether the individual has previously been convicted of any relevant offences—

Ian McKee: Charged.

Gordon McNicoll: I am sorry. You are right, I should have said charged. That was a slip of the tongue. If someone is charged with those offences at any time, they would be deprived of the defence.

Ian McKee: But they would not have had the stern warning, about which you spoke earlier, not to commit sin again, would they? At the time, the offence was not on the list of relevant offences.

Gery McLaughlin: The stern warning comes by means of the Parliament passing the bill and going on to pass an order in which the relevant offences

are specified. That gives people a public and stern warning that anyone who has committed the offences that are specified in the order that Parliament has debated and made available publicly should take particular care.

Ian McKee: That does not quite answer my point. I asked about the circumstances in which someone was charged with an offence before it was added to the list of relevant offences. The person would not have had the warning at the time that they were charged because the offence was not on the list of relevant offences when they committed—or allegedly committed—the offence.

Gery McLaughlin: The issue is that the warning applies if someone has been charged with one of the offences on the list. In such circumstances, they can no longer rely on the defence that they mistakenly believed that the other person was of age. Therefore, someone who has been charged with one of those offences should take particular care to ascertain that any person with whom they intend to have sexual relations is of age. The warning not to commit offences is a general one, whereby the law says that certain acts are illegal and people should not put themselves in the position of having committed them. Once someone has been charged with such an offence, they will have been given due warning to take particular care about the age of any persons with whom they are considering having a sexual relationship. Once they have been so charged, the provisions on not being able to use the defence of being mistaken about someone's age take effect. The disapplication of that defence does not go back further than that. It arises at the point at which a person is charged with a relevant offence.

Ian McKee: What new relevant offences could be added, given that the offence that we are talking about is having sexual relations with a girl who is between the ages of 13 and 16? Surely that is the only relevant offence.

Gery McLaughlin: We might want to take into account a number of relevant offences. The list of relevant offences might be changed because of changes in the law in Scotland or elsewhere in the United Kingdom that meant that we wanted to take account of new offences.

Ian McKee: Would such a change in the law apply retrospectively to people who had been charged with such an offence, even if it was not a relevant offence when they were charged with it?

Gery McLaughlin: That would depend on how the legislation was framed. Generally speaking, any new offences would not be retrospective—they would become crimes only when those offences were introduced. In general, new offences are not retrospective, so I would not say that their addition to the list has a retrospective effect. The addition of an offence to the list has an impact only from the point at which that happens and someone is charged with it.

Tom McCabe (Hamilton South) (Lab): In part, my question has already been answered, but I have something to say before I ask it. I am highly conscious that we must concentrate on matters that fall within the committee's remit. I know that there are other committees that can question the officials on the bill's intended policy outcomes, but I want to put it on record that I am increasingly uneasy about the convenient interchange of "charge" and "conviction". It seems that an extremely serious precedent is being set when the fact that someone has been charged with an offence can be treated in almost the same way as if they have been convicted of it. However, it is right that that issue lies within the remit of another committee.

The question that I intended to ask, which has largely been answered, is about the power to specify relevant offences. Our reading of the bill was that that power appeared to allow ministers to specify whatever offence they thought was appropriate, but the officials seem to be saying that there will be a specified list of relevant offences. The only opening is that that list could be added to over time, although when that happens, Parliament will have the opportunity to consider the matter.

Gery McLaughlin: Yes. The list will be specified in an order, which the bill suggests would be subject to negative resolution. That means that any member who objected to it could instigate a debate on the order. Any subsequent changes to the list would be subject to the same procedure so, in that respect, the process would be public.

As regards your point about setting a precedent, I repeat that the approach that the bill takes follows the approach that is already taken for the comparable offence under current legislation. In its use of the word "charged" rather than "convicted", the bill does not set a precedent.

Tom McCabe: I was wrong to use the word "precedent", but the point that I was trying to make still applies—the bill's interchanging of the concepts of "charge" and "conviction", which I accept has been done in the past, seems to be a pretty significant departure.

Helen Eadie (Dunfermline East) (Lab): I echo the concerns of my colleague and friend Tom McCabe as regards the interchange of charge and conviction.

I would like to move on to the use of negative rather than affirmative procedure for consideration of the order that will specify relevant offences. Although you clarified your thinking in your letter, we would be grateful for further amplification

because the power to specify those offences is significant and is of great interest to the public.

Gery McLaughlin: The use of negative procedure reflects the approach that the Scottish Law Commission took to the use of subordinate legislation powers in the bill. My interpretation is that the commission proposed that when a substantial change to or amendment of the approach that is taken in the bill is proposed, affirmative procedure should be used, but when a proposal is made that is in keeping with the policy direction of the bill, negative procedure could be used. In that respect, the commission suggested that such a power should be subject to negative procedure.

The Government therefore considered that negative resolution procedure provides the appropriate level of scrutiny for an order that specifies the offences that are to be included under the definition of a relevant offence. The order-making power does not allow the creation of new criminal offences, nor does it modify the circumstances in which an offence may be committed. Its effect is only to limit the circumstances in which a particular defence to what would otherwise be a criminal act can be used. The Government considers that, as the prescription of relevant offences is unlikely to be contentious, the use of negative procedure will provide the appropriate level of scrutiny.

The Convener: Before we move on, there are a couple of points that I want to put on the record. I emphasise that our specific interest is the decision to specify relevant offences in subordinate legislation and I make it clear that we are not querying the use of the word "charged" rather than "convicted".

I will set the scene for our consideration of section 32. Before we move to questioning, will you please set out the purpose of the power to amend the definition of what constitutes a "position of trust" in respect of the offence of sexual abuse of trust, with which section 31 deals?

Gery McLaughlin: Section 32 provides for a definition of positions of trust for the purposes of the offence of sexual abuse of trust, which is dealt with in section 31, which criminalises any person who has attained the age of 18 years who engages in sexual activity with someone who is under the age of 18 years when the older person is in a position of trust over the younger person. In accordance with the conditions that are set out in section 32, a person who was in such a position of trust would include someone who worked in a care home, a school or a hospital, or someone who had parental rights or responsibilities in respect of the younger person. Section 32(1) provides that the Scottish ministers may, by order, specify additional circumstances that constitute a position of trust. That order-making power is subject to negative resolution procedure by virtue of section 46(2) of the bill.

The Government's view is that the widely defined power is required to allow sufficient flexibility to respond to changes in the arrangements for the care and education of young people in Scotland, the nature of which we cannot second guess, and to do so without the need for primary legislation. In the Government's view, framing the powers more narrowly would risk losing the flexibility to respond quickly to potential changes.

15:00

Ian McKee: You have answered a large chunk of the question that I was going to ask. I am concerned that the power is significant because it has the effect of making criminal conduct that would otherwise be legal if the person involved was 16 or 17. That leads to concern about the open-ended power to define new positions of trust. I gather that you feel that the power is necessary to be able to move swiftly. Why can the power not be restricted to some extent but still be able to address future changes in care arrangements?

Gery McLaughlin: It is difficult to speculate about what such changes might be. If the committee would like to suggest how the power could be narrowed appropriately, we would be happy to consider that or any other points on how we could approach amending the power at stage 2. However, having considered the matter, it appears to us that the breadth of the power reflects the uncertainty about what care arrangements might be set out in future, or what changes might be made to them. I am sure that ministers will be happy to give a commitment that the power will be used to respond quickly to any changes in care arrangements, and it will be a matter for Parliament to look at any order and consider whether the power is being used more widely. That is the intent behind the power.

Gil Paterson (West of Scotland) (SNP): I have a question about procedures. We note that the current power to specify additional positions of trust is subject to affirmative procedure, in Scotland and the rest of the United Kingdom. That reflects the importance of the power and the effect of its exercise on the criminal law. Why do you take a different view and consider that negative procedure is appropriate?

Gery McLaughlin: I refer to my earlier comments about the Scottish Law Commission's approach to the use of subordinate legislation in the bill. That approach to the proposed power is consistent with the Scottish Law Commission's approach.

In judging which procedure is most appropriate, it is necessary to balance the importance of the issue and the need to be flexible enough to respond to changing circumstances in the light of experience, without requiring primary legislation. We also need to make proper use of parliamentary time. Obviously, negative procedure allows any member who objects to the proposed changes to initiate a full and proper debate, and that is not inappropriate. If the committee has a different view, I am sure that ministers will be happy to consider it in advance of lodging stage 2 amendments.

Gil Paterson: Did you say that you will reconsider?

Gery McLaughlin: I am saying that negative procedure is not inappropriate for the power, but if the committee reaches a different view, ministers will take that into account.

Gil Paterson: I understood that the Scottish Law Commission was of the view that the power should be subject to affirmative procedure. Have you any comment on that?

Gery McLaughlin: I am sorry; did you say the law commission?

Gil Paterson: Yes. It took the view that the procedure should be affirmative.

Gery McLaughlin: I am sorry, but I am not in a position to comment on that at the moment. If we can get the background to that, we will be happy to respond by letter if that would be helpful.

Gil Paterson: That would be helpful.

The Convener: It is a racing certainty that that point will be reflected in our report. We will have one final look at the bill at stage 1 next week, before we report. I thank Gordon McNicoll and Gery McLaughlin for their time and trouble; it is appreciated.

Gil Paterson: Before we go into private session, I should declare an interest with regard to the bill. I am a board member of Rape Crisis and the deputy convener of the cross-party group on men's violence against women and children.

The Convener: Thank you.

15:05

Meeting continued in private until 15:19.

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