SUBORDINATE LEGISLATION COMMITTEE

Tuesday 28 April 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

14th Meeting 2009, Session 3

CONVENER

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

DEPUTY CONVENER

*Ian McKee (Lothians) (SNP)

COMMITTEE MEMBERS

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

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:

Bruce Crawford (Minister for Parliamentary Business)
Paul Johnston (Scottish Government Legal Directorate)
Madeleine MacKenzie (Scottish Government Office of the Scottish Parliamentary Counsel)
Jan Marshall (Scottish Government Constitutional, Law and Courts Directorate)

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 April 2009

[THE CONVENER *opened the meeting at 14:15*]

Draft Interpretation and Legislative Reform (Scotland) Bill

The Convener (Jamie Stone): I welcome everyone to the committee's 14th meeting this year. We have received apologies from Jackson Carlaw. I ask everyone to switch off their mobile phones and BlackBerrys.

I welcome the Minister for Parliamentary Business, Bruce Crawford, and Jan Marshall, Madeleine MacKenzie and Paul Johnston. Our purpose today is to take evidence on the draft interpretation and legislative reform (Scotland) bill. Part 2 of the draft bill largely implements recommendations that were made by the committee in its regulatory framework inquiry report. Our questions will therefore focus on that part, although we also have questions on other issues in which we have an interest.

We welcome the Scottish Government's co-operative attitude. Much has been delivered, and we appreciate that: a collaborative process is to the benefit of the Scottish Government, the committee and the Parliament.

I understand that the minister wishes to make a short opening statement, and I invite him to do so now.

The Minister for Parliamentary Business (Bruce Crawford): Thank you, convener, for allowing me to come along to the committee to discuss the draft interpretation and legislative reform (Scotland) bill. I welcome the opportunity to discuss its likely content and progress. As the committee is aware, the Government has been engaged in a consultation on the bill. Its content is technical but important, dealing principally with interpretive and procedural matters.

The draft bill essentially has four main purposes. First, it deals with the publication, interpretation and operation of acts of the Scottish Parliament and instruments made under them. Secondly, it deals with the making and publication of subordinate legislation, the definition of a Scottish statutory instrument and the scrutiny procedures to apply in the Scottish Parliament. Thirdly, it deals with the procedures that will apply to orders that are subject to special parliamentary procedures. Fourthly, it gives the Scottish ministers a power to make certain amendments to enactments to pave the way for their consolidation.

Until now, the first three of those topics have been regulated by transitional orders made under the Scotland Act 1998. After 10 years of devolution, it is now time for the committee, the Government and the Parliament to make their own provisions. Hence, we are introducing the bill.

Broadly speaking, our approach has been to restate the content of the existing transitional orders on interpretation and special parliamentary procedures, which are already widely familiar to practitioners. However, we are taking the opportunity, where appropriate, to modernise our interpretation code and to make it fit for future decades.

The statutory instrument component of the bill is based on the recommendations in the committee's useful and considered report of its 2008 inquiry into the regulatory framework in Scotland. Those provisions will simplify the definition of an SSI, as well as streamlining and bringing clarity to the procedures for SSIs. We are also using the bill as an opportunity to remove complexity and to introduce flexibility where it is appropriate. My officials have been working closely with the committee clerks on that component of the bill, and I hope that nothing in it will come as a surprise to the committee. The committee is aware that the only recommendation that the Government does not support is concerned with the period that the Parliament has to annul an SSI subject to the negative procedure. No doubt, we will discuss that this afternoon.

The proposed pre-consolidation power would simplify and speed up the consolidation process: there would be no need—as there might be at present—for separate Scottish Law Commission recommendations in cases when it is desirable to amend the existing law before consolidating it.

The consultation on the bill closed on 12 April. We received 16 responses, mainly from academics and local authorities. As part of the consultation process, we held a discussion event on 19 March, which was attended by delegates including parliamentary officials.

Overall, the reaction to the bill has been supportive. We have received some thoughtful and constructive responses, and we are in the process of analysing them. We will then make any appropriate changes to the draft bill before introduction. It would be my intention—all things being equal, and if we can—to have the bill introduced in the Parliament before the summer recess.

The Convener: I now invite members to put questions to the minister or his officials. We start with Helen Eadie.

Helen Eadie (Dunfermline East) (Lab): I appreciate, minister, that it is possible that some of the points that you have made in your opening remarks might have an impact on your answers to the questions that we have prepared for you. In that case, you might simply wish to add to or expand on your remarks slightly.

My question relates to the definition of "Scottish instrument", which you have already covered to an extent. Schedule 1 potentially widens the definition of "Scottish instrument" to include not just, for example, orders and regulations but ministerial directions and certain guidance and codes of practice. Why have you taken that approach?

Bruce Crawford: Generally, respondents preferred the definition of an instrument to be as wide as possible, as they believe that it would be difficult, and perhaps dangerous, to try to produce an exhaustive list of what would be classed as a Scottish instrument. There are other views, however, and some respondents thought that there was a lack of clarity about what would be captured under the proposed definition of a Scottish instrument. We need to examine that point further in the context of the arguments, and there is some further work to be done. We will examine the consultation in that regard.

Helen Eadie: As you say, some respondents to the consultation expressed concern about the application of a definition, with legal effect, to documents that do not have any such legal status. What are your views on that? I am referring to questions 2(f) and 2(g) in the consultation paper.

Bruce Crawford: There are other examples, such as codes of practice, which might also be caught up in that. I do not have a defined view on the matter yet; we need to consider the evidence that we have received under the consultation process and to bottom out the arguments. We need to bring clarity to the matter if we possibly can. I am not sure that I am in a position today to say, one way or the other, where we will be coming from. Jan Marshall might wish to say more in that regard.

Jan Marshall (Scottish Government Constitutional, Law and Courts Directorate): Our position in preparing the consultation was to take the widest possible definition and seek views on that with a view to closing it down. As the minister has said, we are looking closely at the consultation responses and we will react appropriately.

Helen Eadie: That is very helpful—thank you for that. I am glad to hear that there will be further deliberations on that point.

The committee was concerned that you did not support its recommendation on the deadline for Parliament to accept a motion to annul on a negative instrument. Specifically, you have not agreed to the committee's proposal that the period be increased from 40 days to 50 days. Why could better forward planning not make it possible for you to lay instruments earlier?

Bruce Crawford: It is not just about forward planning. I will comment on some of the specifics and on the relationships between the Westminster legislative process and the Scottish Parliament process—there are issues there, too.

I understand why adding extra time to the scrutiny period might appear attractive for the purpose of removing perceived pressures on parliamentary time, but I do not think that evidence has been advanced to say that the 40-day period has been a failure. I have not yet seen any claims to suggest that that is a statement of fact. I am someone who does not want to change things unless they are broke, and I see nothing, at the moment, to suggest that the 40-day period is broken.

My officials provided the committee with detailed arguments about why some practical difficulties with governance could arise from the proposal to extend the period. Although, nominally, increasing the scrutiny period in such a way would mean only a 10-day increase, the actual increase could, in some cases, run into months because of parliamentary recesses and so on. I will say a bit more about that in a moment.

We must also consider the bigger picture. At present, certain instruments are linked to legislative delivery across the United Kingdom as a whole. Westminster also operates a 40-day period, and having a different laying period in Holyrood would complicate the legislative process, for which co-ordination between the two Parliaments is essential.

I will give you two concrete examples of that. First, we use Scotland Act orders to get Westminster to improve United Kingdom legislation on our behalf, following procedures in the Scottish Parliament. At the moment, 10 such orders are active. They also have a 40-day laying period, and they must be laid in Westminster at the same time as we lay them here.

The second example concerns the Somerville judgment and the necessity to act with speed. The response to Somerville required the making at Westminster of an order under section 30 of the Scotland Act 1998. If there were different processes and timescales in Scotland, we would not be able to act with the required speed, and we might be out of kilter in coming to a conclusion on a process of law that needs to be dealt with.

On the issue of a 40-day versus a 50-day period, a 40-day annulment period for an instrument that was laid on 8 May this year would end on 18 June. However, a 50-day annulment period would not end until 1 September. That increase of 10 laying days works out as an increase of 116 calendar days—more than three months. Of course, it could be argued that the Government would be able to manage that process but, inevitably, that will not always be the case—those who have been in Government will be aware that there is often a bulge at that time of year. I would not like us to be in a situation in which we had to wait until September if that could possibly be avoided. Laying days do not include the weekends, which is why some of the problems with the timescale arise.

I hope that I have explained that clearly.

Helen Eadie: That is a helpful answer. We can reflect on the minister's response.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I was not part of the committee when this recommendation was made, so I have not been over the arguments as thoroughly as some of my colleagues have. However, I have a couple of issues that I would like to raise.

The Westminster argument was perhaps the most persuasive part of your response, minister, but I am not entirely convinced that those issues could not be overcome. Are you sure that there is absolutely no way around them with regard to the Scotland Act orders?

Bruce Crawford: Such issues can always be overcome, but why would we want to create a process that was more cumbersome for both parliaments when the 40-day period works adequately? I have heard no evidence that the 40-day period is not working.

Perhaps Paul Johnston would like to add something.

Paul Johnston (Scottish Government Legal Directorate): If the same order is subject to different time periods in the two Parliaments, the longer of the two periods is the one that would apply. In effect, if Holyrood had a longer period, the order would be delayed by those extra days.

Malcolm Chisholm: Negative instruments are not always laid a full 40 days before they come into force. Why would you have to lay the instrument a full 50 days in advance of the date at which you wanted it to come into force? Is there not some flexibility that might cover the example that you give of the problems relating to the summer recess?

Bruce Crawford: We are moving from a situation in which we have eight procedures to one in which we have only three. We still have flexibility, however, with regard to when negative instruments are laid.

Do you want to say anything about that, Paul?

Paul Johnston: It would still be possible for a negative instrument to be brought into force before the expiry of the 40-day period, but there is always some risk during that period. When an instrument is brought into force before the expiry of the period, the Government recognises that it is subject to annulment. Having a 50-day period would increase the period of risk.

Bruce Crawford: If the SSI involved, for example, a health board coming to an end and another body being created, arrangements to enable that to happen would have to be made—you cannot process a negative instrument and not do work to prepare for the situation that it will bring about. However, if there were a 50-day annulment period, there would be a longer time before you would be able to do that work. I do not think that any of us wants to elongate the business of Government or the process of Parliament when that is not necessary.

I come back to the fundamental point, which is that no evidence has been put to me that the 40-day period is broke.

14:30

Malcolm Chisholm: We will reflect on your comments. As I said, some of my colleagues have been considering this matter for longer than I have, and no doubt they will have views on the matter.

The example of a health board being dissolved is interesting, as it relates to another point. The draft bill requires the Scottish ministers to revoke an instrument if it has been annulled by the Parliament. It also provides that an annulment resolution or revocation does not affect the validity of anything that was previously done under the instrument. The consultation paper asks whether the Scottish ministers should be required or enabled in some circumstances to restore the position to what it was or in some other way to remove any legal uncertainty. Why do you think that there might be legal uncertainty? I suppose that the issue of the dissolution of a health board might be relevant in that regard.

Bruce Crawford: If you give me just a few moments to go through my papers, I will answer you—this is an extremely technical piece of legislation, as I am sure you realise.

Helen Eadie: You have our sympathies.

Malcolm Chisholm: It is quite an interesting matter, though. Is the issue not that a power would be required to deliver fully the Parliament's

intention? The lawyers might be able to tell me whether there is legal uncertainty or whether, although there is legal certainty, there is a problem around the fact that something might be done that the Parliament did not intend, such as a health board being abolished. I do not suppose that such a situation comes up often, but there must be examples of it happening.

Bruce Crawford: One reason why I mentioned the example of the health board is that that situation must be examined further. A situation could arise wherein the Government has decided that it wants to get rid of a health board and begins work to bring that about but, halfway through the annulment process, the Parliament decides that it does not want that to happen. We need to examine that issue a bit further.

Malcolm Chisholm: So there needs to be some provision for ensuring that the will of Parliament is followed. Would there be legal uncertainty around that situation, or would the health board be abolished until some action were taken?

Bruce Crawford: The health board would be abolished unless the Government introduced a process that would unabolish it. We need to examine how we can sort that out.

Ian McKee (Lothians) (SNP): The draft bill provides for one general type of affirmative procedure, but the Subordinate Legislation Committee's 2008 report supported retention of class 3 or emergency affirmative procedures and the super-affirmative procedure. In the absence of specific provision in the bill, how will those types of affirmative procedure be retained?

Bruce Crawford: The bill departs from the Subordinate Legislation Committee's recommendations as it does not retain class 3 emergency affirmative procedures or class 8 super-affirmative procedures. However, if the Parliament considers that it is appropriate to apply those procedures, or any other procedure, it can define them under a process in the legislation.

I will illustrate that point using the health board example that I referred to earlier. Although the bill does not provide for that super-affirmative process, it sets out a procedure for a roll-out order to be made following the piloting of health board elections. It requires ministers to publish the order in draft and have regard to representations that are made about it. A similar process is on-going in relation to the Smoking, Health and Social Care (Scotland) Act 2005 (Variation of Age Limit for Sale of Tobacco etc and Consequential Modifications) Order 2007 (SSI 2007/437), which was made under the Smoking, Health and Social Care (Scotland) Act 2005.

It is possible to build a process into the primary legislation that will allow matters to be dealt with in the ways in question. The powers have not disappeared; they can still be used if Parliament or the Government considers that to be appropriate.

Ian McKee: Are those powers in the bill?

Bruce Crawford: Yes. That gives us a bit more flexibility than previously, as we can tailor mechanisms that are appropriate for each piece of legislation.

Ian McKee: Respondents' views varied quite widely on whether an instrument's validity should be affected if laying requirements are not complied with. Why do you propose that failure to comply with laying requirements should not affect validity?

Bruce Crawford: Are you talking about making an instrument before 21 days—or, under the draft bill, 28 days—have passed?

Ian McKee: Yes.

Bruce Crawford: The Government considers that process to be directive but not mandatory. We have always argued that; we discussed that with the SLC. That is why the bill will make it clear that the Government will no longer be in potential conflict if such a situation arises in the future. The bill should clear that up.

Ian McKee: The process is just directive and not mandatory.

Bruce Crawford: The process is just directive and not mandatory. We will make that absolutely clear in the legislation, so—although I did not accept the SLC's position—the potential for such a dispute will no longer exist.

Tom McCabe (Hamilton South) (Lab): My question follows that to a degree. The Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096) says that, "Where it is necessary", ministers may bring into force an instrument within 21 days. Why does the draft bill not contain a test of necessity in section 29 or elsewhere?

Bruce Crawford: You are talking about a transitional SI order issue.

Tom McCabe: Yes.

Bruce Crawford: Are you talking about what happens when a breach of the 21-day rule is necessary?

Tom McCabe: The existing order says that, "Where it is necessary", ministers may make an instrument that is to be brought into force within 21 days. The draft bill contains no test of necessity. What test of necessity will be applied? The draft bill contains no reference point. What is the thinking behind that? It is normal to put in place parameters within which a minister decides what is required.

Bruce Crawford: I am trying to keep all the balls in the air. I ask Jan Marshall to respond.

Jan Marshall: To an extent, the issue is linked to what the minister said about the Government's view on failure to comply with a laying requirement. As he said, the Government's view is that compliance is directory rather than mandatory, and removing the test of necessity is consistent with that view. If the Scottish Government intends to lay an instrument that will breach the 21-day rule—which will become the 28-day rule—it will nevertheless have to explain to the Presiding Officer why it proposes that action.

Tom McCabe: I appreciate that from the Government's point of view, but the Parliament takes a different angle. The Parliament exists to scrutinise the Government's actions. The intention might be explained to the Presiding Officer, but the Parliament would be assisted if parameters were set within which it could judge a minister's actions. If the minister applied a test that was set out clearly in legislation, that would assist the Parliament in considering and making a judgment on what the minister proposed.

Bruce Crawford: I understand where you are coming from but, as a former minister, you will know that the situation of each SSI is distinct and needs to be treated on its merits. It would be difficult to devise a tick list or set of criteria on when and where the 21-day or 28-day rule might be breached. An emergency might require the Government to act quickly to introduce legislation to cover an unexpected gap and, in such a situation, it would be right that we explained that to the Presiding Officer and the Parliament. However, as for bracketing all such situations in a process, legislation does not work in that way: every case must be dealt with on its merits. However, I will consider your points further.

Tom McCabe: Without a test of necessity or a reference point, the danger is that every decision by a minister will be viewed as political. Irrespective of the political party that is in control, it is probably not in the interests of government if it could be inferred that such decisions were political and did not refer to anything else.

Bruce Crawford: That is certainly not how I understood the previous Executive to work, and it is certainly not how the current Executive works. The Parliament has the whip hand. Whether an instrument is subject to annulment or to an affirmative process, if the Parliament is unhappy about a breach and considers that to be a fundamental issue, it can still vote down the SI. That backstop will still exist. If a minister's explanation does not adequately meet the criteria that the Parliament sets for scrutiny, it will still be the Parliament's prerogative to vote down the instrument. That is a remedy, but I hope that we would not arrive at such a situation.

Tom McCabe: It is not implied that the current Government has a track record that means that we must try to limit it. Irrespective of how the existing and previous Governments have operated, temptation always hangs there. We hope that people will behave properly but, if it is possible to do something, someone might on a rare occasion be tempted to do it.

Bruce Crawford: I will look at the issue. It is obvious that legal uncertainty about whether such a test has been met must be to the fore.

I repeat that, given the variety of statutory instruments, it would be difficult to set benchmark criteria that each should meet. It is inevitable that arguments about the reasons for breaching the 21-day rule—which will be the 28-day rule—will be different every time, unless maliciousness is going on, in which I am not sure that any Government would want to be involved. That would put a minority Government in particular in direct conflict with Parliament, which is a pretty dangerous place to be.

Bob Doris (Glasgow) (SNP): I will ask about the power to change the procedure to which subordinate legislation is subject. Section 31(2) of the draft bill provides that the Scottish ministers may, by order, amend the procedures that are specified in a parent act, following a resolution of Parliament. That implements a recommendation from the committee. The consultation paper asks for people's views on whether following such a resolution of the Parliament should be compulsory or discretionary for the Government. I am keen to know your thinking on why ministers should not be bound by such a resolution of the Parliament.

Bruce Crawford: The current set of ministers did not necessarily come up with that view—it is a fact. I will shortly read out a quotation from Donald Dewar that helps to explain the situation well.

Section 31's purpose is to provide flexibility in the system, for which the SLC asked. That is why we responded in the way that we did. The section will provide Parliament with a different way of operating and might resolve difficulties. For instance, an instrument that was subject to negative procedure could instead be subject to affirmative procedure, and vice versa. That would allow the Parliament a stronger voice in the process. The SLC made a novel suggestion and I am pleased that we have gone in that direction.

You suggest that, as some consultation respondents said, the Government should be required to promote such an order if the Parliament so wishes. Any Government that is worth its salt will respond to whatever Parliament says and will do what Parliament asks it to do,

particularly if it is a minority Government, which can be easily outvoted. However, issues come along from time to time on which a Government might not do what the Parliament asks.

14:45

As former members of the previous Executive may or may not recall, I wrote to Donald Dewar about this very matter in the early days of the Parliament. As a new MSP—as we all were at that time—I received a rather interesting response. In his letter to me of 11 October 1999, Donald Dewar said:

"As part of these perfectly normal constitutional arrangements, except in certain circumstances, the Scottish Executive is not necessarily bound by resolutions or motions passed by the Scottish Parliament."

That was a bit of an eye-opener for me, but that was the view advanced—rightly, I believe—by Donald Dewar at the time. He went on:

"Nor would it be proper or appropriate for me to give an unconditional guarantee that there will be no occasion when the Scottish Executive will choose not to implement a decision made by the Parliament."

I guess that Donald Dewar was in a situation in which he had a guaranteed majority so he could say such things, whereas the situation is a bit more difficult for a minority Government.

Of course, any Government worth its salt will listen to the view of the Parliament, which ultimately has the final say in that it can, if it so wishes, pass a motion of no confidence in the Government that is in charge. In the process that we are discussing, I cannot see any circumstances in which the Government would necessarily be resistant to a request for flexibility from the SLC or any other committee. Otherwise, I would not be introducing a proposal that will make the process much more visible and allow for such flexibility to be brought to bear if the Parliament so wishes. I think that that is a good thing to do.

Bob Doris: Thank you for that answer. I might not ask a supplementary question on that, lest we stray from process to politics, which is not really the role of this committee—

Bruce Crawford: Forgive me if I just did so.

Bob Doris: I am sure that you would do no such thing.

On a perhaps less contentious point, let me ask about the publication of acts and instruments. We note that the Queen's Printer for Scotland will not be required to print copies of SSIs. Some have said that that potentially raises questions about accessibility. What is your response to the concerns that were expressed about that by a number of the respondents to the consultation?

Bruce Crawford: I asked that very question, as I was a bit concerned by the proposal. However, I then received some statistics about how many SSIs are actually printed. On average, only 29 copies of each SSI are printed, so the accessibility argument kind of disappeared in front of me when I was told that. That number includes those that are supplied to the Scottish Government. I found it difficult thereafter to continue my argument about accessibility.

As has been mentioned, the consultation paper invited comment on whether the bill should continue to require the QPS to print all SSIs. Respondents were divided on the issue. We are working closely with the office of the QPS to take account of those views. I agree that we need to ensure that the law continues to be made readily available and accessible to the public, but we need to strip out inefficiency when occasion requires. If on average only 29 copies of each SSI are printed, we need to strike a balance between accessibility and efficiency. I will listen to what the committee says, but I think that it would be difficult to justify such a requirement, given the numbers involved. In addition, we want to be as environmentally friendly as we can in deciding about the print run.

Bob Doris: In the internet age, given that public libraries provide internet access, a requirement to print everything is perhaps a luxury that we do not need for transparency.

Bruce Crawford: That is exactly what we are saying. You have put the point better than I did.

Tom McCabe: Let me just assist the minister on the previous question. If memory serves me right, the minister and some of his colleagues vociferously opposed the late First Minister's view at that time. Indeed, I think that they wrote to me to state that they vociferously opposed his view, but I will check my records.

Bruce Crawford: Certainly, I learned a lot from Donald Dewar's response. One thing about good politicians is that they always take on board good ideas.

The Convener: I see. After that interesting exchange, let me pose our final questions, which are about pre-consolidation modification of enactments. Will the minister send the committee a note on how the proposed procedure would work in practice?

I have two further specific questions. First, the proposed pre-consolidation order-making power would enable the Scottish ministers to make amendments that they considered to be not only necessary or desirable to facilitate the consolidation but "desirable in connection with" the consolidation. Is not that a very wide power? Secondly, page 49 of the consultation paper

implies that such orders might tackle significant policy changes or matters that are likely to provoke controversy. Is it appropriate that a process that is designed simply to aid consolidation should do that?

Bruce Crawford: I am not sure that we propose a wide or controversial power. Madeleine MacKenzie has—I hope that I am right in saying this—some expertise in this area.

Madeleine MacKenzie (Scottish Government Office of the Scottish Parliamentary Counsel): Yes, this is an area in which any drafter of a consolidation bill has quite an interest. I can understand why people might think that the proposal could provide scope for making political changes, but it would simply allow the drafter to bring together two or three or more acts—some of which might be quite dated—that were all drafted at different times. The proposal would expand the scope of the consolidation project to allow the law that is being gathered together to be changed before it is consolidated. That would allow the law to be modernised and updated to deal with things that were perhaps not even contemplated in old acts of the 1800s or early 1900s.

Bruce Crawford: We can write to the committee to provide more specific details on that, as the matter is complicated.

The Convener: That would be useful.

As there are no further questions, it falls to me simply to thank the minister. However, before I do so, let me just clarify that today's evidence-taking session was an exploration of the issues and is in no way the end result of the committee's hard views. Committee members will all retire to a darkened room for some time to think about these matters. Nevertheless, we are grateful to the minister and his officials for appearing before the committee today; indeed, we are grateful to the minister for the jaunt down memory lane when he recalled that correspondence with Donald Dewar.

Bruce Crawford: Thank you for the invitation, which provided a jolt to my mind by ensuring that I spent several evenings over the last wee while trying to get some of this detail into my head.

The Convener: The same was true for us, minister. Thank you very much.

We will pause for just a few seconds while our guests leave us.

Tobacco and Primary Medical Services (Scotland) Bill: Stage 1

14:52

The Convener: We move to agenda item 2. Today, we will try a slightly different procedure, in that we will clear the decks of all the stuff that we think is acceptable and then consider the nitty-gritty. That is a slightly different way of doing things, but it involves more tidy thinking on our part.

We are considering the delegated powers memorandum to the Tobacco and Primary Medical Services (Scotland) Bill. First, the commencement power in section 35(3) is subject to no procedure. Are we content that that power is acceptable and that it is appropriate that it is subject to no procedure?

Members *indicated agreement*.

The Convener: Our legal brief then lists the powers that will be subject to the negative procedure and which we think are acceptable. I will read out the list for the record, so forgive me if this takes a minute or two. Those powers are:

"Section 1(2)(c), 1(3)(b) and 1(4) – power to prescribe requirements for exempt display

Section 4(4)(c) – prescribe documents as proof of age

Section 5(5) – power to prescribe dimension etc of warning notice

Section 8(2)(d) – power to prescribe additional information on applications

Section 30 (new section 17CA(5)(6)) – meaning of regular performance etc/disregarding certain periods

Section 30 (new section 17CA(7)) – effect of change of partnership

Section 31 – (new section 17L(5)(6)) – meaning of regular performance etc/disregarding certain periods

Section 31 (new section 17L(7)) – effect of change of partnership

Section 34(1) – ancillary powers – not textually amending primary legislation

Schedule 1 fixed penalty – following aspects:

para 11(1)(a)(c) form of notice and means of payment".

Are we content to find those powers acceptable and that it is appropriate that they are subject to the negative procedure?

Members *indicated agreement*.

The Convener: We now move to consider powers that are subject to the affirmative procedure, which are:

"Section 27(3) – power to amend list of tobacco products

Section 34(1) – ancillary powers textually amending primary legislation

Schedule 1 fixed penalty – following aspects:

Para 10 – application by councils of payments and keeping of accounts

Para 11(1)(b) – prescribe circumstances in which fixed penalty may not be given".

Are we content to find those powers acceptable and that it is appropriate that they are subject to parliamentary scrutiny under the affirmative procedure?

Members *indicated agreement*.

The Convener: I now turn to those powers in the bill on which it is recommended, as members can see from the legal brief, that we seek further information. The first, which is in section 2, is the power to distinguish between an advert and a display. I had to read what the legal briefing says about that several times. Are we content to ask the Scottish Government to explain the justification for the use of the negative procedure, given that the exercise of the power and choice of regulatory regime impact on the level of applicable penalties? The application of the affirmative procedure to a similar power in the Tobacco Advertising and Promotion Act 2002 is referred to, and the Scottish Government is asked to explain the difference in approach. Are we happy to ask why the Government is doing something different in that regard?

Members *indicated agreement*.

The Convener: The next power is in section 3(1), which is on requirements in relation to the display of prices. The power in section 3(1) defines the limits of permitted behaviour and therefore the scope of the offence provisions, and it replicates the power in section 8 of the Tobacco Advertising and Promotion Act 2002. Are members content to ask the Scottish Government why it is considered that the negative procedure is appropriate, given the nature of the power and the fact that the regulations under section 8 of the 2002 act are subject to the affirmative procedure?

Members *indicated agreement*.

The Convener: We come to section 8(2)(e), which is on the form and manner of application for registration. Are members content to ask the Scottish Government the following questions? First, in what manner, or by what means, does the Scottish Government propose to publish or otherwise make known to potential applicants the form and manner of an application that is to be determined by the Scottish ministers, if those are not to be prescribed in subordinate legislation? Secondly, does the Scottish Government consider that it would be more appropriate for the form and manner of an application under section 8(2)(e) to be specified in regulations, whereby the requirements would be clear and transparent and potential applicants would have access to them and know what they had to do in order to make a valid application for registration? Do we agree to ask those questions?

Members *indicated agreement*.

The Convener: Section 17 is on the power to modify the application of chapter 2 of the bill to vehicles and vessels. Are members content to ask the Scottish Government the following questions? First, given that the power in section 17 is very broad and has the potential to alter any aspect of the regime for the register of tobacco retailers as it applies in relation to

"vessels, vehicles and other movable structures",

would it be possible for the Scottish Government to specify and restrict the nature, scope and extent of modifications that may be provided for in regulations under the section? Secondly, given the potential scope and effect of the power, what is the justification for the Scottish Government's view that the negative procedure provides an adequate level of parliamentary control, particularly given that it appears that the power could be used to make alternative provision in relation to significant matters such as offences and sentencing? Do we agree to ask those questions?

Members *indicated agreement*.

The Convener: We move to section 30, which inserts new section 17CA into the National Health Service (Scotland) Act 1978. New section 17CA(1) is on arrangements for

"persons with whom agreements can be made"

and conditions that can be prescribed. Do we agree to ask the Scottish Government the following questions? First, does it consider that the effect of the power in subsection (1) of the proposed new section is actually to permit the general prescription of conditions before a health board can make a section 17C agreement for the provision of primary medical services, rather than the power simply being one to prescribe criteria for eligibility to perform such service, and is that the intended effect of the power? Secondly, what does the Scottish Government consider that the power adds to the existing provisions in section 17E of the 1978 act to make regulations with respect to section 17C arrangements, particularly in section 17E(3)(ca)? Thirdly, is there any intention to prescribe further conditions beyond those relating to eligibility? Do we agree to ask those questions?

Members *indicated agreement*.

15:00

The Convener: We move to section 31, which substitutes section 17L in the 1978 act with new section 17L. Subsection (1) of the proposed new section is on the conditions that can be prescribed for entering into general medical services contracts. Are we content to ask the Scottish Government the following questions? First, does it consider that the effect of the power in new section 17L(1) is actually to permit the general prescription of conditions before a health board can enter a general medical services contract with a contractor, which is the position in current section 17L, rather than simply to impose conditions as to eligibility, and is that the intended effect of this power? Secondly, is there any intention to prescribe further conditions beyond those relating to eligibility? Are we content to ask those questions?

Members *indicated agreement*.

The Convener: We move to schedule 1, on the fixed-penalty scheme, and the following aspects: paragraph 3, on the time after which a fixed penalty cannot be given; paragraph 4, on the prescribed amount of fixed penalty and the discounted amount; and paragraph 11(2), on the power to modify time to pay. Do we want to obtain a further explanation of the proposals for the exercise of the Government's power to change significant elements of the fixed-penalty scheme, as set out in paragraphs 3, 4 and 11(2) of schedule 1, and why the Government considers that the negative procedure is appropriate? Are we content to invite officials to give oral evidence on the fixed-penalty scheme provisions in schedule 1?

Members *indicated agreement*.

The Convener: That is super. We saw in our briefing papers a notion of what the questions might look like. We thank our team for that. The oral evidence session will be on 19 May, all being well.

Draft Instrument subject to Approval

Scottish Public Services Ombudsman Act 2002 (Amendment) Order 2009 (Draft)

15:02

The committee agreed that no points arose on the instrument.

Instruments subject to Annulment

Victim Notification (Prescribed Offences) (Scotland) Amendment Order 2009 (SSI 2009/142)

Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2009 (SSI 2009/151)

15:02

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2009 (SSI 2009/144)

Adoption and Children (Scotland) Act 2007 (Commencement No 3) Order 2009 (SSI 2009/147)

Building (Scotland) Act 2003 (Commencement No 2 and Transitional Provisions) Order 2009 (SSI 2009/150)

15:02

The committee agreed that no points arose on the instruments.

The Convener: That is splendid. Our next meeting is a week from today on 5 May, at the same time. We will discover in due course what committee room it will be in. I thank members for their participation in what I think was an interesting session with the minister and his civil servants.

Meeting closed at 15:03.

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