

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 September 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

23rd 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

CLERK TO THE COMMITTEE

Douglas Wands

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 8 September 2009

[THE CONVENER opened the meeting at 15:01]

Public Services Reform (Scotland) Bill: Stage 1

The Convener (Jamie Stone): I welcome everyone to the 23rd meeting in 2009 of the Subordinate Legislation Committee. We have apologies from Bob Doris and I welcome Christopher Harvie, who is substituting for him. Can we turn off our mobiles, please?

First on the agenda is the Public Services Reform (Scotland) Bill. On behalf of us all, I thank the legal team for a good, detailed briefing. Now we must take some decisions.

First, we have section 7, "Delegation of Ministerial functions under section 7 of Industrial Development Act 1982", and section 8, "Delegation of Ministerial functions under section 5 of Science and Technology Act 1965". Are we content to draw it to the attention of the lead committee—in order to assist its policy consideration—that those sections confer powers on the Scottish ministers to delegate important financial support functions under section 7 of the Industrial Development Act 1982 and section 5 of the Science and Technology Act 1965, but that there are no express requirements that any delegation should be in writing or as to the means of public notification? Are we also content to draw it to the lead committee's attention that the sections confer such powers to delegate functions to any persons without further provision for parliamentary scrutiny before the powers are exercised? Is that agreed?

Ian McKee (Lothians) (SNP): I wonder whether the second recommendation needs expanded slightly, because it seems to me just to encapsulate what is in the bill without stating why we are drawing it to the attention of the lead committee.

The Convener: You have flagged up that concern and it will appear in the *Official Report*, so it will become part of the proceedings of the committee. Is Dr McKee's suggestion about interpreting the decision to agree to the second bullet point in the summary of recommendations acceptable to the clerks?

Ian McKee: I thought that we could include a statement such as "and this needs further consideration", or something like that.

Douglas Wands (Clerk) indicated agreement.

The Convener: Okay, that is no problem.

It has been suggested that we should invite officials to give evidence on the delegated powers in Part 2, "Order-making powers", at our committee meeting on 22 September. Is that agreed?

Members indicated agreement.

The Convener: Dr McKee will convene that meeting, as I shall be away that day.

Tom McCabe (Hamilton South) (Lab): What did we just agree to, convener?

The Convener: We agreed to invite officials to give evidence on the delegated powers in part 2 of the bill at our meeting on 22 September.

Tom McCabe: That is fine.

The Convener: Section 28 is on the advisory and other functions of creative Scotland. Are we content to report the power in section 28(4) as acceptable to be exercised by determination by the Scottish ministers, rather than by subordinate legislation?

Members indicated agreement.

The Convener: Section 29 is on grants and loans to creative Scotland. Are we content to report the power in section 29(3) as acceptable to be exercised by ministerial determination, rather than by subordinate legislation?

Members indicated agreement.

The Convener: Are we content to report the power in section 29(5) as acceptable to be exercised by determination by creative Scotland, rather than by subordinate legislation?

Members indicated agreement.

The Convener: There are two questions on section 30, which is on directions and guidance to creative Scotland.

First, are we content to report that the powers in section 30 to issue directions and guidance are acceptable?

Secondly, are we content to draw it to the attention of the lead committee that there may be scope for doubt as to the edges of the expression "artistic or cultural judgement" in section 30(2), and consequently doubt as to what is excluded from the direction-making power; and that there is no provision in section 30 to the effect that, before issuing directions to creative Scotland, the Scottish ministers are required to consult with that authority?

Members indicated agreement.

The Convener: Paragraph 2 of schedule 2 amends section 75 of the Debtors (Scotland) Act 1987 and provides a power to the Court of Session to regulate the conduct of officers of court

“in exercising their extra-official functions”

and to

“prescribe the procedure in relation to an appeal under section 82”

of the Debtors (Scotland) Act 1987.

Should we ask the Scottish Government to explain why it has been considered appropriate that any provisions that shall exercise the power in paragraph 2(a)(i) of schedule 2 to the bill for the Court of Session to regulate the conduct of officers of court in exercising their extra-official functions shall not be laid in the Parliament—because an act of sederunt would not require to be laid—whereas any code of practice for persons undertaking informal debt collection that would have been issued by the Scottish civil enforcement commission under section 56(2) of the Bankruptcy and Diligence etc (Scotland) Act 2007, as repealed by the bill, would have been laid before the Parliament for consideration?

Members indicated agreement.

The Convener: Paragraph 15(1)(b) of schedule 2 provides a power to require

“an officer of court to provide such information as the professional association reasonably considers necessary”.

Are we content to report that delegated power as acceptable and that it is appropriate that it be subject to negative procedure?

Members indicated agreement.

The Convener: Are we content to report that the delegated power in paragraph 19 of schedule 2, which inserts section 65A, “Annual fee for officers of court”, into the Bankruptcy and Diligence etc (Scotland) Act 2007, is acceptable?

Members indicated agreement.

The Convener: Paragraph 2(2) of schedule 5 is on the power to vary the number of members of creative Scotland. Are we content to report that the powers in paragraphs 2(2) and 2(3) of schedule 5 are acceptable in principle and, in the circumstances, that the approach of permitting the limited textual amendment of paragraph 2(1)(b) is acceptable and that it is appropriate that the powers are subject to negative procedure?

Members indicated agreement.

The Convener: Are we also content to draw it to the attention of the lead committee that, while the delegated powers are acceptable in principle, the powers as drafted permit the substitution of any

minimum or maximum number of members of creative Scotland and that we consider that, in order that the power be drawn only so far as is warranted, consideration should be given to its amendment so as to impose maximum and minimum memberships within which ministers may operate? So we are imposing limits. Is that acceptable?

Members indicated agreement.

The Convener: Section 34(2)(a) contains a power to issue directions to social care and social work improvement Scotland—SCSWIS. Are we content to report that it is appropriate for that power to be exercised by direction, rather than in the form of subordinate legislation?

Members indicated agreement.

The Convener: Are we content to report that the power in section 39, “Power to modify key definitions”, is acceptable in principle and that affirmative procedure is appropriate?

Members indicated agreement.

The Convener: Section 41(3)(b)(vi) provides a power to prescribe

“persons, or groups of persons”

to whom SCSWIS must provide advice when asked. Are we content to report that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 46(4) provides a power to

“make further provision about the preparation, content and effect of reports”.

Can we agree to ask the Scottish Government what is meant by

“further provision about the ... effect of reports”

under section 46? Should we also ask, given that that is a matter of substance rather than an administrative or procedural matter, about the rationale and justification for that element of the power? Should we ask, in particular, whether it is intended that the power could be exercised to make substantive provision about duties to implement the findings of reports or other sanctions and, if so, why it has been decided that a power, as opposed to a specific provision on effect, is required in the bill, and why the use of negative procedure is considered appropriate? Do members agree?

Members indicated agreement.

The Convener: Section 47 is on the power to make further provision for conducting inspections. Do members agree to ask the Scottish Government whether it is proper for the powers in

respect of interview, mental and physical examination and disclosure in sections 47(2)(f) and 47(2)(h) to be considered as only administrative detail; to explain why the proposals for those powers cannot be included in the bill for consideration by Parliament; and how and for what purposes it is intended that the powers in section 47(2)(f) and 47(2)(h) will be exercised?

Members indicated agreement.

The Convener: Section 48(2)(a) relates to the power to prescribe the type and detail of information that is required in an application for registration. Are we content to report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 53(1)(c) concerns the power to prescribe the grounds on which SCSWIS may propose to cancel the registration of a care service. Do members agree to ask the Scottish Government whether, given the potential effect of a proposal to cancel a registration, it will give further consideration to the choice of negative procedure, through the use of which a change in the criteria for cancellation can be brought into force within 21 days? Do we also agree to ask whether, in light of the significance of the proposal for service providers and those who receive services, the use of affirmative procedure would not be appropriate?

Members indicated agreement.

The Convener: Section 55(3) contains a power to prescribe the manner in which an application under section 55(1) must be made and its contents. Are we content that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 61(1) deals with the power to prescribe the maximum fees that may be imposed by SCSWIS and the circumstances in which such fees are payable, which are described in section 61(2). Are we content to report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: We are getting on well.

Section 62(1) concerns the power to make regulations that relate to the registration of care services. Are we content to ask the Scottish Government to clarify what is intended by the reference in section 62(1)(b)(iii) to

"categories of applicant who cannot competently make ... applications"

and how it is envisaged that that element of the

power may be exercised? Shall we also ask the Government whether it is intended that the power could be used to set out criteria for eligibility to provide services and, if so, to explain why that is considered an administrative matter rather than a matter of substance that would be better suited to being dealt with in primary legislation? Finally, shall we ask why, if subordinate legislation is required, negative procedure would be appropriate?

Members indicated agreement.

The Convener: Section 63 is about the power to make regulations to impose requirements in relation to care services that are appropriate for the purposes of part 4. Do members agree to ask Scottish Government officials to give evidence to the committee on that issue on 22 September?

Members indicated agreement.

The Convener: Are we content to ask officials the reason for the power and the limits on its exercise, and to explore with them whether it could be expressed in more focused and restricted terms?

Members indicated agreement.

The Convener: Section 68(2) deals with the power to prescribe the manner in which an application under section 68(1) must be made and its contents. Can we report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 71(2) relates to the power to prescribe the manner in which an application under section 71(1) must be made and its contents. Are we happy to report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 76(5)(c) contains the power to prescribe an act and thereby add requirements or conditions contained in that act to the list of relevant requirements. Should we ask the Scottish Government to explain why the power is considered to be administrative rather than substantive, given that its effect will be to extend the reporting system through the addition of enforcement mechanisms that apply to other matters; whether it has reviewed other enactments with a view to considering what mechanisms should be added to the reporting system; and why it would be necessary to take the proposed power in relation to new legislative provisions, given that when they are made, consideration could be given to including them in section 76(5)?

Members indicated agreement.

15:15

The Convener: Section 76(6) is on the power to prescribe matters in relation to a care service that is registered under chapter 4 of part 4, on which SCSWIS must report and provide information to the Scottish ministers. Given that section 76(6) refers to

“such other matters in relation to a care service”,

are we content to ask the Scottish Government whether it is intended that the exercise of the power will be of general application—in other words, will apply to all care services—or whether it will apply specifically to individual care services?

Members indicated agreement.

The Convener: The powers that we will now consider are contained in section 90, which inserts new sections into the National Health Service (Scotland) Act 1978.

In relation to the power in proposed new section 10A(3) of the 1978 act to issue directions to a body to be known as healthcare improvement Scotland, are we content to report that it is appropriate for that power to be exercised by direction, rather than subordinate legislation?

Members indicated agreement.

The Convener: New section 10C(3)(e)(vi) relates to the power to prescribe persons to whom advice may be given. Are we happy to report that the proposed power is acceptable in principle and that the use of negative procedure is all right?

Members indicated agreement.

The Convener: New section 10D(1) concerns the power to delegate functions. Given the restricted nature of HIS—it is a body that will be concerned with the improvement of health care services—are we content to ask the Scottish Government why it is necessary to have a power to delegate to it any of the Scottish ministers’ functions in relation to the health service? Given that legal liability for the exercise of the delegated functions will be transferred from the Scottish ministers to HIS, are we also content to ask the Government to explain why the use of affirmative procedure would not be merited?

Members indicated agreement.

The Convener: New section 10E(1)(e)(vi) concerns the power to prescribe persons to whom advice may be given. Are we content to report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: On new section 10G, “Power to modify definitions”, are we content to report that the proposed power is acceptable in principle and

that the use of affirmative procedure is appropriate?

Members indicated agreement.

The Convener: New section 10M(4) contains a power to make regulations to make further provision about the preparation, content and effect of reports. Do members agree to ask the Scottish Government what is meant by

“further provision concerning the ... effect of reports”

under section 10M(4)? Given that that is a matter of substance rather than an administrative or procedural matter, what is the rationale and the justification for that element of the power? In particular, is it intended that the power could be exercised to make substantive provision on duties to implement the findings of reports or other sanctions? If so, why has it been decided that a power, as opposed to specific provision on effect, is required in the bill? Why is the use of negative procedure appropriate? Do members agree to ask those questions?

Members indicated agreement.

The Convener: New section 10N(1) concerns the power to make regulations to make further provision for conducting inspections. Are we content to ask the Scottish Government the question that is set out in the summary of recommendations, which is among members’ papers?

Members indicated agreement.

The Convener: New section 10O(2)(a) contains a power to prescribe the information that is required for the registration of independent health care services. Can we report that the proposed power is acceptable in principle and that the use of negative procedure is appropriate?

Members indicated agreement.

The Convener: New section 10R(1)(c) concerns the power to prescribe the grounds on which HIS may cancel the registration of an independent health care service. Do members agree to ask the Scottish Government whether, given the effect of a proposal to cancel a registration, it will give further consideration to the choice of negative procedure, through the use of which a change in the criteria for cancellation can be brought into force within 21 days? Do we also agree to ask whether, in light of the significance of the proposal for service providers and those who receive services, the use of affirmative procedure would not be appropriate?

Members indicated agreement.

The Convener: In relation to new section 10T(3), which deals with the power to prescribe the manner in which an application to remove conditions attached to a registration may be made,

and new section 10Z(1), which contains the power to prescribe fees for registration, are we content to report that the proposed powers are acceptable in principle and that the use of negative procedure is all right?

Members indicated agreement.

The Convener: New section 10Z1 contains a power to make regulations about registers and registration. Are we content to ask the Scottish Government to clarify what is intended by the reference in section 10Z1(1)(b)(iii) to

“categories of applicant who cannot competently make ... applications”

and how it is envisaged that that element of the respective powers may be exercised? Are we content to ask the Scottish Government whether it is intended that the power could be used to set out criteria for eligibility to provide services and, if so, why that is considered an administrative matter and not a matter of substance that would be better suited to primary legislation? Are we also content to ask the Scottish Government why, if subordinate legislation is required, the negative procedure is considered appropriate?

Members indicated agreement.

The Convener: Proposed new section 10Z2 contains a provision on the making of regulations on independent health care services. Are we content to take oral evidence from Scottish Government officials on the reasoning for the power and the limits on the exercise of the power and to explore whether the power could be expressed in more focused and restricted terms? Shall we probe them on that?

Members indicated agreement.

The Convener: Section 92(5) contains a power to modify the list of bodies in schedule 13. Section 94(3) contains a power to modify the list of bodies in schedule 14. Are we content to report that the proposed powers are acceptable in principle and that negative procedure is appropriate in these cases?

Members indicated agreement.

The Convener: Section 95(9) contains a power to modify the list of bodies in section 95(6). Are we content to report that the proposed power is acceptable in principle and that affirmative procedure is appropriate in this case?

Members indicated agreement.

The Convener: Section 96(1) contains a power to direct a person or body to participate in a joint inspection. Are we content to ask the Scottish Government how such participation by a body that is not listed in section 95(6) will be apparent and how it will be demonstrated what powers that body

does or does not have, particularly in the context of a criminal offence that relates to the obstruction of an investigation?

Are we also content to ask why, given that involvement in joint inspections and the acquisition of investigatory powers has a legal effect that can impact on individuals, it is not considered appropriate for the power to be exercised by subordinate legislation?

Members indicated agreement.

The Convener: Section 97(1) contains a power to make regulations relating to joint inspections. Do we agree to ask the Scottish Government, first, whether the powers in respect of interview, mental and physical examination and disclosure in sections 97(2)(d) and 97(2)(f) can properly be considered as only administrative detail; secondly, why the proposals for those powers cannot be put before the Parliament for consideration in the bill; and thirdly, how and for what purposes it is intended that the powers in sections 97(2)(d) and 97(2)(f) will be exercised?

Members indicated agreement.

The Convener: We are almost there, colleagues.

Section 101 contains a power to make ancillary provision. In our forthcoming evidence session with Scottish Government officials we can explore the difference between, on the one hand, the powers in section 63 and proposed new section 10Z2 of the 1978 act and, on the other, the ancillary powers in section 101. We might wish to ask officials about the detail of and justification for the different elements of the ancillary powers under section 101, given that there is no relevant information on that in the delegated powers memorandum. Is that agreed?

Members indicated agreement.

The Convener: Section 103(3) contains a power to commence provisions. Are we content to report that the proposed power is acceptable in principle and that, in accordance with normal practice for commencement orders, it is appropriate for no procedure to apply?

Members indicated agreement.

The Convener: Paragraph 2(2) of schedule 7 contains a power to vary the number of members of SCSWIS, and paragraph 2(2) of schedule 11 contains a power to vary the number of members of HIS. Given that the powers permit the substitution of any minimum or maximum number of members of SCSWIS and HIS, we might wish to seek the Scottish Government's views on whether it would be appropriate for the bill to state a minimum and/or maximum number of members within which the powers may be exercised. Is that agreed?

Members *indicated agreement.*

The Convener: Paragraphs 1, 2(c), 3, 4, 5(1), 11, 12(1), 13 and 19 of schedule 8 contain a power to except a care service. Are we content to report that the proposed power is acceptable in principle and that affirmative procedure is appropriate in this case?

Members *indicated agreement.*

The Convener: I say with some relief that that brings us to the end of item 1.

Draft Instrument subject to Approval

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009 (Draft)

15:24

The committee agreed that no points arose on the instrument.

Instruments subject to Annulment

Food Irradiation (Scotland) Regulations 2009 (SSI 2009/261)

15:24

The Convener: Are we content with the explanation that the Scottish Government has provided for its not complying with the 21-day rule?

Members indicated agreement.

The Convener: Are we content to report that regulations 5(2)(b) and 5(3)(a) and paragraphs 10 and 15(1)(b) of schedule 2 raise a devolution issue as they do not fully transpose the requirements of articles 8 and 9 of directive 1999/2/EC of the European Parliament and of the Council on the approximation of the laws of the member states concerning foods and food ingredients treated with ionising radiation?

Members indicated agreement.

The Convener: The batch number that an irradiation facility outside Scotland applies to a particular food requires to be specified in the documentation that accompanies the food when it is imported into Scotland from a third country. Regulations 6(1)(b)(i) and (ii) are defectively drafted as they do not give effect to the intention that batch numbers that are applied to irradiated food by a facility within the UK, or outside Scotland on import, should be specified in documentation that accompanies the food, as a condition of persons being permitted to store or transport such food for the purpose of sale in Scotland. We might wish to note that the Scottish Government has undertaken to produce an amending instrument to correct those matters as soon as possible, for which we thank them.

Members indicated agreement.

Helen Eadie (Dunfermline East) (Lab): Do we have a means of monitoring whether the Government produces an amending instrument within a reasonable time?

The Convener: I think that our legal team will do exactly that. That point is taken.

There are two further points on the regulations. First, are we content to report that we are satisfied with the Scottish Government's explanation as to why it was not considered necessary to include any express transitional or savings provisions in relation to the Food (Control of Irradiation) Regulations 1990 (SI 1990/2490), which are revoked by these regulations?

Secondly, we might note that the regulations are an example of an amending consolidation, as they consolidate existing laws on food irradiation controls but with some further substantive amendments.

Members indicated agreement.

Act of Sederunt (Commissary Business) (Amendment) 2009 (SSI 2009/292)

The Convener: Are we content with the explanation for the breach of the 21-day rule?

Members indicated agreement.

The Convener: Are we content with the act of sederunt?

Members indicated agreement.

Public Health etc (Scotland) Act 2008 Designation of Competent Persons Regulations 2009 (SSI 2009/301)

Scottish Court Service (Procedure for Appointment of Members) Regulations 2009 (SSI 2009/303)

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

Sheriff Court Districts Amendment Order 2009 (SSI 2009/293)

15:27

The Convener: Are we content to report that the committee is satisfied with the explanation that it sought and received from the Scottish Government regarding the timing of the amendment order, which was made and came into force during the Parliament's summer recess?

Secondly, are we content to note that it would have been useful for our consideration of the amendment order and the Act of Sederunt (Commissary Business) (Amendment) 2009 if the letter that the Cabinet Secretary for Justice sent to the convener of the Justice Committee to explain the timing had been copied to us?

Thirdly, are we satisfied with the Scottish Government's explanation as to why articles 3(1)(f), 3(2) and 4 are classed as transitional rather than consequential provisions?

Members indicated agreement.

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2009 (SSI 2009/294)

The Convener: Are we content to report the act of sederunt on the ground that it contains drafting errors, as noted in the summary of recommendations, but to note that they are not considered likely to affect its operation? Do we agree that, in relation to the second point in the summary of recommendations, we welcome the response that the erroneous references will be corrected when the opportunity arises?

Members indicated agreement.

The Convener: I say to Helen Eadie that I suppose we would wish our legal advisers to keep an eye on that.

Helen Eadie: Yes.

Standing Orders (Changes)

15:28

The Convener: Agenda item 5 is our proposal to recommend changes to standing orders. Members have seen and considered the paper by the clerk. Is the committee content for me to write to the Standards, Procedures and Public Appointments Committee to ask it to consider a proposal to make changes to chapter 10 of standing orders?

Members indicated agreement.

15:29

Meeting continued in private until 15:30.

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Wednesday 16 September 2009

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