SUBORDINATE LEGISLATION COMMITTEE

Tuesday 22 September 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE
25th 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:

Kirsty McGrath (Scottish Government Legal Directorate)
Colin Miller (Scottish Government Strategy and Ministerial Support Directorate)
John St Clair (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 22 September 2009

[THE DEPUTY CONVENER *opened the meeting at 14:17*]

Decision on Taking Business in Private

The Deputy Convener (Ian McKee): Good afternoon. I welcome members to the 25th meeting in 2009 of the Subordinate Legislation Committee. I have apologies from Jamie Stone. Could members and visitors please turn off any mobile phones, pagers and watch alarms?

Item 1 is a decision on taking business in private. It is proposed that under agenda item 6, the committee should consider evidence given by officials on the Public Services Reform (Scotland) Bill in private. Given the nature of the discussion, it would be appropriate to consider the item in private. Do members agree?

Members *indicated agreement*.

Public Services Reform (Scotland) Bill: Stage 1

14:18

The Deputy Convener: We first considered the delegated powers provisions in the bill at our meeting on 8 September. A number of questions were raised and members will have the Government's responses in front of them. Also at our meeting on 8 September, the committee agreed to invite Scottish Government officials to give oral evidence specifically on the delegated powers in parts 2, 4, 5 and 7 of the bill. That said, members are, of course, free to ask officials questions on any of the powers in the bill. We will return to reconsider the written Government responses as well as the powers discussed today at the committee's final consideration of the bill at our meeting on 6 October.

I welcome our witnesses. Colin Miller is head of the public bodies policy team, Kirsty McGrath is the branch head of the solicitors health and community care division, and John St Clair is divisional solicitor in the constitutional and civil law division. Thank you for coming.

Can you outline for the committee the Government's policy objectives regarding the order-making powers in part 2 of the bill?

Colin Miller (Scottish Government Strategy and Ministerial Support Directorate): There are two separate order-making powers in part 2 of the bill. The first, in section 10, is a power to improve the exercise of public functions. The second, in section 13, is a power to make proposals to remove or reduce any burdens. Those are two quite different policy objectives.

I characterise the first power as allowing ministers to make proposals to carry on the process of simplifying the public bodies landscape, and to find a way of improving public functions, possibly by taking forward the agenda that is set out in the bill. The second power, in essence, builds on existing legislation on deregulation, particularly the Deregulation and Contracting Out Act 1994, which is United Kingdom-wide legislation, and the Legislative and Regulatory Reform Act 2006, which applies to reserved matters in Scotland but not to devolved matters. The provisions in section 13 will build on the existing legislation and allow proposals for deregulation to be made on a consistent, UK-wide basis.

The Deputy Convener: In the evidence that the committee has seen, many commentators have expressed concern that, given the nature of the subject matter and its constitutional importance,

subordinate legislation is not appropriate. What is your comment on those concerns and how they might be addressed?

Colin Miller: The concerns that have been raised in evidence to the committee relate almost entirely to the section 10 power as opposed to the power in section 13. Although the section 10 power is wide in coverage in that it applies to the whole range of public bodies as set out in schedule 3 to the bill, and indeed to the Scottish ministers themselves, it is narrow in scope. The scope of the power is not large; it is simply to make proposals that ministers consider would improve the exercise of public functions. The power is also subject to stringent statutory and procedural safeguards, particularly those set out in sections 12 and 20 of the bill.

That is deliberately designed to reflect the fact that the power is to make subordinate legislation, not primary legislation. Of course, the purpose of the power is to enable changes to be made where appropriate, when they satisfy the statutory preconditions, and when Parliament approves them to allow the changes to be made more quickly than would otherwise be the case if Parliament had to wait for an opportunity to make primary legislation. Ministers therefore take the view that the power is quite balanced and, although it is wide in coverage, it is narrow in scope, and accompanied by rigorous statutory and procedural safeguards. Indeed, it is true to characterise the procedure as not only affirmative but super-affirmative.

Tom McCabe (Hamilton South) (Lab): You have largely covered the section 10 power, but it is a wide power and, as you rightly acknowledge, that is causing concern among many commentators. As time goes on, Governments move on, but governance remains in place and, although preconditions and restrictions must be complied with, the power will be used. A minister's interpretation of what would improve a public body could be quite wide. Are you not concerned that the power is very wide and that it bypasses the proper scrutiny of Parliament to some extent?

Colin Miller: The power is wide in the coverage of the range of bodies to which it applies, and that is deliberate: it is designed to extend to all public bodies on the baseline list that was originally announced in October 2007, except of course the bodies that the bill will abolish. As you said, the power is for the specific purpose of improving the exercise of public functions. It is true to say that that is part of the vires of the power. In other words, it is not simply a matter of the minister who brings forward proposals asserting that they would improve public functions; Parliament must be satisfied that that is the case. Indeed, even after an order was approved, it would be possible for a body to which it applied to challenge it, on the basis that it did not improve public functions. It is important to make the point that it is not a power at large—a power simply to transfer, modify or, in some cases, abolish functions. It can do that, but only for a specific purpose.

Many of the submissions that have been made to the committee categorise the legislation as providing, in effect, for a transfer of power from the Parliament to the Executive, but this is still very much a parliamentary process. Ministers can only make proposals, and they can do so only once they have gone through a process of statutory consultation. They must also lay before the Parliament an explanatory document that sets out why they are making the proposals, why they think that the proposals would improve the exercise of public functions, why the preconditions are satisfied, what the response to the consultation exercise that they are required to carry out has been and what changes they have made as a result of representations. All of that takes place before the draft order is laid before Parliament. It is then for Parliament to scrutinise the order in the ordinary way and to approve or not approve it.

By definition, it is a secondary legislation process, so that further changes can be made in certain circumstances without the need for primary legislation; self-evidently, that is the object of seeking the power. However, precisely because the power is exercised through secondary legislation, it is accompanied by tight and specific safeguards.

The Deputy Convener: We have been apprised from various quarters of the fact that there continues to be concern about the power. Would it be possible to draw up a list of bodies that would not be affected by the power? I refer to bodies that have some scrutiny power over Government, such as the Scottish Human Rights Commission and the Scottish Public Services Ombudsman. Our democracy depends on such functions. It would give considerable reassurance if, instead of Parliament being given a right to check later that something wrong had not been done, those bodies were listed as being outwith the bounds of the power.

Colin Miller: The parliamentary commissioners and the Scottish Public Services Ombudsman were included in schedule 3 to the bill purely and simply because they are public bodies and are, therefore, among the range of public bodies to which the power to make proposals to improve public functions might apply.

Ministers recognise that, arguably, the parliamentary bodies are in a separate category from other public bodies, because they report to and are accountable to the Parliament rather than ministers. When Mr Ingram gave evidence to the

Education, Lifelong Learning and Culture Committee last week, that point was made in relation to Scotland's Commissioner for Children and Young People. Mr Ingram made it clear that the Government and, in particular, Mr Swinney as lead minister would be happy to look at the issue again, if the Parliament took the view that the parliamentary bodies should be excluded from the scope of schedule 3. That said, when the Auditor General for Scotland, Mr Black, gave evidence to the Parliament, he pointed out that, if the parliamentary bodies, including Audit Scotland, were removed from the list, minor, sensible and uncontroversial proposals to tidy up certain of their functions or to adjust the boundaries between them would have to await primary legislation.

There is a balance to be struck. It can certainly be argued that the parliamentary bodies are in a different category from other public bodies. Ministers are prepared to look at the issue again, if that is the Parliament's view.

The Deputy Convener: There are genuine concerns. You are right to say that there is a balance to be struck. Ministers may want to revisit the issue.

My final question is about the addition of bodies to the list. It has been suggested to us that, technically, it would be possible to place local government on the list of bodies in schedule 3. Is that the case?

Colin Miller: I am not sure that it is. I invite John St Clair to respond.

John St Clair (Scottish Government Legal Directorate): That is not the case. Local authorities are ring fenced. Powers can only be transferred to local government. They are not subject to the general reorganisational power in section 10.

The Deputy Convener: So it is not possible for local government to be added to the list.

John St Clair: No, it is not.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): How would local government not be covered by section 11(3)(e)(i)?

14:30

John St Clair: Our understanding is that the terms of section 10(4) preclude that. If there were any dubiety or concern about the matter, the minister would make a statement putting the intention beyond doubt. That is how we construe the legislation.

The Deputy Convener: The question is, could local government be added to the list?

John St Clair: No, it could not.

The Deputy Convener: Are you absolutely certain about that?

John St Clair *indicated agreement*.

The Deputy Convener: That is on the record.

Bob Doris (Glasgow) (SNP): The convener has eaten into some of the questions that I was hoping to ask. Thank you, convener—I had it all prepared.

The concern about the section 10 power centres on the fact that it will be exercised through secondary, not primary legislation. Although secondary legislation is part of the parliamentary process, it is different in nature from primary legislation, which allows for amendments as well as scrutiny. That is why we must examine the matter carefully. You mentioned that there will be statutory preconditions, such as tightly worded safeguards, to ensure that the powers do not go too far. I seek more information on that point. What criteria will the Government use to determine whether a change to public functions should be made by order rather than through a bill? What safeguards or statutory preconditions will provide a safety net?

Colin Miller: The first is the scope of the power, as defined in section 10. Ministers can make proposals for an order only if they consider that it

"would improve the exercise of public functions, having regard to—

(a) efficiency,

(b) effectiveness, and

(c) economy."

The things that section 10 allows them to do are predicated on that initial proposition. In other words, ministers would be required first to satisfy themselves and then to satisfy the Parliament that a proposal would improve the exercise of public functions.

Section 12 sets out, in effect, what proposals could not do, even if they fell within the scope of the power that is set out in section 10. John St Clair may want to elaborate on the provisions in a moment. The most important point is that a proposal must be

"proportionate to the policy objective".

It cannot "remove any necessary protection" in existing legislation—anything that is fundamental to the core of a body. For example, it could in no way undermine or remove the judicial independence of judicial bodies. In the case of the national collections, whose primary function is to safeguard and protect the objects that they hold, it could not be used to sell off those objects. If ministers are modifying the functions of an existing body or conferring functions on a new body, they must do so in a way that is

"broadly consistent with the … objects or purpose"

of the body in question.

All the provisions that I have outlined are designed to ensure that ministers cannot use the power to change fundamentally the character or core functions—the raison d'être—of an existing body. The power is designed to do what some of the provisions of part 1 of the bill do. For example, it could have been used to transfer the functions of the Deer Commission for Scotland to Scottish Natural Heritage, without the need for primary legislation, provided that any existing protections were also transferred and that any modifications to the commission's functions were broadly consistent with its existing functions. The power allows ministers to make proposals by secondary legislation, subject to consultation, scrutiny and parliamentary approval, to adjust the boundaries, with a view to improving the exercise of public functions. However, ministers must be able to demonstrate that any proposals would do that and would satisfy the preconditions set out in section 12.

Bob Doris: I will pursue that issue briefly; I know that Mr Chisholm wants to look at it in more detail. You said that any proposals would have to improve the exercise of public functions. I cannot imagine any Government of any colour saying that a statutory instrument that it was introducing would not improve the exercise of public functions. I am certainly not an expert on the Deer Commission for Scotland, but you said that modifications to its functions would have to be consistent with its existing functions. The suggestion seems to be that things can be changed as long as they stay the same. There is a bit of confusion. If any Government could use secondary legislation that is wide in scope and not constrained, might there be a danger that, because it would be easier to use secondary legislation, the Government would simply not bother with a bill, although it would be more appropriate to deal with the matter in a bill?

Colin Miller: I will make two or three points about that. First, the thinking behind the proposal and the simplification programme as a whole is that we want to find ways of reducing duplication and overlap and allowing public bodies to exercise their functions more effectively. There are always judgments to be made about whether a particular proposal would improve things.

What was the second part of your question? I am sorry.

Bob Doris: It was more general. Might Governments in general think, as a result of the power, that it would be far easier to introduce secondary legislation rather than have the full scrutiny of a bill?

Colin Miller: The idea is to make it possible to respond more quickly to developments and opportunities—for example, to recommendations that the Auditor General for Scotland might make in his reports on public bodies, and ideas and proposals that public bodies come up with themselves. An example that is given in the policy memorandum is that the General Teaching Council for Scotland is thinking about whether it wants to amend its constitution in such a way that it will cease to be a non-departmental public body. The possibility of establishing a new single tribunals system for Scotland that absorbs the functions of existing tribunals is also being considered. There are no proposals at this stage, but those are examples of things that might come along in the future to allow changes to be made to the public bodies landscape. Where changes simply involve the transfer of functions between bodies with relatively minor modifications, the power, subject to parliamentary approval, would make it possible to do so much more quickly than awaiting an opportunity to legislate or waiting for a bill into the scope of which any particular proposal would fall. As you know, such opportunities can take some considerable time to come along.

The intention is to allow the Government, with Parliament's approval, to be light on its feet in looking for ways to improve the exercise of public functions and how public bodies go about their business. The proposals are accompanied by safeguards that are designed to ensure that there can be no question of undermining, removing or cutting across things such as the independence of commissioners, even if they remain within the scope of the bill, or bodies that exercise judicial or semi-judicial functions. The core features of those bodies' functions and any necessary protections are effectively among the safeguards that are set out in section 12. The proposal is intended to be carefully balanced.

The Deputy Convener: I am afraid that, in my enthusiasm, I trespassed on questions that my colleagues were keen to ask. I apologise to them. However, I think that I managed to avoid asking a question that Helen Eadie wants to ask.

Malcolm Chisholm: I wanted to ask a question, convener.

The Deputy Convener: I thought that the issue had been covered.

Malcolm Chisholm: No.

The Deputy Convener: I am sorry.

Malcolm Chisholm: Section 12, which contains important restrictions on the power in section 10, has been talked about. I would like to pursue the matter a bit further. There are questions about the extent to which the preconditions are clearly defined. I want to home in on the phrase

"necessary protection". I am not entirely clear how that will be established. I agree with what the convener said about the parliamentary bodies, which ought not to be in the list, but I will give a different example. I have had a big interest in the Mental Welfare Commission for Scotland, which, of course, has a different status from that of the majority of the other bodies in not being under ministerial control. Perhaps you could test the phrase "necessary protection" with reference to that body, which has a direct role in protecting the rights and interests of people with mental health problems.

John St Clair: Obviously, a great deal of thought has gone into the issue because it is at the heart of the balancing exercise between subordinate legislation and primary legislation. We chose the model that was adopted in the Legislative and Regulatory Reform Act 2006, which incorporates the expression "necessary protection". Ministers made statements about that when people were trying to tie them down to specific meanings during consideration of the bill. Rather than being tied down to specific meanings, ministers made it clear that the provision must be read very widely and that protections that are designed to protect the environment and for other specific natural heritage groups, for example, were included. There is a good example in the Water Industry (Scotland) Act 2002, which has protections built into sections 52 to 54 that guard the natural heritage, the environment and public access. Those protections are specific and easy to understand, but we think that "necessary protection" goes wider than that. It includes, for example, protections on judicial independence or, in the case of creative Scotland perhaps, protections to do with ministerial interference with aesthetic judgments or judgments about the arts in Scotland.

The Mental Welfare Commission for Scotland would be subject to the list, but its core functions have a raft of protections that are designed to protect the public. Probably the most important protection is the commission's right to require people to give evidence. That is fundamental to its operation and to get access to anywhere. We could not see any tinkering with the commission being allowed to encroach into safeguards that are designed for the benefit of people with mental illness or who are alleged to have mental illness.

Malcolm Chisholm: But you can see that people are concerned about what prevents a statutory instrument that abolishes the commission from being introduced.

John St Clair: There may be a misunderstanding about how the bill is interpreted and it may be as well that the question has been asked. The bill is designed only for the purpose, aim, object and end of improving efficiency and effectiveness. Unless that improvement can be shown, there is to be no abolition of functions per se. Therefore, the commission's functions could not be abolished, although they could be transferred to another body. There is no licence to abolish functions—they would have to continue, although they could perhaps be carried out by a different body.

Malcolm Chisholm: That is of similar concern. A new health care improvement body would be introduced by the bill. What in the bill would prevent a proposal that the powers of the Mental Welfare Commission for Scotland be transferred by statutory instrument to that new body, which would have a different status and standing and would be under more ministerial control?

John St Clair: We would expect that the safeguards in the legislation that set up the Mental Welfare Commission for Scotland, including any protections against ministerial interference, would have to carry through if its functions were transferred to another body and that those safeguards would pertain to it. It is difficult to think that a body as quasi-constitutional as the Mental Welfare Commission for Scotland would be allowed to have ministerial interference of the type that you are talking about.

Colin Miller: Essentially, it would be true to say that the phrase "any necessary protection" means that any safeguards that are integral and fundamental to a body could not be interfered with. Of course, the nature of the safeguards will vary according to the body in the question. That is at the core of the being of bodies that exercise judicial or semi-judicial functions. The same applies to scrutiny bodies. The core purpose of the national collections bodies, for example, is to safeguard, preserve and add to the collections. The phrase "any necessary protection" is wide and it deliberately makes it impossible to use the section 10 power to undermine or override provisions that are core to the way in which a body exercises its functions. As John St Clair explained, that does not mean that those functions cannot be transferred to another body but, if they are, the necessary protections have to travel with them.

14:45

The Deputy Convener: Is there a possible clash between the appearance of health boards in schedule 3 and the future of directly elected health boards? Could the legislation be used in any way to alter the composition of a directly elected health board?

Kirsty McGrath (Scottish Government Legal Directorate): There is no clash that I am aware of, but we should probably take the point back and

write to the committee about it, if that would be of assistance.

The Deputy Convener: Thank you. That would be helpful.

Helen Eadie (Dunfermline East) (Lab): You did ask my question, convener, but I have a short alternative question about democratic processes. I was concerned to see in papers for another committee that there was no prior consultation with the public on this bill. Why was that the case?

Colin Miller: The requirements for consultation are set out in section 21. The duty on ministers before they introduce a draft order and an explanatory memorandum will be to consult the following groups: organisations that represent interests that will be substantially affected by the proposals; when the proposals relate to the functions of a body or office-holder, the body or office-holder in question; if appropriate, the Scottish Law Commission—that would be particularly relevant in the case of consolidation measures; and such other persons as ministers consider to be appropriate.

It is also relevant to point out that any consultation undertaken by ministers, including under section 21, would fall within the normal guidance on good practice in relation to Scottish Government consultations. For example, that requires the Scottish Government to publish all consultation papers on our website, to allow consultees 12 weeks to respond, to distribute the consultation papers to core recipients, including anyone who has expressed an interest in the subject or in consultations in general, and to publish the responses.

A consultation under section 21 would be a full public consultation exercise. Section 21 imposes a statutory duty on ministers to undertake a consultation before introducing a draft order and then to report on the outcome of that consultation and any changes they have made to the order in response when they lay an explanatory document before Parliament.

Helen Eadie: My key point was not about what will happen once the bill is enacted—if it is enacted—but about the fact that the bill itself was not consulted on across Scotland.

Colin Miller: I am sorry; I see what you mean.

Helen Eadie: If we are about improving the democratic process, I want to know why the bill was not consulted on.

Colin Miller: I am sorry; I misunderstood your question. Any proposals that are made for a draft order would be the subject of, if you like, a bespoke consultation process and would be subject to parliamentary scrutiny and approval. Such consultations would be a parliamentary process, which is why no specific consultation was carried out on the proposals in part 2 of the bill.

Tom McCabe: Orders made under section 10 can confer powers on ministers to make further legislation. I do not think that there has been any explanation of the need for such a power. What is the thinking behind that aspect of section 10?

Colin Miller: Which specific provision in section 10 are you looking at?

Tom McCabe: It relates to section 15.

Colin Miller: I think that those provisions are restrictions on powers rather than additional self-standing powers.

John St Clair: Yes. When ministers currently have powers to make legislation, section 15 places restrictions on the transfer of those powers to another body.

Tom McCabe: Okay. I did not really understand that. It sounds counterintuitive.

The Deputy Convener: Section 15 can further a section 10 order to delegate.

Helen Eadie: We are talking about the whole issue of sub-delegation and the creation of a further level. Sub-delegation to a third level would give rise to additional concerns for the Parliament. Under section 15, the statutory instrument that was exercisable under a section 10 order could be subject to affirmative or negative resolution procedure. Why? Does such an approach not undermine the approach to section 10 orders, which are to be subject to affirmative procedure?

John St Clair: I think that there has been a little misunderstanding. Section 15 tightly controls the transfer of current legislative powers by insisting that any transfer should be to the same level, so a power may not be delegated to another body and must be kept only with ministers if that is where the power currently lies. That also applies to certain types of consents and appointments. Section 15 prohibits the type of delegation that you are worried about.

Colin Miller: If it would help, we could write to the committee to unpick that in more detail.

John St Clair: Section 15 is complicated, but I assure members that it is intended to do what I described. I would be happy to write to the committee about that.

Colin Miller: The purpose of section 15 is to impose further restrictions on the use that can be made of section 10. We can write to the committee on that.

The Deputy Convener: The committee has wrestled with the issue for a long time. It is not the easiest matter that we have come across, so it

would be helpful if you could write to us to expand on your explanation.

Helen Eadie: We need reassurance about whether there would be no limit to what could be further delegated under sections 10 and 13. No justification has been provided for the approach.

Bob Doris: The thrust of the committee's questions has been about whether the bill will give too much power to ministers to act through secondary legislation. Has the Government considered the option of a more exacting form of super-affirmative procedure for orders made under sections 10 and 13, whereby the Parliament and stakeholders would have an opportunity to debate a draft order before the finalised order were laid in Parliament? Such an approach would give the Government the chance to listen to the debate and consultation and to respond by proposing amendments to the draft order.

Colin Miller: In large part, what is envisaged is indeed a form of super-affirmative procedure, which to a large extent allows exactly the approach you have proposed. Before ministers lay a draft order before the Parliament they will have to undertake the statutory consultation process that is set out in section 21. If they decide to make changes as a result of that process, they will have to undertake a further round of consultation. The consultation process would take place before the draft order came before the Parliament.

When the order is laid at the end of the process, it must be accompanied by an explanatory document, which among other things will set out the responses to the consultation and changes that have been made as a result. In other words, there will be a process of engagement and consultation before the order is laid before the Parliament, and therefore there will be an opportunity for ministers to amend the proposals before they bring them to the Parliament.

Bob Doris: In that case, I am unclear about the difference between affirmative and super-affirmative. We were told that orders would be subject to affirmative procedure but that we could move to super-affirmative procedure. However, you are saying that there would be a form of super-affirmative procedure. I am trying to grasp the issue as I go along. Either the procedure is affirmative or it is super-affirmative; it cannot be a form of super-affirmative procedure. Will you clarify the distinction?

Colin Miller: It is certainly an affirmative process, as opposed to a negative process, because at the end of the day such an order can be made only with an affirmative resolution of the Parliament. We regard it as falling within the category of super-affirmative procedure because it contains additional statutory safeguards and requirements, over and above the normal affirmative resolution procedure.

What is categorised as super-affirmative procedure does not fall within specific and tightly defined parameters in the same way as the negative and affirmative procedures. As I understand it, super-affirmative procedure is simply affirmative procedure with additional statutory safeguards and takes a number of shapes and forms. I have just been passed a note that states that the Interpretation and Legislative Reform (Scotland) Bill sets out standard procedures only for the negative and affirmative procedures. Essentially, super-affirmative procedure is affirmative procedure with additional statutory safeguards. That is exactly what we have in sections 21 and 22.

Bob Doris: Surely we need to know whether there is a list of what those additional statutory safeguards should be. Can ministers decide what they will be, depending on the secondary legislation with which they are dealing? For example, would a draft order go out to further consultation and be amended before it was debated and voted on in the chamber? That is my picture of one version of super-affirmative procedure. I am not saying that it is the best version, but to state that super-affirmative procedure is the affirmative procedure with bells on does not tell us what the bells will look or sound like. We need more detail on what it means.

The Deputy Convener: There is concern about whether Parliament has the time to collect enough evidence to test the Government's assertions. That is part of the problem with the procedure.

Colin Miller: Both the lead committee and the Subordinate Legislation Committee will be aware of whether the Government is proposing to lay an order under section 10. Although this is not in the bill, I do not envisage that we would have difficulty with giving the Parliament an undertaking to write to the lead committee and the Subordinate Legislation Committee as a matter of course when we embark on a consultation that might lead to a section 10 order.

As I understand it, the precedents for super-affirmative procedure in the Scottish Parliament normally involve the two safeguards that we have incorporated in sections 21 and 22—a statutory duty to conduct a consultation process before an order is laid and, when the order is laid, to lay before the Parliament an explanatory document that, in this case, complies with the requirements set out in section 22.

John St Clair: The current thinking on statutory instruments, which is reflected in the Interpretation and Legislative Reform (Scotland) Bill, is that there should be only two types of procedure—affirmative

and negative—unless Parliament says that a different procedure should be followed. The power that we are discussing is thought to be different, so we have incorporated two statutory features that are usually associated with super-affirmative procedure. That definitely means that the procedure in this case can be called super-affirmative procedure.

On the question whether the overall procedure is correct, it may be worth mentioning the approach that the committee took in relation to the Local Government in Scotland Act 2003, in which the Scottish ministers took similar powers. Section 1 of the 2003 act imposed a duty of best value on local government, which was backed up by powers of ministers to do at local government level almost all of the things that they will be able to do under the Public Services Reform (Scotland) Bill to promote efficiency, effectiveness and economy.

15:00

Similarly, in section 19 of the 2003 act, wide powers were taken to allow ministers on local initiative to reconfigure the local government landscape and, in section 20, to add to what was meant by the advance of wellbeing. What your committee said to itself was, "When ministers ask for these powers, which appear wide, we cannot object to them in principle. What we should ask ourselves is whether, in this particular case, it is appropriate for ministers to take this type of power."

With the current bill, ministers are saying that the type of power that they are asking for at the public, national level—which is analogous to what was given in the Local Government in Scotland Act 2003—is appropriate for several reasons. First, there has to be a narrow focus on the three Es of economy, efficiency and effectiveness, which have to be the sole purpose of any such subordinate legislation. Secondly, the power is hedged in with very strong protections against misuse. Thirdly, the super-affirmative procedure will require a much more protected form of consultation and a statutory explanatory document. Finally, the Parliament itself sets the bar and can let the Government know, by all the means of communication at its disposal, whether it is not on for the Government to try to do something, in which case such a proposal will be voted down and never see the light of day.

All those things together mean that we think that this request is an appropriate, justified method of dealing with changes for which the slower process of primary legislation may not be appropriate. A lot of benefit to the public sector in improved efficiency could be lost if ministers are not given the power.

Bob Doris: That is useful information. I will read the *Official Report* and reflect on it in private.

The Deputy Convener: There has been concern that there might not be enough time for Parliament itself to gather information to determine whether something is a reasonable request. Mr Miller, you said that you are pretty certain that Parliament would be told before an instrument was laid.

Colin Miller: Yes.

The Deputy Convener: That is not an obligation, though, is it?

Colin Miller: It is not an obligation, but there is a statutory duty to consult and the Government's firm practice—except in very unusual circumstances—is to allow a minimum of 12 weeks for a consultation process. If, as a matter of courtesy and good practice, the minister in launching a consultation process advised the conveners of the relevant committees, it would be open to those conveners, if they so wished, to begin the process of looking at the Government's proposals three months before the Government was likely to lay a draft order.

Among other things, the requirement for consultation provides an answer to those who might be concerned that the process could allow ministers to smuggle something through quickly and quietly. It is simply inconceivable that any controversial proposal that had to be consulted on would pass unnoticed by either stakeholders or the Parliament.

Helen Eadie: That concern was put to us by the Law Society of Scotland. It told us that one of its key concerns was that ministers would have the discretion to decide who was consulted and that there is no reference in the bill, when there is a proposal to change a body, to consulting the bodies mentioned in the legislation that constitutes the body concerned.

Colin Miller: The statutory duty in section 21 is specific: it is to consult organisations that are representative of those who would be substantially affected by the proposals—in particular, when a proposal relates to the functions of a person, body or office-holder, it is to consult the person, body or office-holder in question—and then to consult such other persons as ministers consider appropriate. The normal practice even in non-statutory consultations is to consult very widely, which is undoubtedly what ministers would do in introducing any proposal. However, as the starting point is that the bodies or stakeholders that have an interest in the proposal or that are affected by the proposal must be consulted, by definition anyone who has an interest is going to pick it up very quickly.

John St Clair: I will add one point of clarification. When a statutory duty to consult is set in such a specific way, the courts are protective of the rights of people who have to be consulted. In a recent case involving Greenpeace and nuclear power, ministers' proposals were quashed because they had gone into a consultation apparently with a closed mind. The courts will guard the rights of those who might be affected so that they are not bounced into legislation.

Helen Eadie: One concern that the Lord President raised is that the section 10 power could be used to abolish the Scottish Court Service, as established by the Judiciary and Courts (Scotland) Act 2008, or transfer back its functions. You mention the courts, but that is a concern.

Colin Miller: Section 1 of the Judiciary and Courts (Scotland) Act 2008 enshrines the independence of the judiciary, which is a prime example of a necessary protection. Any changes that ministers made to the public functions of the Scottish Court Service could not in any way remove or undermine that necessary protection. The same thing goes for any other bodies that exercise judicial or semi-judicial functions. In essence, the power is one to adjust public functions—to transfer them between bodies and to make any necessary modifications. Bodies can be abolished only if their functions have been transferred in their entirety or if the body has ceased to operate. The power in section 10 relates to functions, not bodies. Any necessary protections that relate to those functions cannot be interfered with. If functions are transferred from body A to body B, any necessary protections—such as judicial independence, in the case of the Scottish Court Service—must travel with them.

It is not beyond the bounds of possibility that, under the bill, the functions of the Scottish Court Service could be transferred to another body. However, if they were, that body would have to do the same things and would be subject to the same protections as are written into the 2008 act.

Helen Eadie: I seek further clarification. You are saying that any body in Scotland could be abolished, not just the ones that are mentioned in part 1, which are the Scottish Records Advisory Council, the Scottish Industrial Development Advisory Board, the Building Standards Advisory Committee and the Historic Environment Advisory Council for Scotland. Any body in Scotland could be abolished, although its powers would be transferred to a new body. That gives ministers huge powers.

Colin Miller: It is the other way round, if I can put it like that. There is a power to transfer functions from one body to another, although, if ministers do so, the functions that are transferred cannot be substantially modified and any necessary protections must travel with them. For example, if the functions of the Deer Commission for Scotland were transferred in their entirety to Scottish Natural Heritage by a section 10 order—rather than under section 1 of the bill—because the body had in effect become redundant, it would be possible to abolish it. That is not so much abolition, as a merger. If the functions of one body are transferred entirely to another, the section 10 power, which facilitated the transfer, could also be used to wind up the body that basically has no functions left to exercise.

The Deputy Convener: It would be a sort of ghost.

Colin Miller: Yes—exactly. However, there is no power to take an extant body and abolish it.

Malcolm Chisholm: You will be pleased to hear that we will now move on to later sections of the bill. Section 63(1) and proposed new section 10Z2(1) in the National Health Service (Scotland) Act 1978 use the same words. They state:

"Regulations may impose … any requirements which the Scottish Ministers consider appropriate".

In the first case, that relates to care services and in the second to independent health care services. I suppose that the concern is that the power appears to be very wide. What is the reason for seeking the power? More important, what, if any, limits have been placed on how it is exercised?

Kirsty McGrath: As the committee is doubtless aware, much of parts 4 and 5 seeks to re-enact with improvements parts of the Regulation of Care (Scotland) Act 2001, which established the Scottish Commission for the Regulation of Care and set up the procedures for registering and regulating care services, including independent health care services. Section 63 and proposed new section 10Z2 of the National Health Service (Scotland) Act 1978, as inserted by section 90, represent a re-enactment of section 29 of the 2001 act, in that they provide for ministers to make regulations that impose in relation to care services and independent health care services any requirements that they think fit for the relevant parts of the bill.

However, I should highlight two substantive differences. Section 29 of the 2001 act contains nine subsections of provisions, running to four pages, that illustrate the main provisions in section 29(1), all of which are subject to negative procedure. Section 63 and proposed new section 10Z2 of the 1978 act do not have such illustrative provisions but are subject to affirmative procedure. After carefully considering the matter and looking at the regulation-making powers in the 2001 act, we felt that, as subsections (2) to (9) of section 29 act as illustrative provisions to the main provisions in section 29(1), as section 29(1) does not derive

its scope from those provisions and as, in any case, the wording of the first phrase includes the specific examples set out in further subsections, there was no need to replicate that approach in the bill. The four pages of illustrative powers in section 29 of the 2001 act are unfocused. Indeed, very few of them have been specifically referred to in regulations, and the regulations that have been made with reference to them could have been made under section 29(1) without any such references.

As far as the limits of the exercise of the power are concerned, any regulations must be read in the context of parts 4 and 5, which set out the specific duties of and sanctions available to the new body and to ministers with regard to care and social work and health care improvement.

We expect the powers in section 63 and proposed new section 10Z2 to the 1978 act to be used to make regulations on, for example, the fitness of persons to work in care services or requirements to be placed on health care or health care premises. Given the nature of the regulations, we thought it appropriate that they be subject to affirmative procedure, which will allow a higher level of scrutiny than is currently afforded to similar regulations made under the Regulation of Care (Scotland) Act 2001.

Malcolm Chisholm: That was a very comprehensive response. I will have to read what you said later.

As the minister who took the Regulation of Care (Scotland) Act 2001 through Parliament, I should know the answer to my supplementary question, which you might already have answered to a certain extent; in any case, I am probably not the best person to ask it. I suppose that people will ask whether the provision can be expressed in a more focused or restrictive way.

Kirsty McGrath: The danger of that approach is that we might inadvertently limit the power in such a way that we cannot make certain regulations, which might make it difficult for the new bodies to carry out scrutiny. The current prescriptive use of regulation-making powers in the existing legislation has led to a number of difficulties in practice for the care commission, so in seeking to strike a better balance between the flexibility required for an effective scrutiny service and Parliament's ability to scrutinise secondary legislation appropriately we have simply learned from the commission's experience and decided that affirmative procedure is more appropriate in this case.

The Deputy Convener: Section 101 sets out the power to make ancillary provision. Section 101(1) states:

"The Scottish Ministers may by order make such consequential, supplemental, incidental, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for the purposes of giving full effect to, any provision of this Act."

Section 101(2) provides that:

"An order under this section may modify any enactment, instrument or document."

15:15

In giving the "Reason for taking power", paragraph 123 of the delegated powers memorandum states that those provisions are included

"To enable Scottish Ministers to adequately give effect to the provisions in this Bill."

As you know, the committee considers that ancillary powers should be considered carefully in the context of any particular bill and according to their component parts. Why has justification for the different elements of the ancillary powers under section 101 been omitted from the delegated powers memorandum?

You may write to us later if you prefer.

John St Clair: We did not think that the bill sought anything untoward in section 101, given the wide-ranging and complex nature of the provisions in the bill. It is impossible in proposed legislation such as this to anticipate everything that will come out of a reorganisation—hence the need for the power. The most extreme one is the "supplemental", but there is nothing sinister about it: there is no agenda other than trying to anticipate problems that might arise.

The Deputy Convener: Given the significance of the powers in part 2, which we have already discussed at length, how would you respond to the suggestion that the exercise of supplementary powers to augment their effect should always be subject to affirmative procedure?

John St Clair: I do not think that there is a perfect answer to that. I would have no difficulty with the power being either affirmative or negative.

The Deputy Convener: Without the use of the affirmative procedure, is there not a risk that the restrictions and procedural requirements in part 2 could be circumvented?

John St Clair: We certainly propose to examine the question whether that procedure would be more appropriate during the passage of the bill.

The Deputy Convener: There are no further questions. Thank you very much for coming along and helping us by providing information about the bill. It has been quite a long session for the Subordinate Legislation Committee, but I am sure

that it will prove to be very rewarding. We look forward to hearing from you with the extra information that you promised to provide.

Interpretation and Legislative Reform (Scotland) Bill: Stage 1

15:17

The Deputy Convener: Item 3 is on the Interpretation and Legislative Reform (Scotland) Bill. Today, we will consider the remaining delegated powers in the bill. Members will recall that, last week, we considered powers in parts 4 and 5.

We start with section 1, which is entitled "Application of Part 1". Section 1(7) is on the "definition of 'Scottish instrument'". Is the committee content to ask the questions that are listed in the summary of recommendations?

Members *indicated agreement.*

The Deputy Convener: Section 25 is on the definitions in schedule 1. Is the committee content to ask the questions on section 25(2) that are listed in the summary of recommendations?

Members *indicated agreement.*

The Deputy Convener: Section 34 is headed "Power to change procedure to which subordinate legislation is subject", and our question is about section 34(2). Are members content to ask the Scottish Government to explain why it considers that, following any resolution of the Parliament under the terms of section 34(1), the Scottish ministers should have the discretion, rather than be required, to make an order making the necessary modification of any enactment to give effect to such a resolution?

Members *indicated agreement.*

The Deputy Convener: Section 42 is headed "Publication, numbering and citation: regulations". Is the committee content to ask the questions on section 42(1) that are listed in the summary of recommendations?

Members *indicated agreement.*

The Deputy Convener: Section 57 is on commencement. Are we satisfied that the commencement power in section 57(3) is acceptable and is not subject to procedure?

Members *indicated agreement.*

Draft Instruments Subject to Approval

Teaching Council (Scotland) Act 1965 Modification Order 2009 (Draft)

15:19

The Deputy Convener: Do members wish to report that the committee considers it good practice for amendments to primary legislation to remove any resulting redundant provisions? If so, we welcome the Government's commitment to do so in the context of the forthcoming changes to the status of the General Teaching Council. Is that agreed?

Members *indicated agreement.*

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2009 (Draft)

The committee agreed that no points arose on the instrument.

Instruments Subject to Annulment

Children's Hearings (Scotland) Amendment Rules 2009 (SSI 2009/307)

15:20

The Deputy Convener: The committee is asked whether it agrees to report the rules to the lead committee and to the Parliament on the ground that the meaning of the amendment in rule 2—which amends rule 20(6)(b) of the Children's Hearings (Scotland) Rules 1996 (SI 1996/3261)—could have been more clearly stated with respect to the text that it substitutes, which refers to the local authority having

"complied with the requirements of regulation 7 of the Looked After Children (Scotland) Regulations 2009".

Is that agreed?

Members *indicated agreement*.

Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 (SSI 2009/309)

The Deputy Convener: The committee is asked whether it agrees to report that an explanation has been sought from—and provided by—the Scottish Government on the references to

"the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department",

which is mentioned in regulations 2, 4, 7, 12, 13, 15, 17 and 18, and that the committee is satisfied with the explanation. Is that agreed?

Members *indicated agreement*.

Legal Aid (Supreme Court) (Scotland) Regulations 2009 (SSI 2009/312)

The Deputy Convener: The committee is asked whether it agrees to report to the lead committee and to the Parliament that it requested from the Scottish Government further information on the regulations, with which it is satisfied. Is that agreed?

Members *indicated agreement*.

The Deputy Convener: Agenda item 6 is consideration of evidence on the Public Services Reform (Scotland) Bill, for which we move into private session.

15:21

Meeting continued in private until 15:29.

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