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Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 15 May 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE
13th Meeting 2012, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*John Pentland (Motherwell and Wishaw) (Lab)
John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sam Baker (Scottish Government)
Chris Birt (Scottish Government)
Colin Brown (Scottish Government)
Marianne Cook (Scottish Government)
Craig Flunkert (Scottish Government)
Bette Francis (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 15 May 2012

[The Convener *opened the meeting at 14:38*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 13th meeting in 2012 of the Subordinate Legislation Committee. I ask members to turn off their mobile phones.

We have apologies from John Scott.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee take in private items 7 and 8, on consideration of the evidence that we will hear this afternoon on two bills. Are we content to take those items in private?

Members *indicated agreement.*

Local Government Finance (Unoccupied Properties etc) (Scotland) Bill: Stage 1

14:38

The Convener: Agenda item 2 is the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill at stage 1. This item is an opportunity for members to ask questions of Scottish Government officials on the delegated powers in the bill. I welcome from the Government Sam Baker, who is the policy manager in the housing supply division; Colin Brown, senior principal legal officer; and Marianne Cook, policy manager in the local government division.

I invite Sam Baker to make an opening statement.

Sam Baker (Scottish Government): Thank you very much for giving us the opportunity to give evidence today. Before we take questions, I will give a brief overview of the bill's proposals that I hope some committee members find useful.

The bill includes two topics, the first of which relates to changes to local taxation charges for empty properties through both business rates and council tax. The second topic is the proposed abolition from April 2013 of the requirement for the Scottish Government to pay housing support grant. However, the housing support grant provisions do not involve any subordinate legislation powers, so I do not propose to discuss them in any detail.

The empty property provisions provide for increased powers in relation to what can be covered in regulations that Scottish ministers introduce. First, the bill will enable the Government to introduce regulations to alter the level of empty property relief through business rates from April 2013. Currently, empty commercial properties receive a 50 per cent discount through empty property relief after they have been empty for an initial three-month period. The Scottish Government proposes to introduce regulations that would reduce that discount to 10 per cent, but no changes are proposed for empty industrial properties or listed commercial properties. The Scottish Government feels that the changes are needed both to seek to introduce incentives for owners to bring commercial properties back into economic use and to raise revenue.

Secondly, the bill will enable the Scottish Government to introduce regulations to allow for increases in council tax charges on certain long-term empty homes. Currently, councils must offer a minimum discount of 10 per cent for long-term empty homes, but the expectation is that

regulations will be introduced to give local authorities the flexibility to impose a council tax increase of up to 100 per cent on long-term empty homes, if they wish to do so. However, the increase would apply only after a home had been empty for a minimum period of a year. Such regulations would be subject to consultation, so the position could change.

The provisions are first and foremost about providing an additional tool to help bring empty homes back into use. The Scottish Government is committed to tackling the issue of empty homes. In particular, we want to ensure that more homes can be made available for rent or sale to help meet housing need in a number of key areas. The committee will probably be aware that there are many areas of Scotland with long housing waiting lists and a lot of people looking for affordable housing. In addition, empty homes that are not maintained by their owners can become a blight on local communities. That is another reason why the Scottish Government is looking to bring more empty homes back into use.

While the additional revenue that could be raised by increasing council tax charges will no doubt be an important consideration for councils when they determine whether to use the new powers, the Scottish Government discourages them from seeing the provision only as a revenue-raising measure—it should also be very much about tackling the issue of empty homes.

We recognise that most councils are not yet sure whether they would use the new powers and that in some cases they may need to do more work before making any decisions. That makes it hard for the Scottish Government to estimate how many owners would be affected and what levels of additional revenue would be raised. However, the Government still feels that it is appropriate to give local authorities discretion over whether to have an increase because they are best placed to decide whether empty homes are a particular problem in their area, based on the evidence that they have from, for example, surveys of owners of empty homes or housing need and demand assessments.

That is all that I want to say initially, but we are very happy to take questions. My colleague Marianne Cook will answer questions on the business rates provisions, I can answer questions on the council tax provisions, and Colin Brown will deal with any legal questions.

The Convener: I am grateful to you for that introduction. We have a few questions, which is why you are here. James Dornan will lead our questioning.

James Dornan (Glasgow Cathcart) (SNP): The powers in sections 2(2) and 2(3) are expressed very widely to permit any variation of council tax amount. The policy intention as set out in the policy memorandum is not to confer powers on councils to have complete discretion over increases. Why are the powers to be conferred on the Scottish ministers and local authorities to increase the amount of council tax in respect of unoccupied properties therefore not limited by the specification of any maximum, or initial maximum, level of increase in section 2?

Colin Brown (Scottish Government): It is simply to give discretion for the implementation of the policy. The Scottish Government would be interested in views from this committee and, of course, from the subject committee on any maximum.

I noticed from the subject committee's papers last week that at least one respondent so far has suggested that there should be the potential for increases of greater than 100 per cent. That is not current Scottish Government policy, but it indicates that, in future, there might be differing views as to where the maximum should be drawn. Therefore, why set that out in legislation as an absolute limit?

14:45

James Dornan: I suspect that I will hear the same answer to my second question, which follows on neatly from that.

The policy memorandum states that it is intended that

"no owner should be required to pay the council tax increase unless their home has been empty for at least twelve months and, even where a local authority uses the power to vary, in some cases homes would not be liable for the ... increase until they have been empty for longer."

Paragraph 33 states that it is intended that the regulations will confer on councils a power to charge up to a maximum tax increase of 100 per cent of the standard tax rate. In the interests of transparency, why does the bill not prescribe or initially prescribe those policy intentions in greater detail by setting out the application of the minimum period of 12 months and the maximum increase of 100 per cent?

Colin Brown: You are right—I will give the same answer: to give flexibility in how the provisions operate. It is important to remember that there will be two levels of discretion. There will be what the Scottish Government decides is the area within which local authorities should be able to exercise powers, and there will be the ability of local authorities to exercise those powers in their areas in such manner as they see fit, albeit probably with caps and controls. Until there is experience of the operation of the provisions, it will not be easy to know exactly where local

authorities might encounter difficulties in the exercise of the powers. Therefore, at this stage it seems desirable to have breadth to allow tailoring or amendment if, for example, particular concepts prove to be difficult in operation.

James Dornan: Given that the Government's position is that 100 per cent of the standard rate will be the maximum, why cannot we have that as the initial maximum, with flexibility to change that at a future date?

Colin Brown: That can be done through regulations and the detail can be changed if need be. If that limit went in the bill, any change would require primary legislation. The Scottish Government has attempted to set out how it intends to operate the provisions, because we accept that the bill is fairly sparse—it does not need to be more than that. It picks up on existing powers and adapts them. In relation to non-domestic rates, there are three rates of tax that apply to specified bands of property. I know that your question is not about non-domestic rates, but all that we need to do to implement the new scheme for them is to put into the existing regulations a power to vary the percentage and to adapt the classes to which something will apply. Therefore, we do not need much in the bill.

The situation is no different in relation to the amendments to the Local Government Finance Act 1992. What is changing is one significant point of principle. If the Parliament agrees, in future there will be a power to impose increases of council tax rather than discounts. If the Parliament is content with that principle and approves it, the rest of the process is really about implementing the detail around that and what we put in to enable it. In essence, that fits within the scheme of the current regulations.

Sam Baker: It is worth adding that the policy memorandum sets out our intentions based on a consultation that we did on the bill proposals at the end of last year and the start of this year. However, the Scottish Government will still need to consult on the regulations, so it is possible that there will be changes. For example, there might be a change to the minimum period before a council can impose an increase. We do not want to set that out firmly in primary legislation before we have considered the issue more closely.

The Convener: If I interpreted Colin Brown correctly, he said that there is no change to existing powers. Are you suggesting that, one way or another, there is a power to increase council tax at present?

Colin Brown: No. At present, the power is only to provide discounts. The big change that the bill makes is to substitute variation for discount, so that there is the potential to impose increases in council tax.

The Convener: Does that not strike you and your colleagues—as it strikes me—as being one of those things that Parliaments get concerned about? The moment Government at any level tries to increase costs on the citizen is surely precisely the point at which Parliament says, "Maybe—but surely there must be a limit."

A totally open-ended variation offends the general principle that Parliament must give Government the power to tax. Surely you do not expect us, as the Parliament, to give you a power to impose a variation that could be 1,000 times the current amount. I know that that would never happen, but it is an issue of principle.

Colin Brown: In principle, there is a case for setting a maximum amount. However, the regulations are laid under the affirmative procedure: the Parliament will debate them, and will have to approve whatever ceiling is set.

As I mentioned, to my knowledge there has been one stakeholder response so far—although I have not read all the responses—that says that a case can be made for increases of more than 100 per cent. There is scope to debate where the limit should be; some might say that 100 per cent is too high.

The Convener: I entirely accept that people will argue about the numbers, but it is not the numbers that worry me. If you said that you wanted a factor of 10, at least the Government would be setting a limit that Parliament could scrutinise and consider. Giving us no limit whatsoever seems to me to give us a problem in principle, which I suggest that the Government might want to solve.

Sam Baker: We can certainly take that into account if the Subordinate Legislation Committee is concerned about it. We will want to hear what the Local Government and Regeneration Committee says on that point, but we can consider it further.

The Convener: Thank you. The next question comes from Chic Brodie.

Chic Brodie (South Scotland) (SNP): I have a couple of questions on the proportional distribution of tax rates under section 74 of the Local Government Finance Act 1992 and the consequences of any action that might be taken under section 2 of the bill.

Section 74 of the 1992 act requires

"the amounts of council tax payable in respect of dwellings situated in any local authority's area"

to be in defined proportions according to valuation band, as set out in that section.

How is it intended that the powers to increase council tax amounts that section 2 confers will relate to the specific requirement under section 74 of the 1992 act? Is any increase intended to be without reference to that requirement, or are further provisions needed to clarify the situation?

Sam Baker: Colin Brown can confirm this, but the bill as it is currently drafted and the existing legislation, which is the Local Government in Scotland Act 2003, allow for changes in discounts in comparison with the standard council tax rates for the relevant band.

For example, if a council was to impose a 50 per cent discount, it would be imposed on the standard council tax rate for each property band—band B, for example. Similarly, if there was a 50 per cent increase, the amount would be 50 per cent above the standard council tax rate for the band that a property is in. For example, if a property was in band B, the amount would be 50 per cent higher than a couple living in a band B property would already be paying.

Chic Brodie: Are you saying that section 74 stands, and that the bill will have no impact? Are no further provisions required with regard to the discounting arrangements?

Colin Brown: Section 74 gives the start point for the calculation. It establishes liability for a property of a certain size, and various adaptations in the bill will cut in from there, including the discounts under the 1992 act or—if Parliament approves the new variations—under the 2003 act.

Chic Brodie: Do you think that the requirements in section 2 will undermine in any way the proportionate distribution of the bands in the 1992 act?

Sam Baker: No.

Colin Brown: No, they would vary the amount that someone pays, but the starting amount that someone pays will remain the amount for that valuation band. That might be adapted for all sorts of reasons. For example, I believe that a disability-adapted property in which a disabled person lives is classed one band lower than it would otherwise be. As Sam Baker mentioned, if a property is a single-occupancy property, a single-occupant discount would apply within that band, which means that a person in that property might pay less than a person who is living in a lower-banded property.

It remains the starting point of the calculation, however. To that extent, it is a completely relevant point.

Chic Brodie: I hope that it is the finishing point of the calculation as well.

What happens when an increase is proposed under section 2 in relation to unoccupied properties in a particular valuation band or bands, as the prescription of a tax amount for one band requires to be in proportion to other bands in terms of section 74? Do you think that the situation is clear enough? If not, could you provide further clarification that would address such a situation?

Colin Brown: I think that the process works adequately at present, because it simply works as an existing discount would. However, I am happy to take a further look at the drafting and double check that that is indeed the case.

The Convener: Our advice is that the 1992 act accounts for discounts specifically, but perhaps not for increases. There might be a drafting issue.

Colin Brown: The office of the Scottish parliamentary counsel and I checked all references to discount in the 1992 act in drafting the legislation. There were some that we felt did not need to change; there was only one, I think, that needed to change and has been changed. However, I take the point and will have another look at the legislation.

The Convener: We would be grateful for that, thank you.

Mike MacKenzie (Highlands and Islands) (SNP): In your earlier exchange with the convener, you discussed the proposed expansion of the powers to enable the increase in payments in respect of unoccupied properties without any limit in the bill. You mentioned that you feel that the level of scrutiny that is provided by the affirmative procedure is appropriate. However, given the wide power that is anticipated and the fact that such a rise could have huge financial effects on the people affected, do you think that there is a case for the proposal to be dealt with using a super-affirmative procedure?

Colin Brown: I do not think that a greater degree of scrutiny is required. The Scottish Government will consult on regulations before it makes them. Indeed, there will be a statutory obligation to consult the Convention of Scottish Local Authorities and such other bodies as ministers think appropriate.

If, by super-affirmative procedure, you mean a more defined period of consultation, I do not think that the Scottish Government would see that as necessary. In terms of their complexity, the regulations will not be particularly different from regulations that are made under the current procedure, which are not particularly lengthy or complex. They are subject to the affirmative procedure, and we felt that that remained appropriate in relation to the new power, given the requirement to consult.

The other thing that needs to be borne in mind is the issue of speed. There is no doubt that, if more extended procedures for making regulations became available, our timetable for allowing councils to implement the changes from April 2013 would not be met—the timetable is already quite tight. I do not offer that as an argument against adopting a super-affirmative procedure; my point is that the regulations will not have content that requires the use of that procedure.

Mike MacKenzie: Okay, thank you.

15:00

Michael McMahon (Uddingston and Bellshill) (Lab): The witnesses will be aware that, following the Finance Committee's discussion of the financial memorandum to the bill, there was some criticism of the fact that the Scottish Government appears to have taken account of only 12 properties that may be unoccupied and which are its direct responsibility. It has been brought to your attention that there are a whole host of non-departmental public bodies that have unoccupied properties that have not been taken account of in the financial memorandum or the bill. If bodies such as health boards and Scottish Enterprise are to be taken into account in relation to charges, will the bill have to be redrafted, or will subordinate legislation be required? Do the Government's provisions to permit assessment mean that such situations are already covered in the bill?

Marianne Cook (Scottish Government): The aim of the bill is twofold. On the business rates side, the aim is to raise revenue, and the measure will raise £18 million. The other aim is to encourage owners of empty properties to bring them back into use, regardless of whether ownership is in the public or private sector.

There is an impact on public sector properties. We have just sent information to the Finance Committee to clarify the impact on the national health service, Scottish Enterprise and councils. In terms of the direct Scottish Government estate, only about a dozen properties for which the Scottish Government is the rate payer are listed.

Sam Baker: That does not include long-term empty homes. I do not have the financial memorandum with me, but I think that we identified a small number of empty homes owned by the Scottish Government and its agencies, as well as empty commercial properties.

Michael McMahon: Given that the financial memorandum only takes account of the properties that are directly owned by the Scottish Government, my question is, in essence, whether everything else is covered by the bill, or whether there is a requirement for more powers or for subordinate legislation to catch the other properties that you are now looking to take account of.

Marianne Cook: We always knew that there would be an impact on the public sector, so there are no plans to redraft the bill to exclude it.

Sam Baker: The financial memorandum covers the whole costs to businesses and individuals in relation to council tax and empty property relief changes. The memorandum might not individually list the sector, such as local authority or NHS board, but it provides the total level of cost.

Michael McMahon: Are you saying that the bill covers everything, but the financial memorandum just forgot to take account of the health service, Scottish Enterprise and others?

Marianne Cook: I think that the memorandum acknowledges that public sector properties will be taken into account. We just did not break the information down to the level of each of the 32 councils and each NHS board. The memorandum acknowledged that there would be a cost to the local government estate, for example.

The Convener: As there are no further questions to the panel, I thank colleagues. I briefly suspend the meeting to allow witnesses to changeover.

15:03

Meeting suspended.

15:05

On resuming—

Social Care (Self-directed Support) (Scotland) Bill: Stage 1

The Convener: Agenda item 3 provides an opportunity for members to ask Scottish Government officials questions on the delegated powers in the bill. I welcome the officials: Bette Francis, who is head of the self-directed support team; Craig Flunkert, who is the self-directed support bill team leader; and Chris Birt, who is from the Scottish Government legal directorate. Thank you for waiting patiently.

Before I start the questions, it is worth putting it on the record that committee members have received and considered a submission from the national carers organisations. It is fair to say that although we understand the substance of their comments, we do not believe that they necessarily relate directly to the subordinate legislation that we are looking at—a point that officials may be in a position to comment on as we go.

James Dornan: It is also worth putting it on the record that we received a submission from the Scottish Council for Voluntary Organisations on the same matter.

The Convener: I invite Bette Francis to make an opening statement.

Bette Francis (Scottish Government): Thank you for allowing us to give the committee some information on the development of the definition of self-directed support in Scotland and the background to the four options for self-directed support in section 3 of the bill.

Since 1996, legislation has provided for direct payments as a mechanism whereby eligible people can receive a cash payment to purchase their own care. Initially a power for councils to use when they considered it appropriate, the duty to offer direct payments was introduced in 2003. Over that period, eligibility for direct payments was also extended to wider client groups.

Despite the shift to a duty to offer direct payments and wider eligibility for them, the uptake of direct payments remained variable across Scotland and was lower than in England. A review of the reasons for that low uptake included scrutiny by the Scottish Parliament's Health Committee in 2006.

The policy intention behind direct payments was to provide flexible and responsive support by allowing individuals to have more control over tailoring support to their needs. In practice, local authorities implemented direct payments in different ways. At worst, rigid criteria on the use and governance of direct payments have permitted little, if any, flexibility. At best, direct payments have empowered citizens to shape their support around their lives and to live independently. When they work, direct payments contribute significantly to the improvement of individual outcomes.

Around 2009, personalisation became a term that was used in health and social care policy to describe that drive to give citizens power to shape the care and support that they want. Building on that positive experience of direct payments, the personalisation agenda has aims of empowerment, choice and control. A 2010 literature review commissioned by the Scottish Government highlighted confusion about the use of terminology in this area of policy and a lack of clarity about the existing legislation at that time.

The definition of self-directed support—in the national strategy and in this bill—has been developed through significant consultation and engagement with a range of interested parties and individuals. The Scottish Government's first consultation on potential new legislation sought views on making direct payments the default position for social care. There was significant opposition to that proposal. The main concern was that it would not achieve the goal of providing people with real choice. The Scottish Government therefore developed the bill with choice as the default position. Option 3 in the bill—for services to be allocated by councils—has in effect been the default position until now.

Option 2 in the bill enables individuals to select their provider and to have more control over their support, without taking responsibility for handling the cash payment. It addresses concerns that were highlighted in evidence about barriers to direct payments for those who do not wish to and are not in a position to handle the additional responsibility of commissioning their own support.

Option 2 extends the options for those who want more say in the provision of services locally. In recent years, some retendering activity has resulted in people who might not have wanted to take a direct payment opting for that route to secure support with the provider of their choice. The approach is sometimes referred to as an individual service fund.

Option 2 is not widely available. However, as with direct payments in the past, the option has evolved from small pockets of innovative practice, which in this case providers have mostly led. As in the past, legislation is catching up with innovation in practice, to make an option available to everyone who could benefit from it.

The bill aims to provide a statutory framework for the current and future evolution of personalised approaches to service delivery. As the bill is enabling legislation, the intention of its additional powers is to respond to new and innovative approaches that might suggest further or amended options for the bill.

Self-directed support has evolved and will continue to evolve as public services take account of the aspirations, capabilities and skills of people who use them. The Scottish Government believes that the four options in the bill are defined broadly enough to deliver flexibility, but history suggests that unforeseen restrictions on delivery might occur. The bill has therefore been developed to allow sufficient flexibility to respond to changing circumstances.

The involvement of a broad range of interests in developing the bill will continue through a group that has been convened—it will begin its work tomorrow—to help to develop draft statutory guidance and the regulations that will need to be in place for the bill's enactment.

The Convener: Thank you for that substantial discussion of the bill's purpose. We have little disagreement with that, although policy is not our remit.

What will follow is quite a large number of questions on the detail. I will give you the headline. We understand the basic principles, which are pretty clearly laid out, and we understand the need for flexibility. Most of the questions will be along the lines of asking why the building in of flexibility through subordinate legislation is so complicated. I think that we will often suggest that there is conflict between some of the provisions that might not be helpful.

After that brief introduction, I will let Chic Brodie lead the way.

Chic Brodie: Indeed, we shall do what you suggest, convener. I am sure that the group that will be convened will look after customer interests and financial interests as appropriate.

Section 12 provides the power to modify section 3, which contains the options for self-directed support. In what future circumstances and for what purposes does the Scottish Government envisage that power being exercised?

Craig Flunkert (Scottish Government): As you point out, section 12 provides the power to modify the options, of which the bill presents four. I return to what Bette Francis said—ensuring flexibility and future proofing the range of options that is available to individuals were the main reasons behind including in the bill the power to modify the options.

As Bette Francis explained, the power reflects the experience of direct payments. The feeling in some quarters was that narrow definitions of the direct payments option could lead to narrow interpretations of what could be done. During the consultation on the bill, there was quite a lot of debate about how to define each option. That experience is the main reason why the power was taken.

I will draw out an example for the future. Option 2 is

"The selection of support by the supported person and the making of arrangements for the provision of it by the local authority on behalf of the supported person."

That describes an individual directing their support, but not necessarily taking the cash payment. In the consultation period, a number of consultees pushed for the description of the financial resource that someone would direct to be somewhere in that definition. Other consultees did not think that that was a big issue. There are certainly no plans to amend any of the options in the immediate term if the bill gets through the parliamentary process successfully. However, if in future a consensus built around including the financial resource in the description of the option, the bill could be amended by way of regulation. Such amendment would not justify an entirely new bill, given limited parliamentary time—

15:15

Chic Brodie: We are talking about options. What other options have been considered and discarded, not necessarily in relation to financial resource?

Craig Flunkert: Do you mean other options for people to direct their support?

Chic Brodie: Yes.

Craig Flunkert: There was consultation and the four broad options that people came up with probably accurately reflect the options that the sector wants, as Bette Francis said. It is difficult for me to predict a fifth option that might appear. In some cases—

Chic Brodie: I am surprised. Did the consultation come up with only four options that were worth considering, or were there other options?

Bette Francis: There were no other options. When the discussion about defining self-directed support began, the direct payments mechanism was the only option. Option 2 is a new mechanism, which allows people to have some control. The initial policy discussion was about whether there could be options other than direct or third-party payments.

Chic Brodie: Section 12 will give the Scottish ministers the power to modify section 3 in any way that they see fit, which could include adding options. You carried out a consultation. Why is it necessary to give ministers such a broad power to achieve the Government's aims?

Chris Birt (Scottish Government): As Bette Francis and Craig Flunkert explained, it is impossible for us to foresee additional options that might arise in future. In the not-too-distant past, individual service funds had not been contemplated. The power in section 12 could have been drawn differently. For example, it could have allowed ministers to vary, remove or add an option. What it does is allow ministers to modify section 3.

The power to modify is bound by the terms of section 3; we can modify only what is in section 3, which is four options and the definitions that go with them. The power is wide, but a narrower drawing up of it would have amounted to the same thing.

Chic Brodie: I was not talking about narrowing the power per se. That is why I asked how many options had been considered as part of the consultation.

Was consideration given to limiting the scope of the power that ministers will have? If so, why was that not considered appropriate?

Chris Birt: As we said, the power in section 12 reflects the policy intention, which is to provide flexibility to move with social work practice in future.

Chic Brodie: The power to modify section 3 by regulation will be subject to the affirmative procedure. Why does the Government think that that will provide a sufficient level of scrutiny?

Chris Birt: It is a similar story to the one that you heard from the bill team for the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill. The options had been widely consulted on prior to the bill's introduction. I assure you that there are no plans to use the power at present, and that any making of regulations would be done with extensive consultation with stakeholders.

The affirmative procedure means that the Government will not be able to do anything if the Parliament does not approve of the proposal. We think that that is the appropriate level of scrutiny.

Chic Brodie: Okay. I will move on. Given that the right to choose one of the four options in section 3 is fundamental to the bill, does the Government accept that, regardless of this Administration's intentions, the power in section 12 could be used in future substantially to restrict the effectiveness of that choice?

Craig Flunkert: Would you clarify exactly what you are asking? Are you asking whether ministers would ever use that power to restrict or remove options?

Chic Brodie: Yes.

Craig Flunkert: There is certainly no expectation that that is how the power would ever be used. The principle and fundamental policy purpose of the primary legislation is to provide a range of options and choices to individuals, and it would be against that policy intent to use that power to restrict. The modification is really around modifying technical descriptions of options or, if new options came about, to add to them.

Chic Brodie: I do not think that the matter is very technical; if it were, I would not understand it. What the four options are looks very clear. At heart, the issue is whether the power in section 12 could be used in future substantially to restrict the effectiveness of the choice.

Bette Francis: That would certainly not attract any stakeholder support whatsoever, and such a move would be very difficult to justify without sufficient evidence that all the parties concerned felt that it was necessary.

Chic Brodie: Okay.

The Convener: I would like to come in on that, to support what has been said. Forgive me—this is not a criticism. We respect and do not have a problem with what the current Government wants to do, of course, but it will be a Government only for the next four years. In principle, we are putting things on the statute book for ever, so part of our remit is to consider what a future Government might be empowered to do and whether it is appropriate to give it that power. The fundamental question is therefore whether the variability that is inherent in the provision is consistent with the basic purpose of the bill. Should it be possible to get rid of the options by delegated legislation?

Craig Flunkert: Bette Francis and I have answered from a policy perspective in respect of what the current Government would do, but there may well be a question for Chris Birt on how wide the legal effect of the power is.

Chris Birt: Obviously, there are different ways of saying the same thing, and we are open to suggestions about how the power might be drawn more narrowly to achieve the aim. However, if, say, the power were drawn so that options could be added or removed, all the options could just be removed. It is simply theoretical. The Parliament could refuse to agree to regulations under the affirmative procedure. If a future Government with different intentions with regard to the use of the power rejected the original intentions, the Parliament could refuse it.

Chic Brodie: Let us move from the theoretical to the practical. What consideration has been given to safeguards to protect the fundamental principles of the bill? We have talked about the affirmative procedure, but has any consideration been given to the use of a super-affirmative procedure—for example, to ensure that there is an opportunity for detailed consultation on draft regulations?

Chris Birt: As I have already said, we can assure members that there will be detailed consultation on any provisions, and that will follow the affirmative procedure. The super-affirmative procedure is ill defined as it is, but we understand that it involves detailed consultation followed by the affirmative procedure. As we have said, we can assure members that that will take place.

Chic Brodie: Okay. I have a final question. Section 12(b) of the bill confers a specific consequential power to modify sections 4, 6 and 7 when using section 12(a) to modify section 3. Section 20(1)(b) confers a general bolt-on power to make ancillary provision in any regulations that are made under the bill. Does the section 12(b) power exclude the possibility of using the bolt-on power in conjunction with the section 12(a) power?

Chris Birt: No, I would not say so. The specific power in section 12(b) would allow us to make any consequential changes to the bill. We thought that it was preferable to have an explicit power to do that rather than rely on the general power in section 20(1)(b).

Chic Brodie: Okay. Thank you.

James Dornan: Why, then, is it considered necessary to be able to exercise both the power in section 12(b) and that in section 20(1)(b) in conjunction with section 12(a)? In what circumstances do you envisage the Scottish ministers needing such extensive powers to make ancillary provision in connection with a modification to section 3?

Chris Birt: It is not possible to speculate without knowing the terms of any changes to section 3. As I said, the specific power in section 12(b) would be used to amend the bill consequentially. If another amendment were needed to a further enactment—say, regulations regarding direct payments—we could use the power in section 20(1)(b) to make a consequential change there. However, we cannot speculate without knowing—

James Dornan: The specifics.

Chris Birt: Yes.

James Dornan: Okay. Thank you for that.

The Convener: Let us move to section 13 and questions from John Pentland.

John Pentland (Motherwell and Wishaw) (Lab): You will be pleased to know that I have only one question to ask about section 13. As you will be aware, section 13 allows the Scottish ministers to make further provision via subordinate legislation about direct payments. The negative procedure would appear to be appropriate in respect of administrative and technical provision, but as section 13(2)(a) and section 13(2)(b) might be operated substantially to restrict access to direct payments, provision under those paragraphs seems to be substantive rather than technical. Why does the Scottish Government consider that the negative procedure provides a sufficient level of parliamentary scrutiny in making such regulations?

Craig Flunkert: Section 12B of the Social Work (Scotland) Act 1968 is where the current direct payments primary statute sits, and the regulation-making powers attached to that are currently subject to negative procedure. That includes the power to restrict access to direct payments for specific persons and in specific circumstances. So there is precedent and the bill would carry on those same regulations, albeit perhaps in a different form and following consultation.

I invite Chris Birt to add to the general reasoning about what provisions are appropriately subject to negative and affirmative procedures, although I think that we have stated that in relation to the previous provisions, too.

Chris Birt: I simply reiterate what Craig Flunkert said. If the committee considers it more appropriate for regulations made under these provisions to be subject to affirmative procedure, we will consider that in due course. As we have said, we have simply reflected what was in the previous statute.

John Pentland: Okay.

The Convener: Thank you very much. We move on to section 21. The questioning will be led by Mike MacKenzie.

Mike MacKenzie: Given the overlap between the power in section 21 and that in section 13(2)(b), why are both powers considered to be necessary? Does section 13(2)(b) confer power to do anything that could not otherwise be done under section 21?

Craig Flunkert: The potential application of section 21 cuts across all the options for SDS. In relation to option 2 in the bill, which is not the direct payments option, there have been discussions with consultees around some of the recipients of social care who are at the outside edges of those whom social work departments support—people whose need arises from homelessness, drug addiction or alcohol addiction. The sector may not be ready to respond to the

increased flexibility of option 2—the individual service fund option—in the short term, at least. Therefore, it was felt that a power to modify the application of the act was necessary as well as the DP option. Chris Birt may want to add something on the technical legal background.

Chris Birt: Section 21 is intended to be used, as it says, to disapply section 4(2) or section 7(2)—that is, in essence, the choice. Any way in which section 21 was used would say, "You have no choice. In these circumstances, the local authority will provide the services as the local authority sees fit." However, sections 13(2)(a) and 13(2)(b) would be able to restrict the choice and to say, "You have a choice, but your choice is between options 2 and 3 and option 4"—in as far as you could mix options 2 and 3—whereas section 21 would say, "You don't have a choice." That is the distinction. Is your question simply whether you could do what sections 13(2)(a) or 13(2)(b) would do by use of section 21?

15:30

Mike MacKenzie: Yes. If both powers are thought to be necessary, what criteria will be applied to determine which of the two powers ought to be exercised in any given case?

Chris Birt: One of the bill's principal aims, along with increasing flexibility and so on, was to consolidate the law on direct payments and bring it all into one place. Practice has diverged from how the Government wanted direct payments to operate and we thought that one of the reasons for the divergence was the complexity of section 12(B) of the 1968 act and regulations made under it. Our intention is to bring direct payment regulations into one place so that where services or people were ineligible for direct payments, that would be stated in the regulations that deal with all other matters regarding direct payments.

We foresee the section 21 powers being used separately and only for the purposes of taking away the choice. We would not intend at all to use section 21 to relate to a particular option; it is about removing the options.

Mike MacKenzie: Thank you. The committee was concerned to note from the delegated powers memorandum that when the bill was introduced the Scottish Government did not know what the power in section 21 would be used for. Have the divergent views mentioned in paragraph 24 of the delegated powers memorandum been reconciled? Can you advise the committee as to the circumstances in which the power in section 21 might be exercised? I appreciate that you have partially answered that.

Craig Flunkert: It might be useful to provide another example. Paragraph 24 of the delegated powers memorandum refers to the Children (Scotland) Act 1995. We should bear it in mind that the provision of the four options applies not only to adult support under the Social Work (Scotland) Act 1968 but to support provided to children under section 22 of the 1995 act. That section is quite wide-ranging in terms of council powers to provide support to children in need and I believe that it links to later sections in the 1995 act that are much more about child protection and intervention. That is probably a good example of where a regulation may potentially be introduced under section 21 to clarify for practitioners that the provision of the other three options would not apply where the support that has been provided is about intervening and protecting a child. In other words, there is a restrictive aspect to it, rather than a choice and flexibility aspect.

That example of how section 21 may be used in practice has come up in discussion with stakeholders, and the Association of Directors of Social Work mentioned it recently in evidence to the lead committee.

Chris Birt: I clarify that section 22 of the Children (Scotland) Act 1995 is similar to section 12 of the Social Work (Scotland) Act 1968 because it is a power to promote the general welfare of children in a local authority's area. We are not experts in the child law aspects but, as far as we understand it, that is often used for the softer edge of child protection services, although not the compulsory elements of the 1995 act.

Mike MacKenzie: I have one further question. I am still a bit confused, but if the power was exercised to disapply sections 4(2) or 7(2), to what extent would the other provisions in those sections continue to apply? In particular, would sections 7(3) and 7(4) continue to apply, or is it your view that they would be disapplied by necessary implication?

Chris Birt: Essentially, yes. If your choice was removed, then clearly the other provisions in the section that relate to that choice would be disapplied.

James Dornan: Section 6 makes, in respect of adult carers, similar provision to that in sections 4 and 7, but the choice for carers in section 6(2) has been exempted from the scope of the power in section 21(1). The DPM states that it would not be appropriate for the power to apply to the choice in section 6(2). Why does the Scottish Government consider the power in section 21(1) to be appropriate in respect of adults and children who receive support, but not in respect of adult carers?

Chris Birt: That comes back to the point that I made about the breadth of section 12 of the Social Work (Scotland) Act 1968 and section 22 of the Children (Scotland) Act 1995, which relate to the

power to promote social welfare. That is an enormously wide power that affects a range of people—not just disabled people, who often become the focus of the power. Our new power to provide support for carers is a limited power that relates to people who provide care. We have already said that it is difficult to foresee our limiting the choice in sections 4 and 7, but we can envisage situations in which that would happen. However, we could not come up with a justification for using the section 21(1) power in relation to section 6, so it was intentionally excluded.

James Dornan: To clarify, does that mean that adult carers will not lose out in any way under the proposals?

Bette Francis: The specific intention is not to restrict carers. By dint of the fact that they provide care, they probably are not subject to some of the more restrictive levels of support or protection to which other people are subject.

Chris Birt: I return to the examples that I gave about the use of section 7. We could all foresee when an element of choice would not be appropriate in a child protection situation, but when would a choice not be appropriate in giving support to a carer?

James Dornan: In what circumstances might the supplementary power in section 21(2)(b) be exercised to modify or disapply any other section of the bill in consequence of a disapplication of section 4(2) or 7(2)?

Bette Francis: Chris?

James Dornan: You got the easy one, Mr Birt.

Chris Birt: The power would be used for, for example, the provisions on providing information. I forget which section those are in—I think it is section 8. It would be sensible to disapply local authorities' duty to provide information on choices if somebody did not have a choice. That is one example.

James Dornan: Would the aim be to avoid giving people unnecessary information?

Chris Birt: Yes.

James Dornan: Do you accept that, on the face of it, the supplementary power could be exercised to disapply section 6(2) in consequence of a disapplication of sections 4(2) or 7(2)?

I think that we are leaving that one to you again, Chris.

Chris Birt: It appears that way. [*Laughter*.]

It certainly has not crossed my mind that that would be the intention. It would be for Parliament to decide, but that would clearly be a strange use of the power.

James Dornan: Regulations that are made under section 21 will be subject to affirmative procedure. As we have asked previously, why does the Scottish Government consider that that procedure provides sufficient scrutiny?

Bette Francis: The answer is the same as it was previously.

Chris Birt: It is a broken record, I am afraid.

James Dornan: The right to choose one of the options that are specified in section 3 is fundamental to the bill, and that right is found in sections 4(2) and 7(2). What consideration has been given to safeguards that would protect the fundamental principles of the bill from being circumvented by exercise of the delegated power in section 21(1)? In particular, has any consideration been given to the use of super-affirmative procedure? I think that the response will be the same as previously.

Bette Francis: Yes, it is.

The Convener: Thank you. That makes the point that the same question has been asked in relation to different sections. We respect the fact that very rarely will there be different answers.

We will continue with the various ancillary and transitional provisions, on which subject we are in the hands of Michael McMahon.

Michael McMahon: My question is almost the same as those that were asked by Chic Brodie about how sections 12 and 21 relate to section 20(1)(b), but it comes at the matter from the other direction. The bill contains only three substantive delegated powers. We have already mentioned sections 12 and 21 and the ancillary powers and provisions in sections 24 and 25, but what is the purpose of having another section that gives powers to ministers? Is it just a belt-and-braces thing? Is it overkill? Is it a power grab?

Bette Francis: You can choose the terminology.

Chris Birt: It is a power grab. [*Laughter*.]

Michael McMahon: Thanks very much for that. At least you are being honest about it.

Chris Birt: The powers in section 20(1)(b) are parasitic, or are a bolt-on, to the other regulation-making powers and are consequential on the regulations. However, sections 24 and 25 provide an order-making power that is to be used separately. As we have said in the delegated powers memorandum, we foresee section 24 being used to make consequential amendments on the repeal of section 12B of the 1968 act, which is referred to in a number of other enactments.

Michael McMahon: I suppose that we are simply seeking clarity; I am sure that you want the

bill to be as clear as possible. The point is that even though all those powers are separate, they will still interact with each other. Can the powers in section 20(1)(b) be exercised concurrently or do they have to be exercised separately? Can you give us some clarity about how they sit together?

Chris Birt: I cannot speak for every other bill, but the provision in this bill seems to me to be a reasonably common way of putting together ancillary powers. Certain ancillary powers are made to go with other regulation-making powers to ensure that there are not two sets of regulations doing two connected things. We could, for example, make provisions on direct payments under the section 13 power and then set out amendments consequential to those provisions in the same instrument. However, if we have to use the power in section 24, we will need a set of regulations and an order; in such a situation, I would see no benefit to the statute book in having more than one instrument.

Michael McMahon: I know that you responded light-heartedly to my earlier question and I realise that the provision might not necessarily be a power grab. However, under sections 24(2) and 25(2), the power can be used to "modify any enactment". That reference seems to be quite wide-ranging. Does it include powers to modify the bill itself, or does that assessment go too far?

Chris Birt: I know that on a number of occasions the committee has considered the use of the phrase "including this bill" after the phrase "any enactment" but it is not really appropriate for me to share with the committee my views on what that might or might not mean. The phrase "any enactment" in section 24(2) is intended to refer to primary and subordinate legislation, which means that we would consequentially amend any references to section 12B of the 1968 act in both primary and subordinate legislation.

Michael McMahon: So, that is a possible yes. You could modify the bill with the provision.

Chic Brodie: It is a possible maybe.

Chris Birt: We have no intention of modifying the bill. That is as much as I can say.

Chic Brodie: Convener—

The Convener: Forgive me, Chic; I will come in briefly, here. With respect, the Government's intentions are completely irrelevant because the statute will, in principle, be around for our grandchildren. The question to which I do not think we have had an answer is whether the provision will enable regulations to modify the bill when enacted. However, if you are not sure—

Chris Birt: As I see it, I might be sneaking into the territory of giving legal advice to the committee, which is not appropriate. If the committee wants to consider the matter in its report, we will be happy to respond to it in due course.

The Convener: In that case, I make the obvious suggestion that if that is the intention and if such an intention is within the Government's grasp, it could simply say "amend this and any other enactment" or whatever wording would be appropriate.

Chris Birt: As I have said, there is no intention that the power will be used.

Michael McMahon: In the Police and Fire Reform (Scotland) Bill that phrase was used in order to get the clarity that we are talking about. Could that not also be used in this bill?

Chris Birt: As I have said, there is no intention that the power will be used to amend the bill as enacted, so those words are not necessary.

15:45

Michael McMahon: Can I ask one more question?

The Convener: Yes—unless Chic Brodie has a specific follow-up.

Chic Brodie: If Chris Birt believes that, I am not sure that I understand the restriction on his giving us advice. If you do not envisage the power being used, why is it in the bill?

Chris Birt: The power to modify any enactment will enable us to modify enactments, other than the bill as enacted, that we require to amend.

Chic Brodie: So, you do see the power being used.

Chris Birt: Yes—we see it being used to amend enactments other than the bill as enacted.

Michael McMahon: I want to get this pinned down. Would it not be better to do what has been done in the Police and Fire Reform (Scotland) Bill and clarify the position in the bill?

Chris Birt: As I said, we do not need such wording, but we will consider the matter.

Michael McMahon: You will watch out for what we say in our report, so that you can consider it.

Chris Birt: Absolutely.

The Convener: I want to come back to the issue that we raised with regard to sections 20(1)(b), 12(b) and 21(2)(b). It seems to me that this is far worse than any exam that any of you will ever have had to take. I sympathise. As you will be well aware, the powers in those sections are all about modification. I guess that the question that worries our advisers, and which still worries me, is whether you are happy that those three powers

can interact in a way that is not potentially obstructive.

Chris Birt: I would be lying if I did not say yes. It would perhaps be easier for us to consider in more detail, once we receive your report, the exact problems that you foresee with the interaction of the powers. As I have explained, the powers in sections 21(2)(b) and 12(b) are specifically for amending the bill as enacted. They are there because we think we need those specific powers. We would prefer not to rely on general powers.

The Convener: Okay. Thank you. I hear what you say. We have no desire to trip anyone up; we just want to ensure, as you do, that we get legislation that works and which will survive the courts and any misdemeanours on the way.

Chris Birt: I appreciate that.

The Convener: I am being pointed in the direction of what is a standard question, but one that has not been asked in this connection. Although an order that is made under section 25 may modify any enactment, the negative procedure will apply—if I read the provision right—even when textual amendments are made to primary legislation. That is not consistent with general practice; there is a recognition that textual amendments to primary legislation should be made by way of affirmative procedure. We have heard that many times from other officials. Is that an issue that you considered?

Chris Birt: It is. I had thought that it was general practice that such revisions would be subject only to negative procedure, because I cannot think of ways in which transitional or transitory provisions would modify the text of primary legislation. We intend to use the power in question for the continuation of direct payments that are made under the existing system, which we want people to continue to be able to use.

We consider that the negative procedure is the correct procedure to use. If the committee wishes us to reconsider the matter, we can deal with that in due course.

The Convener: Thank you for that answer. I understand that there is no expectation that such an order will be used to alter the text of primary legislation. It is quite likely that the committee would like to stick to the principle that we have enunciated on several occasions—that affirmative procedure should be used when the text of primary legislation is to be altered—even should that turn out to be irrelevant, as we accept is the case here.

As colleagues have no further questions for this long-suffering panel, I thank the witnesses for their excellent answers to some extraordinarily detailed questions, for which I am very grateful. I suspend the meeting briefly to allow our visitors to escape.

15:49

Meeting suspended.

15:51

On resuming—

Instrument subject to Approval

The Food Protection (Emergency Prohibitions) (Dalgety Bay) (Scotland) Order 2012 (SSI 2012/135)

The Convener: Although our legal advisers have raised no points on the Food Protection (Emergency Prohibitions) (Dalgety Bay) (Scotland) Order 2012, it is worth setting out the background to it. It is an emergency order that is subject to emergency made affirmative procedure. In such circumstances, the laying requirements in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 apply. That subsection requires that such an instrument be laid as soon as is practicable after it is made and, in any event, before it is due to come into force.

The Food Standards Agency has provided a letter of explanation for the course of action that has been taken. The order was laid on 9 May 2012 and was brought into force at 15:00 on the same day. It is not clear that there has been a breach of the laying requirement that the instrument be laid before it comes into force.

However, the order raises the more general issue of how such emergency affirmative instruments are dealt with and, in particular, how emergency laying and coming into force are catered for in the laying requirements of the 2010 act and under standing orders.

Do members agree to note that the committee's clerking team and Scottish Government officials will review the matter?

Members *indicated agreement.*

The Convener: With that, is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

The Education (School and Placing Information) (Scotland) Regulations 2012 (SSI 2012/130)

15:52

The Convener: The meaning of regulation 17(3)(a) could be clearer. It provides that a written notification must include

"the information required to be given in terms of paragraph 2 of schedule 2"

to the Education (Additional Support for Learning) (Scotland) Act 2004. However, paragraph 2 does not impose any duty to provide information and it appears that, instead, the intention is that the written notification should include an explanation of the general effect of that paragraph.

Does the committee therefore agree to draw the regulations to the attention of Parliament on reporting ground (h), as the meaning could be clearer?

Members *indicated agreement.*

Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Amendment Rules 2012 (SSI 2012/132)

The committee agreed that no points arose on the instrument.

The Convener: With apologies to our colleagues from the official report and broadcasting, I again suspend the meeting, so that we can take a briefing on the item that follows.

15:53

Meeting suspended.

16:00

On resuming—

Alcohol (Minimum Pricing) (Scotland) Bill: After Stage 2

The Convener: Agenda item 6 is consideration of the delegated powers provisions in the Alcohol (Minimum Pricing) (Scotland) Bill, after stage 2.

Members will have seen the briefing paper and that the Scottish Government has provided a supplementary delegated powers memorandum. Stage 3 is due to take place on Thursday 24 May. The deadline for lodging amendments is 4.30 pm this Friday, 18 May. In that case, the committee may wish to agree its conclusions today.

Do members have comments on the papers?

Michael McMahon: I remain sceptical about the efficacy of the bill, but I am realistic about the parliamentary process and I know what will happen next Thursday. If we are to have a proper opportunity to lodge amendments and if Parliament is to have the fullest opportunity to consider them, what is proposed is eminently sensible. If the proposals for a sunset clause and for reporting to take place are to be introduced, that has to be the way that we get them into the parliamentary system before next Thursday, so I am totally content with it.

The Convener: Forgive me, but I am not quite sure what you are content with.

Michael McMahon: I am content with the process. You are asking whether the deadlines should be as laid out, and I am completely content that that is the appropriate way to do it.

The Convener: It is suggested that we produce a report that will note the Government's responses to our stage 1 report and what changed at stage 2. I suggest that we also note that it is clearly necessary that information be provided every time a price point is changed. We understand that and the Government understands that, so that is fine.

I also suggest that we note the point that has been made to us that the different elements of the bill need, in principle, to be commenced at the same time. However, it would almost be an insult to the Government to suggest otherwise, because that is part of the parliamentary process. We might note that it is not in the bill, but I suspect that we need go no further, because that is what any Government would do.

Are members content that we produce a report noting the various comments that have been made in the briefing paper?

Members *indicated agreement.*

The Convener: Thank you very much indeed. Unless I have missed something, that concludes item 6.

16:02

Meeting continued in private until 16:45.

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