



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 12 June 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

16th 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

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 12 June 2012

[The Convener *opened the meeting at 14:31*]

Instruments subject to Negative Procedure

National Health Service Superannuation Scheme etc (Miscellaneous Amendments) (Scotland) Regulations 2012 (SSI 2012/163)

The Convener (Nigel Don): I welcome members to the 16th meeting in 2012 of the Subordinate Legislation Committee. As usual, I ask members to switch off mobile phones.

Regulation 1 appears to be defective as it does not specify 1 April 2008 as the date from which regulation 28 will have effect, which is the Scottish Government's intention. Instead, since specific provision is not made as regards the effect of regulation 28 in regulations 1(3) to 1(10), regulation 1(2) provides for regulation 28 to have effect from 28 June 2012.

It is particularly important to specify clearly whether it is intended that regulations should have retrospective effect. The committee may therefore consider that, for regulation 28 to have effect as the Scottish Government intended, regulation 1 requires to be amended to make specific provision for the correct date when regulation 28 is to take effect.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (i) as the drafting appears to be defective?

John Scott (Ayr) (Con): It is very important that the Government amends the regulations so that they reflect the purpose that they were designed for—they do not appear to express that.

Chic Brodie (South Scotland) (SNP): The Scottish Government response states:

"Regulations 27 and 28 are to take effect on 1st April 2008. Regulation 29 is to take effect on 11th August 2011."

Regulation 28 is supposed to take effect from 28 June. Forgive me, convener, but I would have thought that there should have been a more detailed explanation. I have concerns that we are seeing a bit of sloppiness creeping back into drafting this stuff. We should know why, rather than the Government just saying, "Okay. The point you've made is fine. Regulations 27 and 28 are

now to take effect on the first of April 2008." Are people getting sloppy again?

The Convener: I am sure that the people who drafted the regulations will have got the message. I hesitate to say that they were being sloppy, but clearly the regulations could have been better drafted. I do not think that that is in dispute. The Government's response seems to be a convoluted way of saying that it thinks that what the regulations say comes up to the right answer. Nonetheless, it is plain and obvious that if something is to be retrospective, that should be said in those terms. I think that that is the point that we would like to make.

Chic Brodie: That would be helpful, but I would like the Government to come up with the right answer the first time.

The Convener: I agree with your point and I suspect that the Government would as well.

There is also a drafting error in new regulation T3(10) of the National Health Service Superannuation Scheme (Scotland) Regulations 2011 (SSI 2011/117), which is inserted by regulation 7 and which refers to

"section 273C of the 2004 Act"

rather than section 237C of the 2004 act. The committee is invited to accept the Scottish Government's view that, notwithstanding that typographical error, regulation T3(10) is likely to be construed as intended, not least because the section that is referred to as it is written does not exist.

Is the committee content also to draw the regulations to the attention of the Parliament under the general reporting ground, as they contain a drafting error?

Members indicated agreement.

The Convener: Does the committee further agree to welcome the fact that the regulations remedy drafting errors that the committee reported on in relation to the National Health Service Superannuation Scheme etc (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/364)?

Members indicated agreement.

Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167)

The Convener: Rule 7 appears to be defectively drafted. It amends rule 14(2) of the Parole Board (Scotland) Rules 2001 (SSI 2001/315) so that the chairman of the parole board may appoint any two members of the board to deal with a case. However, it appears that the Scottish ministers' policy intention was to enable

the board to sit with a quorum of two, and hence with more than two members in certain circumstances.

Does the committee therefore agree to draw the rules to the attention of the Parliament on reporting ground (i) as they appear to be defectively drafted?

Members indicated agreement.

The Convener: In so doing, does the committee welcome the Scottish ministers' commitment urgently to lay a corrective instrument that will revoke and replace rule 7 to address the issues identified by the committee?

Members indicated agreement.

Licensed Legal Services (Interests in Licensed Providers) (Scotland) Regulations 2012 (SSI 2012/154)

The Convener: No points have been raised by the legal advisers on the regulations. However, members will note that our legal advisers exchanged correspondence on the meaning of certain terms.

Does the committee agree to welcome the intention of the Scottish ministers to consider whether they could expand on the meaning of the terms "loan creditor" and "trustee of any settlement under which the individual has a life interest (in England and Wales a life interest in possession)" in guidance to be issued under section 46 of the Legal Services (Scotland) Act 2010?

Chic Brodie: I have never heard of the term "loan creditor". I have never seen it in any financial instruments that I have had a look at. The term is either lender or creditor; I do not know what loan creditor means. The Scottish Government's response exacerbates the confusion about the term when it states that

"rights ... as a loan creditor are to be disregarded for the purposes of ascertaining their rights as an investor."

A loan creditor, or lender or creditor, is not an investor. There might be complementary activity on both sides of the balance sheet.

In addition, the Government's response in the first full paragraph on page 2 of paper SL/S4/12/16/2 confuses the whole thing even more when it states:

"Defining the term with reference to the definition in the Corporation Tax Act 2010 was not considered to be appropriate as this seeks to limit the ordinary meaning of the term for tax purposes".

It needs total clarification.

The Convener: That is what we are asking for, and you have emphasised that that is what is needed. Thank you.

The Scottish ministers provided a helpful response to the committee's question on the regulations. Does the committee therefore agree to call on the Scottish Government to make that response readily available to users of the regulations by incorporating its substance into the guidance that it plans to issue?

Members indicated agreement.

The Convener: Notwithstanding those comments, is the committee content with the regulations?

Members indicated agreement.

Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Amendment Regulations 2012 (SSI 2012/170)

The Convener: Our legal advisers have raised no points on the regulations. However, members will note that our legal advisers inquired informally as to why the Scottish Government chose to amend rather than replace the Adults with Incapacity (Requirements for Signing Medical Treatment Certificates) (Scotland) Regulations 2007 (SSI 2007/105).

The Scottish Government's legal directorate explained that its client department holds a stock of pre-printed forms that refer to the 2007 regulations. To allow the continued use of those forms, the 2007 regulations have been amended rather than replaced. Although that approach does not promote transparency, it might offer some administrative savings in the short term. Do members have comments on that?

Chic Brodie: I am beginning to sound liverish. I am not sure what is being said—is sound, good law to depend on a department's buying activities and the inventory that it builds up? Are we saying that we will apply the law once the inventory has been totally depleted? I have never heard so much rubbish in my life.

The Convener: The point has been made that most regulations come with ancillary forms or leaflets that refer to them. What has been said sounds like a copper-bottomed excuse for never consolidating provisions and always amending an instrument.

Chic Brodie: I suggest that the copper-bottomed answer is to get people to buy things in quantities that relate to their expected usage rather than to pretend that bulk buying is sensible.

The Convener: That point will probably be noted.

The committee might consider that an appropriate decision was made in this case but might be concerned if it indicated a trend against

consolidating, for reasons of administrative convenience. That is a diplomatic way of putting what we have just said. Does the committee agree to raise the matter with Scottish Government officials as part of our long-term work on consolidation?

Members *indicated agreement.*

The Convener: Is the committee otherwise content with the regulations?

Members *indicated agreement.*

**Sports Grounds and Sporting Events
(Designation) (Scotland) Amendment
Order 2012 (SSI 2012/164)**

**Town and Country Planning (Development
Management Procedure) (Scotland)
Amendment Regulations 2012 (SSI
2012/165)**

**European Fisheries Fund (Grants)
(Scotland) Amendment Regulations 2012
(SSI 2012/166)**

**National Health Service (Travelling
Expenses and Remission of Charges)
(Scotland) (No 2) Amendment Regulations
2012 (SSI 2012/171)**

**Individual Learning Account (Scotland)
Amendment Regulations 2012 (SSI
2012/172)**

**Poultry Health Scheme (Fees) (Scotland)
Regulations 2012 (SSI 2012/176)**

**Animal By-Products (Miscellaneous
Amendments) (Scotland) Regulations 2012
(SSI 2012/179)**

**Property Factors (Registration) (Scotland)
Regulations 2012 (SSI 2012/181)**

**Leader Grants (Scotland) Amendment
Regulations 2012 (SSI 2012/182)**

**Marine Licensing (Fees) (Scotland)
Amendment Regulations 2012 (SSI
2012/183)**

The committee agreed that no points arose on the instruments.

Chic Brodie: It might be worth while trying to stimulate interest in the Sports Grounds and Sporting Events (Designation) (Scotland)

Amendment Order 2012 (SSI 2012/164), on which our briefing says:

“The football matches to be played in Scotland as part of the Olympic Games would not be caught by any of the present classes”.

We should try to catch some, so that we can get audiences at those games.

Instruments not subject to Parliamentary Procedure

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 10 and Saving Provisions) Order 2012 (SSI 2012/160)

14:43

The Convener: We come to agenda item 2. There are two issues to consider in relation to the order. First, the order's meaning could be clearer. The plain meaning of article 3 contradicts the saving provision that is made by article 4(2). Article 3 applies the commencement of sections 168 and 171 of the Criminal Justice and Licensing (Scotland) Act 2010 on 25 June 2012 to criminal proceedings that are commenced on or after that date, in relation to offences that were committed before that date. Article 4(2) disapplies the commencement of section 168, in so far as it inserts section 51B of the Criminal Procedure (Scotland) Act 1995, on diminished responsibility, and section 171, in so far as it abolishes the plea of diminished responsibility, in relation to proceedings when the offence was committed before 25 June 2012. Does the committee therefore agree to draw the order to the attention of the Parliament on reporting ground (h), as the meaning could be clearer?

Members indicated agreement.

14:45

The Convener: Secondly, the committee may wish to comment on the procedure used for the order. We are going back over familiar ground.

In relation to the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 6, Transitional and Savings Provisions) Order 2010 (SSI 2010/413), the session 3 committee reported that

"in general where an enabling Act provides for a particular power to make transitional or savings provisions in connection with the coming into force of the provisions of the Act (such as in section 205(1)), then the Committee would expect that power to be used to make such provisions, rather than any more general powers (such as in section 201(2)(a)). The Committee notes that, as a result of the Scottish Government's choice of power, there is no Parliamentary scrutiny of the ancillary provisions, when had section 205(1) been used the provisions would have been subject to negative procedure."

While the committee can accept that the order is *intra vires*, it notes that, in making the order, the Scottish Government has not followed the expectation in that report. The committee may wish to reiterate the terms of the report and note

that, again, as a result of the Scottish Government's choice of power, there is no parliamentary scrutiny of the saving provisions in article 4. Had section 205(1) been used, the provisions would have been subject to negative procedure.

Does the committee therefore agree to draw the order to the attention of the Parliament on the general reporting ground?

Members indicated agreement.

Bluetongue (Scotland) Amendment Order 2012 (SSI 2012/184)

The Convener: Members will see from the briefing that the order was laid on 6 June, despite coming into force on 5 June. Members will also have seen the explanation provided by the Scottish Government in a letter to the Presiding Officer.

Does the committee agree to draw the order to the Parliament's attention under reporting ground (j), as there has been a failure to lay the order before it has come into force, as required by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

The Convener: However, in doing so, does the committee find the Scottish Government's explanation for that failure, provided in the letter to the Presiding Officer of 6 June 2012, to be acceptable?

Members indicated agreement.

Property Factors (Scotland) Act 2011 (Commencement No 2 and Transitional) Order 2012 (SSI 2012/149)

The Convener: The order is not subject to parliamentary procedure apart from being laid, but the Scottish Government produced a useful Executive note for it. Does the committee agree to welcome the production of the Executive note for the order?

Members indicated agreement.

The Convener: Is the committee content with the order?

Members indicated agreement.

**Scottish Civil Justice Council
and Criminal Legal Assistance
Bill: Stage 1**

exclude the possibility of using an order under section 24 to modify section 6?

Members *indicated agreement.*

14:47

The Convener: Under agenda item 3, the committee will consider the delegated powers in the bill. In doing so, the committee is invited to agree the questions it wishes to raise with the Scottish Government. It is suggested that those questions are raised in written correspondence. On the basis of the responses received, the committee could expect to consider a draft report on the delegated powers at its meeting on 26 June 2012.

Section 18(2) of the bill, which inserts new section 9B into the Legal Aid (Scotland) Act 1986, enables the Scottish ministers to disapply the existing eligibility criteria for assistance by way of representation. A new scheme of eligibility, prepared and published by the Scottish Legal Aid Board, would have to meet certain criteria, including on the avoidance of undue hardship to clients or their dependants. Separately, the Scottish ministers may give the board directions on the preparation and publication of a scheme of eligibility, and the board must comply with those directions.

Does the committee agree to ask the Scottish ministers to explain why the power to make a scheme of eligibility is not expressed as a power to make subordinate legislation, given their stated position that the extension or alteration of eligibility for criminal legal assistance requires thorough parliamentary scrutiny, and why the direction-making power in section 9B(5) of the 1986 act is necessary, given the Scottish ministers' extensive powers in relation to the approval, modification and withdrawal of a scheme of eligibility?

Members *indicated agreement.*

The Convener: Section 24 allows the Scottish ministers to make such ancillary provision as they consider necessary or expedient for the purposes of or in connection with the bill. However, there is an overlap between this provision and the bespoke ancillary powers provision in section 6(5), which may be used when making provision under section 6(3) on the number of members of the Scottish Civil Justice Council.

Does the committee agree to ask the Scottish Government whether, given the existence of the specific power in section 6(3) to modify that section, and the limited nature of that power, it is intended that it should be possible to modify section 6 by means of an order under section 24 and, if that is not the case, whether it intends to

Welfare Reform (Further Provision) (Scotland) Bill: After Stage 1

14:50

The Convener: Agenda item 4 is consideration of the Scottish Government's response to the committee's report on the bill.

Members will have seen the response to the committee's recommendations from the Cabinet Secretary for Health, Wellbeing and Cities Strategy. There is a proposal in briefing paper SL/S4/12/16/4 to write to the cabinet secretary to clarify the reasoning behind two of the committee's recommendations and to seek a specific response in advance of stage 3.

On reflection, I wonder whether we need to respond to the cabinet secretary. To be fair to her, she has given us the Government's considered response. We would merely be repeating ourselves. Given that the issues are well understood and have been reflected on by the Government, and that the convener of the Welfare Reform Committee, Michael McMahon, is with us and is well aware of the issues, I confess that my instinct is to wonder whether we need to write again. The issue is out there and people know about it.

Michael McMahon (Uddingston and Bellshill) (Lab): That is a fair point, convener.

It appears that the Government is trying to have its cake and eat it. We are in uncharted territory with this bill—it came about because a legislative consent motion was rejected, which we have never done before. We had to forego the normal consultation period. We had to seek a suspension of standing orders to allow the committee to meet outwith our normal meeting times, including Thursday lunch times. We are meeting tomorrow, when we normally meet on a Tuesday, because of the foreshortened timescale for stage 2.

Many precedents are being set that we have accepted and we have worked closely with the Government to try to get the bill in place. However, the Government's response to the points raised by this committee—and by outside organisations, to be fair—is that it wants to carry on as normal now that the bill has been established.

To get the bill in place we have had to do all sorts of things outside normal procedure, but now we are expected to follow normal procedure. That concerns me. We have not had the bill consultation that we normally have. There will be a consultation over the summer, which is not the normal way we do things. The subordinate legislation will be in the autumn—we do not know

what it will be like or how it will be impacted by technical data from the Department for Work and Pensions that is still outstanding.

It concerns me that the Scottish Government is saying on the one hand, "Please treat this differently because we are in difficult circumstances," but on the other hand is saying, "Thereafter let's just get back to normal and let us judge things by the normal standards". I do not think that that was the tenor of the discussion that we had at the outset of the process.

John Scott: To add to Michael McMahon's point, it appears to me that the Government's response has also been to take more and broader powers as a result of the uncertainty that the Welfare Reform Committee has had to deal with. There does not appear to be a time limit on those broader powers. Once the legislation is in place, are those powers any longer required? I am not sure that they are.

The Convener: My take on the cabinet secretary's response is that as long as Westminster has the opportunity to amend what it is doing, we may need to respond. Surely you would not want to have to try to find a place in the legislative programme to be able to respond—whenever that might be needed and whatever the hue of the Government.

James Dornan (Glasgow Cathcart) (SNP): Although I accept what Michael McMahon and John Scott are saying, I am not sure how relevant it is to the issue. We asked the cabinet secretary, and she responded. If we send her the same letter, we will get the same response, so I do not think that there is any benefit in doing so. Given that time seems to be an issue, why would we add another layer to the process?

The Convener: To be fair, the cabinet secretary says:

"I will further consider your recommendation"

on the final points. I think that the Welfare Reform Committee will see that at stage 2, and we will collectively see that at stage 3.

We understand that there is an issue: it is on the record in this committee and in the Welfare Reform Committee. However, I am struggling to see that we will add anything to the process by submitting another piece of paper and asking someone else to reply. I am comfortable about leaving the issue with the subject committee.

Michael McMahon: I agree with your position, convener. I have said what I have said for the record, but I think that the comments from you and James Dornan are absolutely right. I see no purpose in pursuing the issue in this committee any longer. We have the response; it is either accepted or not, but it is the response.

The Convener: I take it that there will be a formal acknowledgement of the letter—the clerk is nodding—but that we will not write again if we are happy that that is the response that we have received. That is probably appropriate on the timescale.

Members *indicated agreement.*

Crime and Courts Bill

14:56

The Convener: Agenda item 5 is consideration of the first of three legislative consent memorandums on United Kingdom legislation.

The committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the Crime and Courts Bill. Members will note the briefing paper, which sets out the relevant aspects of the bill and comments on their effect.

The committee is invited to find acceptable the powers in clause 27 and paragraphs 27 and 28 of schedule 5 to the bill, and the procedure to which they are subject. However, the committee may wish to raise with the lead committee the fact that the legislative consent memorandum contains no information regarding the two powers in schedule 5.

Does the committee agree to report to the lead committee in the terms set out in the brief?

Members *indicated agreement.*

Electoral Registration and Administration Bill

14:57

The Convener: Under agenda item 6, the committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the Electoral Registration and Administration Bill. As before, a briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect.

The committee is invited to find acceptable the powers in the bill and the procedure to which they are subject. Does the committee agree to report to the lead committee in the terms set out in the brief?

Members *indicated agreement.*

Local Government Finance Bill

14:57

The Convener: Under agenda item 7, the committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the Local Government Finance Bill. Members will, again, note the briefing paper, which sets out the relevant aspects of the bill and comments on their effect.

The committee is invited to draw the Parliament's attention to the alteration of the executive competence of the Scottish ministers and to find acceptable the powers in the bill and the procedure to which they are subject.

Does the committee agree to report to the lead committee in the terms set out in the brief?

Members *indicated agreement.*

The Convener: That brings us to the end of quite a substantial agenda. I place on record my thanks and the committee's thanks to our legal and clerking staff for dealing with a vast amount of work within the past few weeks, to the considerable benefit of the committee.

Meeting closed at 14:58.

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