



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 26 June 2012

Session 4

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**SUBORDINATE LEGISLATION COMMITTEE**  
**18<sup>th</sup> 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 ATTENDED:**

Judith Morrison (Legal Adviser)

**CLERK TO THE COMMITTEE**

Irene Fleming

**LOCATION**

Committee Room 6



**Scottish Parliament**  
**Subordinate Legislation**  
**Committee**

*Tuesday 26 June 2012*

[The Convener *opened the meeting at 14:56*]

**Decision on Taking Business in**  
**Private**

**The Convener (Nigel Don):** Good afternoon. I welcome members to the 18th meeting in 2012 of the Subordinate Legislation Committee. I remind folk to turn off mobile phones and other electronic equipment, please.

Does the committee agree to take items 4 and 5 in private? It is perhaps worth putting it on the record that item 4 is consideration of a draft report on the Scottish Civil Justice Council and Criminal Legal Assistance Bill, and item 5 is further consideration of the committee's review of its scrutiny role.

**Members** *indicated agreement.*

**Instruments subject to Negative**  
**Procedure**

**Parole Board (Scotland) Amendment (No 2) Rules 2012 (SSI 2012/197)**

**Trade in Animals and Related Products (Scotland) Amendment Order 2012 (SSI 2012/198)**

**Wildlife and Countryside Act 1981 (Exceptions to section 14) (Scotland) Amendment Order 2012 (SSI 2012/205)**

**Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Amendment Order 2012 (SSI 2012/206)**

14:57

**The Convener:** The Scottish Government made all four amending instruments in response to comments that the committee made in previous meetings about the original instruments—we considered the Parole Board (Scotland) Amendment Rules 2012 (SSI 2012/167) on 12 June and the original orders in relation to trade in animals and the Wildlife and Countryside Act 1981 on 19 June. In all cases, the Government has taken quick action to ensure that the amending instruments come into force on the same day as was provided for in the original instruments. That has meant breaching the 28-day rule.

Does the committee therefore agree to draw the four instruments to the attention of the Parliament on reporting ground (j), as there has been a failure to lay them at least 28 days before they come into force, as is required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

**Members** *indicated agreement.*

**The Convener:** Does the committee also agree that the Scottish Government's explanations for that failure are acceptable, and does it welcome the prompt action that the Scottish Government took to make the amending instruments to correct defects that the committee identified in the original instruments, so that the amending instruments will come into force at the same time as those originals?

**Members** *indicated agreement.*

## Instruments not subject to Parliamentary Procedure

### Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) 2012 (SSI 2012/188)

14:59

**The Convener:** The meaning of rule 33.7(1)(a)(i) of the ordinary cause rules, as amended by paragraph 5(4)(a) of the act of sederunt, could be clearer, in that the words “between the parties” appear to be superfluous and to be capable of causing confusion in construing the provision. Does the committee therefore agree to draw the act of sederunt to the attention of the Parliament on reporting ground (h)?

**Members** *indicated agreement.*

### Act of Sederunt (Rules of the Court of Session Amendment No 3) (Miscellaneous) 2012 (SSI 2012/189)

**The Convener:** There appears to be doubt whether the act of sederunt is *intra vires*, in so far as it inserts form 12B.2 into the rules of the Court of Session, when the purported effect of that form is to require a prospective lay representative to make a declaration disclosing spent convictions. That provision appears to be of doubtful *vires* because it purports to disapply the effect of section 4(1) of the Rehabilitation of Offenders Act 1974 in the absence of any identifiable power that enables the Court of Session to make provision to that effect.

Do members have any comments on that?

**Mike MacKenzie (Highlands and Islands) (SNP):** I agree absolutely with our advisers and I hope that the committee can note that position to the Lord President’s office in the strongest terms, because it is a fundamental issue of principle and importance.

**John Scott (Ayr) (Con):** I have grave concerns about the *vires* of the act of sederunt. It appears not to be in accordance with the general objects and intentions of the parent act. At the very least, there is a need for clarification because we are in a difficult position. I have concerns about it, given where we are at the moment.

**The Convener:** I merely make the point that the act of sederunt has been made and will come into force. We can ask about it, but we are not in a position to do anything else.

**Michael McMahon (Uddingston and Bellshill) (Lab):** I have a general point. A lot of what

happens in this committee sometimes slips under the radar, even though it is vital in the general order of things. We understand the technicalities and have had an explanation of them. We cannot afford for the committee and the Lord President to write back and forth, expressing their views, while the world goes on round about us without knowing how important the issue is. Is there any way in which we can raise the profile of our concerns? Although the committee will deal with this in the only way in which it can, it is also important to raise the profile of the issue in terms of the Lord President being held to account by people other than the committee.

**The Convener:** I merely comment that the obvious line of communication is that between the Parliament—the committee’s officials, because that is where the line of communication comes into the Parliament—and the Lord President’s private office. That line of communication has already been used and will be used some more. If you feel that the profile needs to be raised elsewhere, what do you suggest?

**Michael McMahon:** In other committees, not least subject committees, members can take advice and assistance from the Parliament’s media team. It can identify issues of importance to the wider public and it can, and does, use all the communications expertise at its disposal to raise issues with the media. The issue is vital to the work of the committee and the Parliament. As well as flagging up juicy policy items that are of interest to journalists, it is sometimes important for our media team to flag up technical things. The issue is vital and it should not be allowed to slip under the radar. If other committees can avail themselves of the services of the Parliament’s media and press support team, why should this committee not do that on this occasion?

**The Convener:** I am sure that there is no reason why we should not.

**Chic Brodie (South Scotland) (SNP):** I have some sympathy with Michael McMahon, although I am not so sure that I would use the media. The act of sederunt has been made. What, if anything, can we do to highlight that we are challenging it?

**The Convener:** I merely suggest that we already are challenging it. This is the appropriate committee of Scotland’s Parliament; we are on the record and the Lord President’s private office will notice this discussion.

**Chic Brodie:** That does not stop the act of sederunt having been made. Is there any way in which we can stop it?

**The Convener:** We need to take legal advice on that. I think that the answer is no, we cannot stop it, because we have no power to do that.

**Judith Morrison (Legal Adviser):** That is correct.

**The Convener:** It is confirmed. We have no power to do that.

**James Dornan (Glasgow Cathcart) (SNP):** Clearly we have a couple of responsibilities to meet. First, we must ensure that any legislation that comes before us is as good as we can make it but, in this case, we are shutting the stable door after the horse has bolted. Secondly, we also have to protect the Parliament's reputation, so we should make the Lord President's office aware in the strongest possible terms of how disappointed we are with this and how strongly we disagree.

**John Scott:** I agree with my colleagues. The fundamental point is that, as I understand it, this might well leave the courts open to challenge. I am also concerned that such challenges might well be founded on the basis that they seem to be taking on powers that they have no right to—at least not according to precedents that have been established thus far. The act of sederunt raises real concerns and our duty, in as much as we are able to discharge it, is to express those concerns, which is very obviously what we are doing.

**The Convener:** Members have suggested that we raise the matter through the media and that we attempt to annul the act of sederunt—although it has become clear that we have no power to do the latter. I have not heard anyone suggest that we engage the Government, which might like to consider whether it has a view on the matter. I appreciate that it plays no part in this particular process, but the law officers might want to consider whether they would want to be part of some process of challenge or consideration.

**John Scott:** On a point of clarification, convener, am I right in believing that ministers rather than the courts have the power to make these decisions? If so, ministers might well have a view on this particular decision, which I understand comes into effect on 9 July.

**The Convener:** Our advice is that Scottish Government ministers have powers in the same area, but they are not the same as those that the Lord President is relying on. They run parallel but are not the same. Nevertheless, we can expect the Government—or at least the law officers—to have a view on this matter.

I also point out that the committee will report to the Parliament on the act of sederunt, which means that the whole Parliament will have an opportunity to consider it. That means that the Justice Committee might take the view that as the issue falls within its area it might want to pursue it, even though it is playing no part in the current scrutiny. I am looking for advice on this matter but perhaps we should ensure that our report, which

we will write in any case, goes to the Government and the law officers and that the Justice Committee understands that it might have a role to play and ask those folk to consider what they might be able to do.

**John Scott:** It is just a suggestion, but the Justice Committee might want to investigate the matter.

**The Convener:** We can make that suggestion to that committee.

**Mike MacKenzie:** Michael McMahon is correct to suggest that all this touches on a much bigger issue. A tug of war seems to be developing here. The committee can apply only a very minor scrutiny mechanism to instruments from the Lord President, when the Parliament itself should be able to deal with such fundamental issues of democracy. Although they might find it somewhat dry, the wider public should have an interest in this matter.

**The Convener:** I hear what you are saying, Mike—indeed, you are not the only person to have made the suggestion—but, to be honest, I think that we should explore the parliamentary procedures before we begin to discuss the issue too widely outwith the Parliament. Apart from anything else, the issue will not be widely understood; indeed, we ourselves needed an extensive briefing to try to understand it and I do not think that we can expect the general public to come to an understanding of the issues very easily.

We can talk to the Government; we can, via our reports, inform the Parliament and make the Justice Committee aware that it might have an interest in the matter; and we have the opportunity of getting back to the Lord President's office, which will be well aware of what is on the record. We should do those things first instead of trying to engage with all guns blazing.

**Chic Brodie:** The reality is that, if we challenge the matter and if the Justice Committee holds an inquiry that turns over a lot of stones and shows, as Mike MacKenzie suggested, things that are hardly democratic, we will attract attention anyway.

**The Convener:** The issue might well attract attention at some point, but I suggest that we turn over a bit more ground before we invite it. I certainly do not think that we have explored all the options at a parliamentary level.

Are members happy with that approach?

**Members indicated agreement.**

**The Convener:** Let us ensure that the report that we write goes to the appropriate people in the Parliament and Government and that the essential

point is understood. After all, the act of sederunt raises a constitutional issue that is quite important to us as parliamentarians and we should see whether, in the first place, we can explore it with the Parliament. Are folk happy with that?

**Members** *indicated agreement.*

**The Convener:** Encapsulating our discussion in one sentence, I ask whether the committee agrees to draw the act of sederunt to the Parliament's attention on reporting ground (e), as there appears to be a doubt whether it is *intra vires*.

**Members** *indicated agreement.*

**Town and Country Planning (Continuation  
in force of South Lanarkshire Local Plan)  
(Scotland) Order 2012 (SSI 2012/194)**

*The committee agreed that no points arose on the instrument.*

**The Convener:** I move the meeting into private session.

15:12

*Meeting continued in private until 16:08.*

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e-format first available  
ISBN 978-1-4061-9214-8

Revised e-format available  
ISBN 978-1-4061-9225-4

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Printed in Scotland by APS Group Scotland

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