



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 4 September 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

19th 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)

*Hanzala Malik (Glasgow) (Lab)

*John Pentland (Motherwell and Wishaw) (Lab)

*John Scott (Ayr) (Con)

*attended

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 5

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 4 September 2012

[The Convener *opened the meeting at 10:33*]

Interests

The Convener (Nigel Don): I welcome members to the 19th meeting in 2012 of the Subordinate Legislation Committee. As usual, I ask members to turn off their mobile phones.

Item 1 is a declaration of interests. I welcome Hanzala Malik to his first meeting of the committee. In accordance with section 3 of the code of conduct, I ask him to declare any relevant interests.

Hanzala Malik (Glasgow) (Lab): Thank you. It is a pleasure to be here. I have no interests to declare at this meeting.

Instruments subject to
Affirmative Procedure

Property Factors (Scotland) Act 2011
(Modification) Order 2012 [Draft]

Population (Statistics) Act 1938
Modifications (Scotland) Order 2012 [Draft]

Criminal Justice and Licensing (Scotland)
Act 2010 (Incidental Provisions) Order
2012 [Draft]

10:34

The committee agreed that no points arose on the instruments.

Instruments subject to Negative
Procedure

Bluetongue (Scotland) Order 2012 (SSI
2012/199)

10:34

The Convener: There is a drafting error in the order, in that it does not make clear the Scottish Government's intention that the definitions of the terms "protection zone" and "surveillance zone" in article 2 of the order are not to apply for the purposes of interpreting the term "restricted zone" in article 19(4) of the order.

As a result, it is not clear that the requirement to notify the movement of animals under article 19 applies to animals that were previously located in zones outside Scotland that were declared to be affected by bluetongue. Does the committee agree to draw the order to the Parliament's attention under the general reporting ground, because it contains a drafting error?

Hanzala Malik: The Scottish Parliament is answerable to the European Parliament in relation to timing and clarity. Cross-border issues need to be carefully considered, so clarity is important at all times. It is essential that instruments that come before the Scottish Parliament are clear about cross-border responsibilities. I agree that we need to draw attention to the need for clarity.

John Scott (Ayr) (Con): I, too, am unhappy about the order. When policy is created, it is poor practice to rely on a court's likely interpretation, as appears to be the Government's approach, given its response to the committee's questions. Such an approach is not sensible, when we are starting with a clean sheet of paper. People might be held criminally liable as a result of not complying with the order, and they should not necessarily have to go to court to prove their innocence. The Government has not made a good job of drafting the order.

Perhaps less important, but important nevertheless, is that the phrase "period of midge activity" is poorly defined. Midges can and do bite animals at times when they would not necessarily bite humans. Humans—by nature and habit—go to great lengths to avoid being bitten, so they might not be aware of midge activity in animals unless they had given the matter a great deal of thought.

There should be a clearer definition. Midge activity can extend into September, October and November, particularly in cattle sheds. I should have declared an interest at the outset: I am a farmer. I have seen midge activity in late autumn,

when people who are working in the countryside with animals do not expect to be bitten. I do not know whether the midges are biting animals at that time—the animals do not say—but by and large they do not bite humans then, although they are certainly among the animals. The issue needs clearer definition—I do not want to labour the point.

James Dornan (Glasgow Cathcart) (SNP): Can we clarify something? I thought that the definition was intended to provide flexibility for people who know that animals are being bitten, so that they can deal with the issue. If we say that there is a definitive “period of midge activity”, which stops in the middle of September—I am surprised to be talking about this—although midges bite in October, there will be no flexibility. As John Scott said, midges might go on biting after the period that was laid down in the order.

John Scott: I take your point, but I still have concerns that the drafting is not clear enough. However, the more fundamental point is the first one that I made.

James Dornan: I agree.

The Convener: I think that we are probably all surprised to be having a discussion about when midges bite. That is in the nature of some of the issues that come before this committee.

Mike MacKenzie (Highlands and Islands) (SNP): There are various interpretations of what is meant by the phrase, which is disappointingly subjective. I have been bitten by midges more than I care to remember, but “midge activity” is something that affects different human beings differently. Midges seem to avoid some people like the plague, whereas they bite others prolifically. Given that the order could give rise to criminal prosecution, the phrase and definition are hopelessly inadequate.

The Convener: This discussion is on the record, so people will be listening and will note what we have to say. Do we want to report that we are not convinced that the phrase is good enough? I might need a little bit of advice on this, but perhaps the order can be reported on the general ground that it is insufficiently precise or unhelpfully vague—I am not sure what terms we should use. One thing that comes out of the discussion is that it is difficult to be precise, so we need to be practical. There is a general feeling that the order is not as well drafted as it might be, although I guess that there is a thought that perhaps it is as well drafted as it could be—perhaps it just will be vague.

Chic Brodie (South Scotland) (SNP): We would be as well putting a sign on a barn door saying “Midges Keep Out”. As the Government response says, there are many factors. Are we

really saying that somebody should go to jail or what have you because the temperature has changed, as it is doing because of climate change, or because the wind changes? The Government should change the phrase.

The Convener: Okay, but I am not sure whether the Government will be able to change the phrase, which is why we need to be slightly careful. Is the committee content that we report that phrase as well as the point about where a restricted zone might be, on the basis that we are not entirely convinced that the order is as well drafted as it might be? I use those terms without worrying about precisely what the report will say. I get the impression that the committee would be comfortable with that—is that correct?

Members indicated agreement.

The Convener: Does the committee consider it unfortunate that the Scottish Government has not considered it necessary to correct the error about protected zones, either now or at the next available opportunity? I think that there is a general feeling that we would like the Government to revisit the issues. Do we call on the Scottish Government to do so?

Members indicated agreement.

Hanzala Malik: I cannot emphasise too strongly that clarity is absolutely critical. It is important that that is reflected in our comments.

Energy Performance of Buildings (Scotland) Amendment (No 2) Regulations 2012 (SSI 2012/208)

The Convener: There is a drafting error in regulation 9(a) that the Scottish Government has undertaken to amend at the next opportunity. Regulation 9(a) inserts the phrase “or building units” in regulation 7 of the 2008 principal regulations

“after the word ‘buildings’, in both places where it appears”, whereas it is plainly intended to insert those words in three places. Therefore, does the committee agree to draw the regulations to the Parliament’s attention on the general reporting ground because they contain a drafting error?

Chic Brodie: I have one question. We are told that the Government will amend the regulations when the next opportunity arises, but who defines when the next opportunity arises? If the issue is impacting on legislation, why is the Government not amending now?

The Convener: The Government will define when the next opportunity is, because it will make the next opportunity. The reason why the Government is not doing that now is that it is a significant amount of work to produce another

instrument. The Government's argument would generally be that it is a patent error—everybody knows what the instrument means and nobody will go to jail as a result. I think that that would be the answer.

Chic Brodie: This is like a rerun of last year. Perhaps the Government will not make drafting errors if we say that we want the change done as quickly as possible, and we ask for a date by which it will be done.

The Convener: I am sure that we could ask the Government when it thinks the next opportunity will arise and that it will note your comment.

Hanzala Malik: It is not an unreasonable request to be advised when it will be done, given that we have taken the trouble to point out to the Government that there is an error that needs to be fixed. The statement that it will do so when it has the opportunity is quite vague. We might want to press the point and say that we would appreciate being informed when the error will be corrected. That would perhaps focus minds on actually doing it rather than sitting on it.

10:45

The Convener: I have just been reminded that we check up on these things in our annual report and we produce statistics on them. However, that is different from asking the Government when it thinks the next available opportunity might arise, which I suggest would be a reasonable request.

John Scott: In the cause of taking a united, cross-party approach to the issue, I add my support to what has been suggested.

The Convener: Maybe next time we would like the Government to say not just that it will do something at the next available opportunity, but when it anticipates that that will be.

Chic Brodie: Good law should not be exercised by whether somebody goes to jail as a consequence of a drafting error.

The Convener: We are unanimous on that, Chic.

Are we nonetheless content to draw the regulations to the Parliament's attention on the general reporting ground because they contain an error?

Members indicated agreement.

Conservation (Natural Habitats, &c) Amendment (Scotland) Regulations 2012 (SSI 2012/228)

The Convener: There has been a failure to lay the regulations at least 28 days before they came into force, as required by section 28(2) of the

Interpretation and Legislative Reform (Scotland) Act 2010. The committee may wish to recognise that for policy reasons it may have been imperative to have the amendments made by these regulations and the Conservation of Habitats and Species (Amendment) Regulations 2012 (SI 2012/1927) brought into force by a certain date as part of a co-ordinated response to infraction proceedings against the United Kingdom. The committee recognises that not having completed the preparation of the regulations prior to the summer recess meant that a failure to comply with section 28(2) of the 2010 act became inevitable.

In its consideration of the failure to comply with section 28(2), the committee is not concerned with the contents of the negotiations with the European Commission, which concern issues of policy and which the committee understands are sensitive; rather, the committee would wish to be reassured that the timetable for responding to infraction proceedings, which have been on-going since 2006, was planned so as to respect the parliamentary procedures for laying and bringing into force all the instruments necessary across the UK. The committee expects all Administrations across the UK to endeavour to respect the different legislative processes that apply, where at all possible. The Scottish Government's response has not supplied that reassurance to the committee. It is not clear whether the need to legislate over the summer recess was unavoidable as a result of factors beyond the control of the responsible authorities within the United Kingdom or as a result of a failure to take proper account of the respective legislative procedures.

As the regulations were not laid at least 28 days before they came into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, does the committee agree to draw the regulations to the Parliament's attention under reporting ground (j)?

Members indicated agreement.

The Convener: Do members have any other comments?

Hanzala Malik: I am happy with the report, which is clear. I also appreciate the fact that the time aspect is critical. I commented earlier on our responsibility to the European Union with regard to that aspect. It is important that our report reflects that. We need to guard against not doing things timeously in the future to ensure that we do not put the Scottish Parliament at risk of being undermined or fined in any way. The failure to observe the 28-day rule in this case is the kind of thing that we need to guard against in the future.

John Scott: I support that view. I am not reassured that every effort was made to respect and stick to the 28-day rule.

James Dornan: Surely we will have information about that once we get the Government's response. Is that not what we are asking for? We can make the point that we want reassured that the Government did everything that it could regarding the 28-day rule.

The Convener: We have had the Government's response to the questions, which is all history now. Clearly, however, we can now make the point that we were not as reassured as we might have been. Quite simply, I have read nothing that suggests that the Government tried to do things to fit in with our rules.

Quite how much panic there was elsewhere and why that panic arose is not obvious—maybe the Government does not want to tell us—but we have not got the reassurance that we wanted.

There is also a drafting error in regulation 4, which inserts regulation 3A(4) in the Conservation (Natural Habitats, &c) Regulations 1994 (SI 1994/2716). That regulation should specifically apply the duty in regulation 3A(1) to sections 23A, 23B, 23C and 24 of the Hill Farming Act 1946, but it does not do so. Instead, it applies the general duty specifically to sections 23 and 25 of that act, which was not what was intended. Therefore, does the committee agree to draw the regulations to the Parliament's attention on the general reporting ground, because they contain a drafting error?

Members *indicated agreement.*

The Convener: At the same time, does the committee welcome the fact that the Scottish Government has undertaken to lay an amendment to correct that error in due course?

Members *indicated agreement.*

The Convener: Does the committee also welcome the fact that the Scottish Government has indicated that there are good arguments in favour of consolidating the Conservation (Natural Habitats, &c) Regulations 1994 in relation to Scotland, and that it will do so as soon as is practicable?

Members *indicated agreement.*

The Convener: I think that we would see that as a step in the right direction.

Building (Scotland) Amendment Regulations 2012 (SSI 2012/209)

Green Deal (Acknowledgment) (Scotland) Regulations 2012 (SSI 2012/214)

Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 (SSI 2012/219)

Charities Reorganisation (Scotland) Amendment Regulations 2012 (SSI 2012/220)

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Annual Close Time (Permitted Periods of Fishing) (River Dee (Aberdeenshire) Salmon Fishery District) Order 2012 (SSI 2012/210)

Public Services Reform (Scotland) Act 2010 (Commencement No 6) Order 2012 (SSI 2012/218)

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 2) 2012 (SSI 2012/221)

10:52

The committee agreed that no points arose on the instruments.

**Freedom of Information
(Amendment) (Scotland) Bill:
Stage 1**

The Convener: That brings us to the end of the agenda. Our next meeting will be held on 11 September—next Tuesday.

Meeting closed at 10:53.

10:52

The Convener: We move on to agenda item 5. The bill confers on the Scottish ministers two separate powers to make subordinate legislation. The first, which is in section 4 of the bill, amends the order-making power that is set out in section 59 of the Freedom of Information (Scotland) Act 2002. The power is subject to the affirmative procedure.

The second delegated power allows the Scottish ministers to appoint a day on which the provisions in the bill come into force. Orders that are made under that power require only to be laid before the Parliament.

Does the committee agree to report to the Parliament that we are content with the delegation of power in section 4 and the fact that it is subject to affirmative procedure, and with the delegation of power in section 7 and the fact that it is not subject to any parliamentary procedure?

Members *indicated agreement.*

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