



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 November 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE
26th Meeting 2012, Session 4

CONVENER

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

DEPUTY CONVENER

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

COMMITTEE MEMBERS

*Jim Eadie (Edinburgh Southern) (SNP)

*Mike MacKenzie (Highlands and Islands) (SNP)

*Hanzala Malik (Glasgow) (Lab)

*John Pentland (Motherwell and Wishaw) (Lab)

*John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Graham Crombie (Legal Adviser)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 20 November 2012

[The Convener *opened the meeting at 10:54*]

Instrument subject to Affirmative Procedure

Scotland Act 1998 (Modification of Schedule 5) (No 2) Order 2013 [Draft]

The Convener (Nigel Don): I welcome members to the 26th meeting in 2012 of the Subordinate Legislation Committee and ask everyone to turn off their mobile phones. First, I advise the committee that its annual report for 2011-12 will be published today. I believe that it demonstrates the committee's good work in its efforts to improve the quality of subordinate legislation, although I note that today might not provide us with good examples in that respect.

Agenda item 1 is consideration of instruments subject to affirmative procedure. Although no points have been raised under any of the reporting grounds in relation to the draft order, the committee might wish to refer the following matters to the lead committee and the Parliament for consideration.

On the scope of the reservation, article 2 modifies the reservation of social security schemes set out in section F1 of schedule 5 to the Scotland Act 1998. The new exception to the reservation makes it clear that, once the order comes into force, the subject matter of section 69 of the Child Support, Pensions and Social Security Act 2000 will remain reserved. However, the section is to remain reserved as it will have effect on the date on which the order is due to come into force, which is 1 April 2013. Given that the date is in the future and that the Scottish Parliament does not have the power to control the subject matter of section 69, the fact is that, at the point at which the Parliament is being asked to approve the terms of the order, it is not clear what subject matter is being reserved by this provision.

On the extension of functions, article 3 modifies existing devolved statutory functions of Scottish ministers and local authorities to ensure that from 1 April 2013 they are to have effect as if the transfer of legislative competence made by article 2 of the order had had effect at the time the functions were conferred. The purpose of article 2 is to confer legislative competence over community grants and crisis loans on the Scottish

Parliament with effect from 1 April 2013. Given that, by giving effect to article 2 in this manner from that date, article 3 makes provision that would be within the legislative competence of the Parliament on that date, the Parliament should be clear about the exact intended effect of article 3 if legislation is being made on its behalf by order promoted by the Scottish and United Kingdom Governments.

The Scottish Government's policy note indicates that the intention is for local authorities and Scottish ministers to make provision for the new devolved matters of community care grants and crisis loans through the exercise of their powers to advance wellbeing under the Local Government in Scotland Act 2003. If that is the case, it is not clear why the exercise of the Parliament's new competence under article 2 needs to extend more widely than those specific provisions to "any pre-commencement devolved enactment". Without an exhaustive review of the statute book, it is not clear what the full effect of article 3 will be.

Given that, does the committee agree to refer those matters to the lead committee and the Parliament, which might well wish to seek an explanation of those matters from the Scottish Government to inform consideration of the draft order?

Members indicated agreement.

John Scott (Ayr) (Con): I agree and must admit that I am unhappy with the inherent uncertainty over the scope of what will be reserved. In a sense, we are being invited to approve what is essentially the issuing of a blank cheque. I am choosing my metaphor carefully, but it is well worth drawing the matter to the Government's attention.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): John Scott is of course correct, but I think that I can understand the timing issue. As the measure will affect the budgeting for and operation of local authorities and Government from the beginning of April, it is necessary to give legislative certainty well in advance of that, even though the strict possibility of introducing some uncertainty might arise. The situation is not dissimilar to that for the legislative consent motions that the Parliament passes, in which we essentially say that although it is our right to legislate we are allowing Westminster to do so on our behalf, on the basis of trust and prior agreement that things will be done properly.

The important thing is not necessarily the substantive matter but ensuring that the appropriate committee understands that the effect of agreeing to the order is to hand responsibility to Westminster to do things properly. That is what we should be reporting. Unless I have misunderstood

the situation, I can see the case for doing things to the timescale that has been set out.

John Scott: Although I agree entirely with Mr Stevenson, we are nonetheless being asked to approve something that we do not know anything about.

The Convener: Indeed. That is why the committee is being asked to refer the order to the lead committee, because such a policy element is clearly for that committee rather than ourselves. Do members agree to refer the order to the lead committee in those terms?

Members indicated agreement.

Instruments subject to Negative Procedure

Adults with Incapacity (Public Guardian's Fees) (Scotland) Amendment Regulations 2012 (SSI 2012/289)

10:59

The Convener: Column 3 of the table that is contained in schedule 1 to the regulations sets out the fee that is currently payable for services provided by the public guardian. In entry 19 of the table, the fee that is currently payable for estates valued between £250,001 and £500,000 is £800 and not £600 to £800 as stated. Similarly, in entry 20, the fee that is currently payable for estates valued between £250,001 and £500,000 is £860 and not £660 to £860 as stated.

Since the errors relate only to a statement as to the existing fee, it seems unlikely that they will have any effect on the operation of the instrument. However, if it is the normal practice to indicate the existing level of fee within the instrument so that readers can identify the changes to fees that are being made, members might consider that the purpose has been frustrated by those errors.

Members may wish to report the matter for that reason or because the instrument is one in a series of instruments revising court fee levels, four of which contain patent drafting errors. When taken with the errors identified in the other fees instruments that are being considered by the committee at this meeting, a broader question arises as to whether an adequate standard of quality control has been applied during the drafting process for this series of instruments.

Does the committee therefore agree to draw the instrument to the attention of the Parliament under the general reporting ground, as it contains two minor drafting errors?

Members indicated agreement.

The Convener: The committee now turns its attention to those other fees instruments that contain drafting errors.

Court of Session etc Fees Amendment Order 2012 (SSI 2012/290)

11:00

The Convener: The drafting of the order appears to be defective. Article 1(2) brings article 5(b) into force on 1 April 2013, when article 5(a) ceases to have effect. Article 1(3) brings article 5(c) into force on 1 April 2014, when article 5(b) ceases to have effect. There are no such

subparagraphs (a) to (c) in article 5, and it is clear that the order should refer instead to the relevant paragraphs of article 6. The effect of this is that the increased fees under the order cannot properly be charged.

Does the committee therefore agree to draw the order to the attention of the Parliament on reporting ground (i)?

Members indicated agreement.

The Convener: Does the committee also agree to welcome the fact that the Scottish Government has undertaken to lay an amending order to correct the errors prior to the order coming into force?

Members indicated agreement.

The Convener: There is a minor drafting error in column 3 of part II(H)(I)(1) of the table of fees in schedule 1. The fee formerly payable for registering a case and receiving and delivering up a bond of caution is narrated as £2,035, when it should be £20 or £35. It is not considered that this error has any effect on the operation of the order.

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

John Scott: I agree that this type of inaccuracy is unlikely to have an effect on the operation of the order, but it will certainly have an effect on anyone reading the order—perhaps a layperson such as myself—who could at best be easily confused and at worst put off. Taken in conjunction with the other mistakes that we have already witnessed or are about to come to, I think that this represents really sloppy drafting at best. Something needs to be done to ensure that this does not happen again in future.

The Convener: Thank you. Does the committee also agree to welcome the fact that the Scottish Government has undertaken to correct this error in the amending order to be laid to correct the errors in article 1?

Members indicated agreement.

High Court of Justiciary Fees Amendment Order 2012 (SSI 2012/291)

The Convener: The drafting of the order appears to be defective. Article 1(2) brings article 3(b) into force on 1 April 2013, when article 3(a) ceases to have effect. Article 1(3) brings article 3(c) into force on 1 April 2014, when article 3(b) ceases to have effect. Once again, there are no such subparagraphs (a) to (c) in article 3, and it is clear that the order should refer instead to the relevant paragraph of article 4. The effect of this is that the increased fees under the order cannot properly be charged.

Does the committee therefore agree to draw the order to the attention of the Parliament on reporting ground (i)?

Members indicated agreement.

The Convener: Does the committee also agree to welcome the fact that the Scottish Government has undertaken to lay an amending order to correct the errors prior to this order coming into force?

Members indicated agreement.

Sheriff Court Fees Amendment Order 2012 (SSI 2012/293)

The Convener: The drafting of the order appears to be defective. Article 1(2) brings article 2(11)(b) into force on 1 April 2013 when article 2(11)(a) ceases to have effect, and article 1(3) brings article 2(11)(c) into force on 1 April 2014. There is no article 2(11), and it is clear that the order should refer instead to the relevant subparagraphs of article 2(10). The effect is that the increased fees under this order cannot properly be charged.

Does the committee agree to draw the order to the Parliament's attention on reporting ground (i)?

Members indicated agreement.

The Convener: Does the committee also agree to welcome the Scottish Government's undertaking to lay an amending order to correct the errors prior to this order coming into force?

Members indicated agreement.

The Convener: Although the committee welcomes the Scottish Government's commitment to laying an amending order to correct the drafting errors in these instruments, the committee might wish to draw to the Scottish Government's attention its dissatisfaction with the overall quality of this suite of instruments regulating court fees. Given the number of errors in the instruments, it appears that there must be doubt as to whether an adequate quality control process has been applied in this case and the Scottish Government might wish to reflect on that to ensure that its quality control process is robust. Does the committee agree to make those points to the Scottish Government?

Members indicated agreement.

Crofting Register (Scotland) Rules 2012 (SSI 2012/294)

The Convener: The form or meaning of these rules could be clearer, in that rules 6(3) and 6(4) make differing provision about the form to be used when applying to register a new common grazing. The effect of rule 6(3) is that such an application is

to be made on form C, while the effect of rule 6(4) is that it should be made on form D. The Scottish ministers acknowledge that such an application should properly be made on form D and that, accordingly, there is an error in the drafting of rule 6(3).

Does the committee agree to draw the rules to the Parliament's attention on reporting ground (h)?

Members *indicated agreement.*

Hanzala Malik (Glasgow) (Lab): The rules are quite confusing not only about what form to fill in, but on how to fill in the forms. There needs to be clarity about that, and I think that the Government must focus on the matter to ensure consistency in what is expected from applicants.

In fact, I want to go further than that and ask whether an applicant who uses the incorrect form for an application will have his fee protected. Will he be expected to pay a new fee or will the fee that he has already paid suffice? I do not want someone to be penalised for not understanding the new system.

The Convener: Our legal advisers might be in a position to comment on the matter.

Graham Crombie (Legal Adviser): I think that if an incorrect form were to be submitted the keeper of the registers would not make a charge, and I presume that the form would be returned to the person who had completed it with instructions on which form should be completed. I expect, therefore, that the fee will be chargeable when the correct form is submitted.

Hanzala Malik: Is there anything in legislation to protect individuals' rights in that way? We are making an assumption here, and I am not sure that we should be putting people at risk by doing so.

Graham Crombie: There is nothing in legislation to that effect, but it should be understood that that is the ordinary practice of one of the officeholders in the Scottish Administration.

John Scott: As a member of the committee that scrutinised the crofting legislation in question, I am afraid to say that there will be a marked reluctance to register in any case. Given the inherent confusion in the legislation, I believe that any confusion that we are introducing now should be eliminated forthwith and I am certain that the Government will want to do that by laying an amending instrument to correct the matter in early course, particularly given the reluctance to register in the first place.

Stewart Stevenson: Forms A to G are all prefaced with

"PLEASE TYPE OR USE BLACK INK AND CAPITAL LETTERS",

with the exception of forms C and G, which say that they

"SHOULD BE COMPLETED ELECTRONICALLY".

However, section 9(2) says that forms C and G

"may be submitted ... on paper",

which is inconsistent. Furthermore, section 10 says that form G, which is supposed to be completed electronically,

"must be accompanied by a paper plan where a plan is necessary"

for the keeper to perform their functions, but form C, which is required to be completed electronically according to the form itself but according to section 9(2) may be submitted on paper, requires the submission of the plan in a range of specified formats only. There is therefore substantial confusion about what is permitted, desired, or required around paper or electronic submission. In some cases, where submission is expected to be made electronically, another part may be submitted on paper. That is unlikely to have been the policy intention behind the drafting of the rules, and it should be drawn to the Government's attention so that the Crofting Commission does not have the opportunity to reject applications because people have misunderstood or misinterpreted whether submissions should be made electronically or on paper, and in what form.

John Scott's point is correct. This was a sensitive issue during the debates on the primary legislation and we should be careful not to create further opportunities for people to choose to misunderstand or to actually misunderstand.

John Scott: I agree.

Mike MacKenzie (Highlands and Islands) (SNP): Part of the rationale for accepting plans in different formats, either electronically or on paper, is for the ease of the applicant, who might be referring to a historical survey or whatever that might not be easy to capture in electronic format. We must distinguish between the errors in the rules and other aspects of the rules that are designed to make life easier for applicants.

John Scott: You make a good point.

The Convener: Members are clearly exercised by the issue.

Stewart Stevenson: It is confusing.

The Convener: We have made the point that it is confusing and that there are concerns. Given the nature of the subject matter, I am getting the impression that the committee would like to suggest to the Government that, given the fact that the scheme is brand new, we should at the very least make it clear to start off with.

Stewart Stevenson: Convener, I understand that there would be time for the Government to act without compromising the action of the rules.

The Convener: Are members happy?

Hanzala Malik: I have one additional point about the electronic movement of information. Not everyone has easy access to the internet, particularly in the north. We want the order to be as helpful as possible, which means that it should be absolutely clear that there is a choice. We might prefer the electronic movement of information, but people need a choice because, at the moment, we are not in a position to guarantee people access to the web, and some people could be disadvantaged.

The Convener: Form C is intended to be used by the Crofting Commission and it would not normally be used by a crofter.

Nonetheless, it is all extremely confusing and, if members are content, we will refer the rules back to the Government, making the point that we would like them to be clear from the outset and that issuing guidance afterwards is not the correct way forward.

John Scott: We are also suggesting that an amending instrument is made to correct the error.

The Convener: That is the suggestion, if members are content.

11:15

Stewart Stevenson: To be clear, we are not talking about just errors, because what I was talking about does not constitute an error. It is lack of clarity of expression. Perhaps the rules do not actually implement the policy that the Government wishes to implement. That is a matter for the Government, not us, because we are not concerned with policy. We cannot be certain, but other readers will be equally uncertain.

Hanzala Malik's point is also good. The substantial difficulties that some rural businesses experience with the legal requirement to submit VAT returns online illustrate the difficulties that arise if we force electronic submission. We have to get there at some point, but we must do so when it is possible.

The Convener: I will suggest two ways forward. The first is that we report formally on the error and the second is that we make the point that we believe that there should be clarity at the outset, given that the statutory scheme is new. Perhaps the committee might write to the minister to alert him to our concerns about all the issues, as we will be able to put them slightly more clearly than we have done now. Clearly, the policy issue is not for

the committee to deal with, but there is an awful lot of practicality in what we have discussed already.

Stewart Stevenson: Equally, convener, given that this is a negative instrument, it is possible to correct it before it comes into force on 30 November.

John Scott: The key point is the confusion between forms C and D on existing grazings and new grazings.

The Convener: Are we agreed on our approach?

Members indicated agreement.

The Convener: Thank you very much. Furthermore, there is an error in rule 6(4), which makes reference to section 26(1)(a) of the Crofting Reform (Scotland) Act 2010. That section specifies the procedure to be followed in applying for first registration of new common grazings. The Scottish ministers accept that it ought instead to be a reference to section 24(1)(a), which requires the making of an application to register new common grazings. Does the committee therefore agree to draw that error to the attention of the Parliament on the general reporting ground?

Members indicated agreement.

Crofting Register (Fees) (Scotland) Order 2012 (SSI 2012/295)

The Convener: The form or meaning of the table of fees could be clearer. Applications for first registration of a new common grazing are made under section 24(1)(a) of the Crofting Reform (Scotland) Act 2010 and so are properly chargeable under the entry for

"Registration of a common grazing under section 24(1) of the Act".

However, a further entry purports to charge a fee for

"Registration of a new common grazing under section 26(1) of the Act".

Section 26(1)(a) specifies the procedure to be followed in an application under section 24(1)(a). It is accordingly unclear what effect that second entry is supposed to have, and it is also unclear whether applicants are chargeable under only the first entry or whether both entries apply and, accordingly, two fees of £90 each are payable on the first registration of a new common grazing. Does the committee agree to draw the order to the attention of the Parliament on reporting ground (h)?

Members indicated agreement.

The Convener: Members may welcome the Scottish ministers' clarification, similar to that regarding the errors in SSI 2012/294, that it is

intended that only a single fee should apply to such an application but may, nevertheless, take the view that it is not satisfactory to attempt to clarify that ambiguity by way of guidance.

John Scott: I agree and, again, reiterate the point that I made—to the boredom of others, perhaps—that, as the act is a new and difficult piece of legislation following attempts to reform crofting legislation over a number of sessions of the Parliament, it would be a great shame if the Government did not take the opportunity to get it absolutely right the first time around and eliminate as much confusion from crofting legislation as possible at the earliest opportunity.

The Convener: As there appears to be a significant ambiguity in the table of fees, does the committee agree to recommend that the Scottish ministers should consider laying an amending instrument to correct the error in early course?

Members indicated agreement.

Justice of the Peace Court Fees (Scotland) Order 2012 (SSI 2012/292)

The Convener: Members will see from the correspondence that two issues were raised with the Scottish Government. The first issue relates to the clarity of the drafting that specifies which civil partnerships are to be recognised as falling within the definition of a partner in article 3(2) of the order and therefore being entitled to certain exemptions from the liability to pay fees. The Scottish Government did not take a consistent approach to defining civil partnerships in relation to the various jurisdictions in the United Kingdom, which might confuse readers.

The legal advisers agree with the Scottish Government that the legal effect is sufficiently clear but, given the drafting errors that have been identified in the other fees instruments this week, members may wish to comment on the resulting untidiness of the inconsistent drafting approach—although members might also feel that they have said enough.

More significantly, the second issue concerns whether ministers have the power to revoke the District Court Fees Order 1984 (SI 1984/251), as article 4 of the 2012 order sets out to do. Members will have seen the discussion in the legal brief. In short, the legal advisers disagree with the Scottish Government's view that a power to revoke previous instruments must reasonably be implied, given that the Interpretation Act 1978 clearly states that such a power is not available.

The question whether an instrument is within vires is obviously serious. However, the legal advisers accept the Scottish Government's assessment of the 2012 order's practical effect. It

is agreed that the 1984 order is superseded by the 2012 order and so no longer has legal effect, although not by virtue of the purported exercise of the power in article 4 of the 2012 order. It is also agreed that the situation has no effect on the ability to charge new fees.

It is important to register the difference in legal views on the matter of vires. However, if it is accepted that there is no practical effect on the new fee regime's operation, the legal advisers suggest that members may be content not to report the order formally. Is that agreed?

Members indicated agreement.

International Recovery of Maintenance (Hague Convention 2007) (Scotland) Regulations 2012 (SSI 2012/301)

The committee agreed that no points arose on the instrument.

Instrument not subject to Parliamentary Procedure

Act of Adjournal (Criminal Procedure Rules Amendment No 3) (Procedural Hearings in Appeals from Solemn Proceedings) 2012 (SSI 2012/300)

11:22

The committee agreed that no points arose on the instrument.

Social Care (Self-directed Support) (Scotland) Bill: After Stage 2

11:23

The Convener: Item 4 is consideration of the delegated powers provisions in the bill after stage 2. Members will have noted that the Scottish Government has provided a revised delegated powers memorandum and members will have seen the briefing paper and the draft report. Stage 3 consideration of the bill is due to take place on 28 November and the deadline for lodging amendments is 4.30 this Thursday, 22 November, so the committee may wish to agree its report today.

Does the committee agree to report that, after stage 2, it does not need to draw the Parliament's attention to the amended powers in sections 12 and 21?

Members *indicated agreement.*

The Convener: Does the committee agree to welcome the fact that the Scottish Government has introduced a statutory consultation requirement that must be fulfilled before the powers in sections 12 and 21 may be exercised, to address the concerns that the committee raised in its stage 1 report?

Members *indicated agreement.*

The Convener: As there is no other business, I will close the meeting. Our next meeting will be held next Tuesday.

Meeting closed at 11:24.

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