



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 November 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

27th 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:

Judith Morrison (Legal Adviser)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 5

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 27 November 2012

[The Convener *opened the meeting at 10:38*]

Instruments subject to
Affirmative Procedure

Pollution Prevention and Control
(Scotland) Regulations 2012 [Draft]

Judicial Pensions and Retirement Act 1993
(Scottish Land Court) Order 2013 [Draft]

The Convener (Nigel Don): I welcome members to the 27th meeting in 2012 of the Subordinate Legislation Committee. As usual, I ask everyone to switch off mobile phones.

Agenda item 1 is consideration of instruments subject to affirmative procedure.

The committee agreed that no points arose on the instruments.

The Convener: Regarding the Pollution Prevention and Control (Scotland) Regulations 2012, does the committee welcome the Scottish Government's withdrawal of the draft regulations as initially laid and their replacement with a revised version that clarifies the penalty attaching to a criminal offence provision in the regulations?

Members *indicated agreement.*

Instruments subject to Negative
Procedure

Council Tax Reduction (Scotland)
Regulations 2012 (SSI 2012/303)

10:39

The Convener: We come to item 2. The brief that members have received suggests that the regulations raise a devolution issue. The question is whether the regulations relate to matters that are reserved under section F1 of part II of schedule 5 to the Scotland Act 1998, or whether they are considered to have the purpose of determining liability for council tax other than for social security purposes.

The regulations have as their objective the establishment of a scheme that replicates existing entitlements to council tax benefit support for persons who have not reached the qualifying age for state pension credit and for persons who have reached that age and receive income support or income-based jobseekers allowance for the financial year commencing 1 April 2013 and subsequent years.

Do members have any comments on what has been recommended?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): On the question whether what is proposed is a benefit under section F1 of part II of schedule 5 to the 1998 act, it has been suggested that the proposal might be considered as a benefit but I note that, although section F1 talks about benefits being a reserved matter, the interpretation says:

“Benefits’ includes pensions, allowances, grants, loans and any other form of financial assistance”

and then goes on to describe some of those forms of financial assistance. For us, the assistance in question is

“in relation to ... housing costs or liabilities for local taxes.”

If we were to consider this proposal for a reduction in local taxes as a benefit, the very real difficulty is that that immediately catches other reductions already in force, such as the reduction in council tax for a single person dwelling in a house and reductions for second homes. It is clear that those elements are not deemed to be “financial assistance” in those terms.

Why is what is being proposed different from what has gone before? What went before—and was operated by the United Kingdom—is caught by this, because it can lead directly to money being put into people's hands if the benefit that is being given to people is greater than the council

tax that they might pay. That does not apply in this case, so there are no circumstances under the legislation before us in which money is directly paid to any council tax payer. It is merely another form of reducing the liability for local taxes in addition to those we already have and therefore does not pass the

“any other form of financial assistance”

test set out in section F1 of part II of schedule 5 to the 1998 act.

In considering our legal advisers’ advice—and it is entirely proper for them to invite us to discuss the matter—we should conclude that this is not

“any other form of financial assistance”

and therefore that we should not refer the regulations to the lead committee, as is suggested by our advisers. My primary reason for making that suggestion is that such a move creates potential threats to two other important forms of reduction in liability for local taxes and might cause serious difficulties. Of course, as this discussion will form part of the *Official Report* of the committee’s meeting, it is perfectly open to others to consider the matter further if they so wish, but I do not believe that the committee should refer the matter to the lead committee.

John Scott (Ayr) (Con): I regret to say that I take a different view to Mr Stevenson. This is not about whether the proposal is a good or bad thing or about reductions; it is about whether the right process has been followed.

Apparently the Government takes a different view from those who advise us. However, my view is that we should support our advisers in this regard, simply because we are here to hold the Government to account. If the Government feels a requirement to explain further the point that Mr Stevenson is seeking to make on its behalf, that is of course a matter for it. We should take the advice that has been offered.

Stewart Stevenson: Just to be clear: I do not speak on behalf of the Government; I speak as a member of this committee. An important point of principle is involved. It is proper and right that the legal advice is put in front of us to discuss, but if our role is always just to accept and pass on our legal advisers’ recommendations, that much diminishes the role of this committee in engaging on a wide range of important issues. I will support our legal advisers’ other recommendations on the regulations; I do not seek to remove them all.

10:45

John Scott: I am delighted to hear that you will do that.

Although you are not of the Government, you are of the party of Government and this is about a point of principle—about holding the Government and, indeed, the party of Government to account. That is one of the things that this committee exists to do.

Hanzala Malik (Glasgow) (Lab): I agree with Mr Stevenson. I think that his comments are reasonable and that it is appropriate that we do as he indicated. What we are suggesting is for the betterment of the regulations. I think that that is our role and I am quite happy for what has been suggested to be passed on.

John Pentland (Motherwell and Wishaw) (Lab): I probably tend to agree with Mr Scott with regard to the process. Mr Stevenson has made good points, but whenever an element of doubt is raised by our legal advisers, the least that we should do is to explore that and get a definitive response back from the Government in that respect. I understand that there is an important process that we should go through. I do not think that we should always agree with what our legal advisers say, but for something as important as these regulations, it is only right that we should go forward with our legal advisers’ recommendation.

The Convener: I observe that we have the Government’s response and that a definitive response from the Government is not possible—I am sure that that is not what John Pentland meant—because a definitive response comes from the courts. Clearly, we do not wish to be anywhere near there, because the whole purpose of the Parliament is to ensure that we never go anywhere near the courts, at least in the case of parliamentary scrutiny.

We seem to have some disagreement on the recommendation. I confess that I am inclined to side with Stewart Stevenson’s view, because I think that we need to accept the regulations, in this respect, as being the way forward. We have the Government’s view, which is that we will not finish up in the courts.

We will not get unanimity on this recommendation, so we will have to vote on it. I cannot remember when we previously had a vote in this committee.

The basic proposition is that we accept the Government’s view that the regulations are *intra vires* and have been laid on that basis, and that we therefore see no need to report them in that respect. The alternative is that we feel that there might be an issue and wish to report the regulations. Does anybody have any other comments?

John Scott: I am astounded that we are not prepared to accept the view that the regulations

might be illegal. I will certainly vote for the legal advisers' recommendation.

The Convener: If there are no further comments, the positive proposition is that we accept the Government's view and that we therefore see no need to report the regulations.

Stewart Stevenson: Just to be clear: the matter is limited absolutely to the devolution issue recommendation; other recommendations are not covered.

The Convener: Indeed. Other recommendations are not covered and will come up later.

The proposition is, that we see no need to report the regulations on the basis of a devolution issue. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Don, Nigel (Angus North and Mearns) (SNP)
Eadie, Jim (Edinburgh South) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Pentland, John (Motherwell and Wishaw) (Lab)
Scott, John (Ayr) (Con)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0. The proposition is agreed to.

We have to consider several other recommendations on the regulations. First, in schedule 7, paragraphs 1(2), 2 and 4, consequential amendments are made to the Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332), the Council Tax (Reductions for Disabilities) (Scotland) Regulations 1992 (SI 1992/1335), and the Council Tax (Reduction of Liability) (Scotland) Regulations 1994 (SI 1994/3170), which add references to the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319).

The powers contained in section 113(2) of the Local Government Finance Act 1992 permit the Scottish ministers to make consequential provisions that they consider necessary or expedient, but only those that are consequential on making these regulations. Those powers do not enable provisions in these regulations that are in fact consequential on the making of the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319), which regulations were not made at the date of making these regulations.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (e) as there is a doubt as to whether the provisions are *intra vires*?

Members indicated agreement.

The Convener: There will be a test later.

There appears to be defective drafting in paragraph (3)(j)(iv) of regulation 20. That head (iv) requires a student to be one in respect of whom a grant for living or other costs has been made under regulation 38 of the Education (Student Support) Regulations 2011 (SI 2011/1986), regulation 25 of the Assembly Learning Grants and Loans (Higher Education) (Wales) (No 2) Regulations 2011 (SI 2011/886 (W.130)) "and" regulation 5 of the Education (Student Support) (No 2) Regulations (Northern Ireland) 2009 (SR 2009/373), when it is intended that those references to regulations should be alternatives.

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

Members indicated agreement.

The Convener: At the same time, does the committee welcome the fact that the Scottish Government has undertaken to correct that error by laying an amending instrument, and does the committee consider that this should be done as soon as possible?

Members indicated agreement.

The Convener: The meaning of "academic year" as defined in regulation 2(1) could be clearer. The reference to

"according to whether the course in question begins in the winter, the spring, the summer or the autumn respectively"

could be made clearer by defining for the purposes of this provision what the commencement dates for each season are, and whether those dates coincide with the dates that are specified, when the "academic year" is held to commence.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (h) as the meaning of "academic year" as defined in regulation 2(1) could be clearer?

Members indicated agreement.

The Convener: Finally, the regulations contain some minor drafting errors. First, in the definition of "additional statutory paternity pay" in regulation 2(1), the insertion of "(a)" after the reference to section 171ZEA is an error.

Secondly, the inclusion of regulation 4(3) is a drafting error in respect that it was not intended to

apply the extension of the definition of “young person”, which is made by that paragraph, in each case where “young person” is mentioned in the regulations.

Thirdly, in regulation 41(4)(c), the reference to “regulation 17A(7) of those Regulations”

is an error. It is intended to refer to the “Jobseeker’s Allowance Regulations” but the title of the regulations previously stated in regulation 39(4) is the

“Employment and Support Allowance Regulations”.

Lastly, in regulation 64(3), “family” is omitted from the phrase

“that applicant or a member of the applicant’s is liable”.

Does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground, in relation to minor drafting errors?

Members indicated agreement.

The Convener: Does the committee also welcome the fact that the Scottish Government has undertaken to correct those errors by laying an amending instrument, and does the committee again consider that this should be done as soon as possible?

Members indicated agreement.

The Convener: Although the committee does not report on the matter, does it also welcome the fact that the Scottish Government has undertaken to clarify, in regulation 48(4)(b), the reference to regulation 17A(7) of “those Regulations” by also amending that provision? The amendment will expressly refer to the “Jobseeker’s Allowance Regulations”.

Members indicated agreement.

Housing (Scotland) Act 2001 (Assistance to Registered Social Landlords and Other Persons) (Grants) Amendment Revocation Regulations 2012 (SSI 2012/306)

The Convener: There has been a failure to lay this instrument at least 28 days before it comes into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

As the instrument was not laid at least 28 days before it comes into force, does the committee agree to draw the instrument to the Parliament’s attention under reporting ground (j)?

Members indicated agreement.

The Convener: Given that this instrument has been brought forward to allow the Scottish Government to address the serious concerns

raised by this committee and by the Infrastructure and Capital Investment Committee regarding the amendment regulations, does the committee find the explanation provided by the Scottish Government for this failure to be acceptable?

Members indicated agreement.

The Convener: Does the committee therefore welcome the prompt action that the Scottish Government has taken to address the defects in the amendment regulations?

Hanzala Malik: Will you clarify why these regulations are here and why we are going through the motion of making this declaration? What is the benefit?

The Convener: The benefit is to record that we have registered that the Scottish Government has responded to what we said. It will give credit where credit is due, on the grounds that we will then find it easier to be more critical when the Government does not respond.

Hanzala Malik: I see this kind of thing quite often in papers and I just wonder whether we need to do it in that way. We could just note that the Scottish Government has amended the regulations rather than going through the motion of “welcoming” the action. Surely, the Scottish Government is just doing its job. I do not understand why we are giving it a pat on the back for correcting a mistake. I just want you to think about that, convener; I am not asking you to respond to it now.

Stewart Stevenson: If Hanzala Malik feels that the present and future form of our response to the Government under these circumstances should be to “note”, I would not wish to divide the committee on that.

Hanzala Malik: Thank you.

The Convener: I think that the point is understood.

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2012 (SSI 2012/305)

Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2012 (SSI 2012/307)

Diligence against Earnings (Variation) (Scotland) Regulations 2012 (SSI 2012/308)

The Convener: No points have been raised by our legal advisers on the instruments. However, our advisers note that the rural development contracts regulations in SSI 2012/307 are now on their 10th amendment. If our advisers are finding it difficult to work out what the 10th amendment

means, we should probably suggest to the Government that it considers some consolidation.

John Scott: Hear, hear.

The Convener: That is not so much because the regulations have reached the 10th amendment but because we have been advised that they might be giving problems, even at that level.

Is the committee otherwise content with the instruments?

Members *indicated agreement.*

Marine Navigation (No 2) Bill

10:57

The Convener: Agenda item 3 is a legislative consent memorandum on the Marine Navigation (No 2) Bill. Under this item, the committee is invited to consider the powers to make subordinate legislation that the bill will confer on the Scottish ministers. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect.

Clause 1 of the bill will amend the Pilotage Act 1987 to give the Scottish ministers the power to specify that a harbour authority is not a competent harbour authority for the purposes of the 1987 act. The bill's explanatory notes state:

"Many harbours require ships traversing their waters to use a maritime pilot with appropriate experience, generating additional costs for shipping companies."

It appears from that statement that the purpose of conferring the power on the Scottish ministers is to permit them to exempt particular harbour authorities from those requirements, which would otherwise be compulsory under the 1987 act.

Does the committee agree to ask the Scottish Government why the powers to remove harbour authorities' pilotage functions are considered necessary, how it intends to exercise those powers, and why it considers that the requirements of section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 offer an appropriate level of parliamentary scrutiny?

Members *indicated agreement.*

The Convener: Clause 5 will insert sections 40(A) to 40(D) into the Harbours Act 1964. Section 40(A) will confer a power on the Scottish ministers to designate harbour authorities that may give general harbour directions to ships that are within, entering or leaving the harbour. Section 40(B) sets out how harbour directions will be made by harbour authorities designated under section 40(A). Section 40(C) will make it an offence for a master of a ship to fail to comply with a harbour direction without reasonable excuse.

The power to designate harbour authorities for that purpose includes the power to amend or repeal any statutory provision "of local application" that the Scottish ministers think is inconsistent with the power to give harbour directions or unnecessary as a result of the power.

In England and Wales, the exercise of the power is subject to the negative procedure. In Scotland, no procedure is specified. The Harbours Act 1964 is specified in section 30(4) of the Interpretation and Legislative Reform (Scotland) Act 2010 as an enactment to which the

requirements of sections 30(1) and 30(2) of the 2010 act are disapplied. The effect is that, since no procedure is specified as applying to the exercise of the power, the order is not required to be laid before the Parliament.

11:00

There is also a technical query on the use of the word “enactment” and the expression “of local application” in identifying the class of enactments that can be modified or repealed. The Interpretation Act 1978 will apply to provisions that are inserted into the 1964 act. In this context, the term “enactment” does not appear to include an enactment that is comprised in or made under an act of the Scottish Parliament.

Does the committee agree to ask the Scottish Government to provide an explanation of the choice of procedure that is applicable to the exercise of the power, particularly as it differs substantially from that applied in England and Wales; whether the restricted definition of “enactment” in the 1978 act is appropriate post devolution; and how the expression “of local application” is intended to operate in Scotland, given that subordinate legislation is no longer classified by reference to that definition?

Members indicated agreement.

The Convener: Clause 6 will insert new sections 17A to 17F in the Harbours Act 1964. The objective of the provisions is to introduce a process for the closure of harbours by ministerial order. Such orders are not subject to parliamentary procedure and are not required to be laid before the Parliament. It is worth noting that the same aforementioned queries concerning the definition of the terms “enactment” and “of local application” arise in relation to those powers.

Section 54A of the 1964 act applies the affirmative procedure to harbour revision orders or harbour empowerment orders that relate to a national development under the national planning framework or to harbours that are specified by ministers. As the Parliament has specifically chosen to apply the affirmative procedure in relation to the creation of such a harbour, there is a query about whether the closure of such a harbour should not be subject to parliamentary procedure and why such an order is not required to be laid by virtue of section 30(4) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Does the committee agree to ask the Scottish Government to provide an explanation of the choice of procedure that is applicable to the exercise of the power, particularly as it differs substantially from that applied to the creation of harbours of national importance; whether the

restricted definition of “enactment” in the 1978 act is appropriate post devolution; and how the expression “of local application” is intended to operate in Scotland given that subordinate legislation is no longer classified by reference to that definition?

Members indicated agreement.

Hanzala Malik: Just for clarity, would a closure be considered temporary before an order comes to the Parliament, or would it be time-restricted? Is there a time bar at all?

Judith Morrison (Legal Adviser): No. The effect of the order would be to close the harbour.

Hanzala Malik: So the issue will not go anywhere else after the ministerial decision.

Judith Morrison: That is the question that we are exploring.

Hanzala Malik: Right—thank you for that.

Stewart Stevenson: I might be misreading, but the suggestion is that the harbour authority first has to apply for or consent to the order. Whether that is an adequate and sufficient check is another matter, but the issue is not solely up to ministers.

Hanzala Malik: I am happy with that—thank you.

The Convener: Finally, clause 13 gives the Scottish ministers the power to commence sections 1 to 6 of the act in relation to Scotland. In doing so, they may make provision generally, or for specified purposes, that may include

“incidental or transitional provisions (including savings)”.

It is normal for commencement orders to be subject only to the requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 that they are laid before Parliament. It is also common for ministers to seek to be able to exercise ancillary powers in connection with the commencement of provisions. However, it is not normal for those ancillary powers to contain the power to make incidental provision. In the absence of any information generally about the intention behind the creation of the powers, the committee might wish to explore the issue further with the Scottish Government before reaching a view.

Does the committee therefore agree to ask the Scottish Government to explain why it considers a power to make incidental provision in connection with commencement is required; what the circumstances are in which such a power may be exercised; and why no parliamentary control is considered appropriate for such provision?

Members indicated agreement.

The Convener: Does the committee agree to raise all those questions in oral evidence next week?

Members *indicated agreement.*

High Hedges (Scotland) Bill: Stage 1

11:04

The Convener: Agenda item 4 is consideration of the delegated powers in the High Hedges (Scotland) Bill.

In considering the bill, the committee is invited to agree the questions that it wishes to raise with Mark McDonald MSP, who introduced the bill on 2 October 2012. It is suggested that the questions be raised in written correspondence. On the basis of the responses that are received, the committee can expect to consider a draft report at its meeting on 11 December 2012.

Section 34(1) enables the Scottish ministers to make regulations that modify the meaning of “high hedge”, as set out in section 1. As the bill will apply only to hedges that are high hedges within the meaning of section 1, the power enables the Scottish ministers to vary the applicability of the bill by making subordinate legislation.

Does the committee agree to ask the member to explain why it is considered necessary to take a power to modify section 1 as a whole? That appears to include the possibility of removing entirely the conditions in paragraphs (a) to (c) of section 1(1), when a power simply to modify those conditions would appear to be sufficient to achieve the changes that are envisaged in the delegated powers memorandum. Does the committee also agree to ask the member to explain whether the power could be used to modify the definition of “high hedge” so that it extends to include individual trees or shrubs, and, if so, why that is considered to be appropriate in a bill relating to hedges?

Members *indicated agreement.*

The Convener: Section 37(2) allows the Scottish ministers to appoint a day for the coming into force of certain provisions of the act. By virtue of section 37(3), such an order may contain transitional, transitory or savings provisions. Does the committee agree to ask the member to explain whether—taking the example in paragraph 25 of the delegated powers memorandum—it is considered that the power in section 37(3) permits the modification of primary legislation and, if so, the basis for that view, or, if not, how it is proposed to deliver the amendment to the Land Registration (Scotland) Act 1979 that is referred to in that paragraph of the delegated powers memorandum?

Members *indicated agreement.*

The Convener: Does the committee agree to raise all those questions in writing, at least in the first instance?

Members *indicated* *agreement.*

The Convener: That brings us to the end of the meeting. Our next meeting will be next Tuesday, which is 4 December.

Meeting closed at 11:07.

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