



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 5 February 2013

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

5th Meeting 2013, 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

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 5 February 2013

[The Convener *opened the meeting at 10:41*]

Draft Instrument not subject to Parliamentary Procedure

Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc) Order 2013 [Draft] (SG 2013/4)

The Convener (Nigel Don): I welcome everyone to the fifth meeting in 2013 of the Subordinate Legislation Committee. As always, I ask members to turn off mobile phones.

The first item is consideration of a draft order not subject to parliamentary procedure. This is a draft of an order that the Scottish ministers propose to make under the Public Services Reform (Scotland) Act 2010 and which is required under section 26(1) of that act to be laid before the Parliament for the purposes of consultation. The consultation period must run for at least 60 days and the Scottish ministers must take into account representations received during that period before laying the order. Once laid, the order will be subject to the affirmative procedure and the committee will scrutinise the draft order laid under that procedure in the normal way.

The legal advisers have raised two minor drafting errors. First, paragraph 3 of schedule 2 to the order amends section 9 of the Ethical Standards in Public Life etc (Scotland) Act 2000 by substituting

“Commissioner for Ethical Standards in Public Life”

for

“Public Standards Commissioner for Scotland”

when the correct title of the new commissioner is the commissioner for ethical standards in public life in Scotland.

Secondly, schedule 1 makes textual amendments to the Scottish Parliamentary Commissions and Commissioners etc Act 2010 that are consequential on the transfer of functions by the order. With regard to paragraph 20, which modifies section 18 of the 2010 act, the word “it”, which appears at the end of section 18(1), should—in line with other amendments to the act—be changed to “the Commissioner”, but this change has been omitted.

The Scottish Government might wish to consider addressing those errors when it brings forward a draft order for approval. Does the committee agree to draw the Parliament’s attention to the draft order under the general reporting ground as it contains two minor drafting errors?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Children’s Hearings (Scotland) Act 2011 (Transfer of Children to Scotland—Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 [Draft]

Social Care and Social Work Improvement Scotland (Requirements for Care Services) Amendment Regulations 2013 [Draft]

The committee agreed that no points arose on the instruments.

10:43

The Convener: Members might wish to note that an earlier version of the first set of regulations was withdrawn as a result of an error identified by the committee.

Instruments subject to Negative Procedure

Housing (Scotland) Act 2001 (Assistance to Registered Social Landlords and Other Persons) (Grants) Amendment Regulations 2013 (SSI 2013/7)

10:43

The Convener: There appears to be a doubt whether the regulations are *intra vires* as the statutory consultation requirements specified in section 93(4) of the Housing (Scotland) Act 2001 do not appear to have been complied with. It does not appear that the Scottish ministers have consulted

“such bodies representing local authorities ... as they think fit”

before making the regulations, as section 93(4) requires.

Do members have any comments?

Hanzala Malik (Glasgow) (Lab): I agree that the level of consultation has perhaps been weak at best. In fact, instead of simply concentrating on our suggested changes, the Government might well have to revisit the regulations. The consultation has not been carried out as required to its fullest extent. Revisiting will be beneficial to the ministers as well—it will protect them against any challenge.

10:45

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I think that the matter is worth reporting. I am not in quite such a certain position as Hanzala Malik, but certainly, at the end of the day, it will protect ministers if they consider whether they should take action.

John Scott (Ayr) (Con): I agree with Stewart Stevenson. It is worth reporting. I welcome the changes that have been made as a result of the committee’s observations on and scrutiny of the previous draft. It is vital that the regulations are properly consulted on. I appreciate that there is some doubt, but it is by virtue of the fact that the changes that the committee suggested have been made that those regulations have not been consulted on, and that could leave them open to challenge, as I understand it. They might very well not be *intra vires*; if they are not, there would be consequences in terms of the awarding of grants and so on that the regulations would have allowed. That opens a whole can of worms that ministers should want to examine. They should go through the proper process so that that potential loophole

and area of challenge can be eliminated at this stage.

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

Members *indicated agreement.*

Energy Performance of Buildings (Scotland) Amendment Regulations 2013 (SSI 2013/12)

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

The committee may wish to recognise that, in policy terms, the coming into force of these regulations at the same time as the Energy Performance of Buildings (England and Wales) etc (Amendment) Regulations 2013 (SI 2013/10) may have been considered necessary in order to ensure consistent application of the green deal throughout Great Britain.

However, the committee may find that the Scottish ministers have not adequately explained why they, in conjunction with the secretary of state, were unable to agree a timetable for the making of both sets of regulations that properly respected the procedural rules on laying that are applicable in this Parliament and in the United Kingdom Parliament.

It is for the committee to decide whether the Scottish ministers’ explanation as to why they were not in a position to make and lay the regulations at the same time as, or shortly after, the Energy Performance of Buildings (England and Wales) etc (Amendment) Regulations 2013 is adequate. Additionally, the committee may wish to note that only two sitting days elapsed between the laying of the regulations and their coming into force.

Do members have any comments?

Stewart Stevenson: I am satisfied with the explanations in so far as they describe why we are in this position. However, although the explanations are sufficient, there is an issue with the co-ordination between the two Administrations, which is not meeting a satisfactory standard. Whether that is a reporting ground for us as a committee is a slightly different point, but I hope that having what I have just said on the record makes it clear that this is not how we would hope that things would happen. I think that the response from the Scottish Government indicates that that is its view as well.

John Scott: I support Stewart Stevenson in that regard. The important point is that there have been only two sitting days available for consultation time and that is not adequate.

I am not sure that we are in a position to judge where blame should be apportioned for that uncoordinated approach, but it appears that there has been a failure of process between the two Governments. The upshot is that an inadequate consultation period has been provided, which reflects on us as a Parliament, so it is not to be welcomed.

Jim Eadie (Edinburgh Southern) (SNP): I think that there is a case for seeking clarification of why ministers were not in a position to make and lay the regulations at the same time as, or shortly after, the English regulations were made and laid. I do not know that we have yet had sufficient explanation of that from ministers.

John Scott: I agree.

The Convener: My reading of the situation is simply that the final version of the regulations that the Scottish ministers received from Westminster was not what they expected, so changes had to be made. I am sure that we could explore the detail of that—let us do so—but I cannot help making the basic observation that if the Westminster Government is sailing close to the wind to observe its 21-day rule, we will never manage to observe the 28-day rule for an instrument that is supposed to come into force at the same time in Scotland.

John Scott: As I read the notes that have been provided, it is claimed that there has been a coordinated approach. Self-evidently, that coordination has broken down, which is probably where the difficulty lies. The upshot is that the consultation period has been reduced from 28 days to two days.

The Convener: The sum of all that is that not only has the 28-day rule been broken, but there has been a total lack of opportunity for the public in general and those who will be affected by the law change to find out about it.

Stewart Stevenson: Just for clarity, I point out that, although there is a difficulty in that the regulations came into force in such a short period that no one could prevent them from coming into force, as the regulations are a negative instrument, there is nonetheless still a period during which they can be revoked. That is not without its difficulties, but we should be proportionate in our discourse. The situation is not ideal.

The Convener: The 28-day rule is there so that we can scrutinise instruments and, on many occasions, have them withdrawn and relaid. Plainly, that opportunity disappears if an

instrument is brought in in two days and there is no meeting at which to consider it.

John Scott: What Stewart Stevenson says is absolutely correct. It would, of course, be for the lead committee to decide not to proceed with the regulations.

The Convener: I think that we have agreed that we will seek more information from the Government on why it was behind when the new regulations were signed at Westminster.

As the regulations were not laid at least 28 days before they came into force, does the committee agree to draw them to the Parliament's attention under reporting ground (j)?

Members *indicated agreement.*

Looked After Children (Scotland) Amendment Regulations 2013 (SSI 2013/14)

The committee agreed that no points arose on the instrument.

Instrument not subject to Parliamentary Procedure

Bovine Viral Diarrhoea (Scotland) Amendment Order 2013 (SSI 2013/21)

10:53

The Convener: No points have been raised by the legal advisers on the order, but members may wish to note that it corrects a defect in the Bovine Viral Diarrhoea (Scotland) Order 2013 (SSI 2013/3), which the committee previously reported on.

Is the committee content with the order?

Members *indicated agreement.*

High Hedges (Scotland) Bill: Stage 1

10:53

The Convener: Agenda item 5 gives us an opportunity to consider the response to the committee's stage 1 report on the High Hedges (Scotland) Bill from Mark McDonald MSP, who is the member in charge of the bill. Members will have seen the briefing paper and the response from Mr McDonald.

In the light of Mr McDonald's offer to write to the committee again prior to stage 2, we may consider the bill again, but if no amendments that affect the delegated powers provisions are made to the bill at stage 2, it might not be necessary for us to look at the bill thereafter. Therefore, members are invited to make any comments that they wish to make on the bill at this stage.

Do members have any comments?

John Scott: My only comment is that I am very pleased that the bill has been introduced. I am certain that the Parliament and the committee to which it has been allocated will consider it fully. I wish it every success.

The Convener: I am sure that every constituency MSP around the table is looking forward to the bill being passed.

Stewart Stevenson: High hedges have never been an issue for me. It is because of the weather—the west of Scotland is more affected by high hedges than the east.

The Convener: Are we content to note the response and, if necessary, to reconsider the bill once we have received further correspondence from the member in charge of the bill or if any relevant amendments are made to the bill at stage 2?

Members indicated agreement.

Public Body Consent Memorandum

Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013

10:55

The Convener: The next item of business is consideration of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, which is a United Kingdom Government order under section 1 of the UK Public Bodies Act 2011.

As members will recall, the consent of the Scottish Parliament is required to make an order under part 1 of the Public Bodies Act 2011 when such an order makes provision that would be within the legislative competence of the Scottish Parliament. The Subordinate Legislation Committee considers and reports on such orders on the same grounds as instruments that are laid before the Parliament.

No formal points have been raised by our legal advisers on the order, but the committee may wish to draw it to the attention of the lead committee that the explanatory document that accompanies the order does not explain how the statutory criteria in section 8 of the Public Bodies Act 2011 have been satisfied in relation to the effect of the order in its application to Scotland. Therefore, the lead committee may wish to explore with the Scottish Government how the order and any subsequent Scottish proposals will improve the exercise of public functions in Scotland.

Does the committee agree not to formally draw the order to the attention of the Parliament, but to raise the aforementioned issue that relates to the explanatory document with the lead committee?

Members indicated agreement.

The Convener: That completes the agenda. Our next meeting will be on Tuesday 19 February. Thank you very much indeed.

Meeting closed at 10:56.

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