



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 December 2012

Session 4

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**Tuesday 11 December 2012**

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**SUBORDINATE LEGISLATION COMMITTEE**

**29<sup>th</sup> 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 5



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

*Tuesday 11 December 2012*

[The Convener *opened the meeting at 10:45*]

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

**The Convener (Nigel Don):** Good morning and welcome to the 29th meeting in 2012 of the Subordinate Legislation Committee. As always, I ask members to switch off mobile phones.

Item 1 is a decision on taking in private item 5, which is consideration of a draft report on the High Hedges (Scotland) Bill at stage 1. Are members agreed?

**Members** *indicated agreement.*

**Instruments subject to**  
**Affirmative Procedure**

**Knife Dealers (Licence Conditions)**  
**(Scotland) Order 2012 [Draft]**

**Planning etc (Scotland) Act 2006**  
**(Supplementary and Consequential**  
**Provisions) Order 2013 [Draft]**

**Public Services Reform (Planning) (Pre-**  
**application consultation) (Scotland) Order**  
**2013 [Draft]**

**Public Services Reform (Planning) (Local**  
**Review Procedure) (Scotland) Order 2013**  
**[Draft]**

10:46

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

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

**Energy Performance of Buildings**  
**(Scotland) Amendment (No 3) Regulations**  
**2012 (SSI 2012/315)**

10:46

**The Convener:** The form or meaning of the amendment regulations could be clearer in that it is unclear who falls within the definition of “the Royal Family” for the purposes of the definition of “excluded building”. It is also unclear what “use from time to time”

of a building entails, notwithstanding the Scottish ministers’ explanation that that is not intended to refer to a property right and that single use and mere attendance at an event in a building would be insufficient.

Additionally, the form or meaning of regulation 13(3) could be clearer. It is not clear from its drafting that the keeper must notify authorised recipients of the existence of any opt-outs in place in relation to buildings or building units about which information is being disclosed by virtue of a request under regulation 13(1), when that appears to be the Scottish ministers’ policy intention.

Does the committee agree to draw the Parliament’s attention to the amendment regulations on reporting ground (h) as the meaning could be clearer?

**Members** *indicated agreement.*

**Materials and Articles in Contact with**  
**Food (Scotland) Regulations 2012 (SSI**  
**2012/318)**

**The Convener:** Subparagraph (1)(b) of regulation 20 appears to be defectively drafted as it contains two contradictory propositions. Regulation 20(1)(b) states that food authorities are not to enforce the regulations in relation to the provisions that are specified in paragraph (3); however, paragraph (3) states that food authorities are to do so.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (i) as the drafting appears to be defective?

**Members** *indicated agreement.*

**The Convener:** Does the committee agree to note that the Scottish Government has undertaken to correct this error by laying an amending instrument and that that should be done as soon as possible?

**Members** *indicated agreement.*

**Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319)**

**The Convener:** As members will note, our legal advisers have suggested that the regulations raise a question whether they relate to matters reserved under section F1 of part II of schedule 5 to the Scotland Act 1998 and as such the committee might wish to report the regulations as raising a devolution issue. Indeed, the same issue was raised in relation to the Council Tax Reduction (Scotland) Regulations 2012, which the committee considered two weeks ago.

The Scottish Government's view on these regulations and the Council Tax Reduction (Scotland) Regulations 2012 is that they do not relate to any of the reserved matters described in section F1 of part II of schedule 5 to the 1998 act. When the committee considered the Council Tax Reduction (Scotland) Regulations 2012, a majority of committee members preferred the Scottish Government's view.

It is for the committee to decide whether it wishes to report the regulations or whether, as with the Council Tax Reduction (Scotland) Regulations 2012, it is content that no devolution issue has been raised. Do members have any comments?

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** We had a fairly comprehensive discussion of the subject when the previous regulations came to the committee. I suspect that we are not likely to add much by discussing the matter again now, and I suspect that the convener will take a similar view.

I have considered the matter further and it occurs to me that, if the definition of "benefits" is, as the legal advice suggests could be the case, to encompass things that do not deliver money to someone, which is clearly a benefit, but which deliver benefits in other ways, we catch even more things than I thought of the last time. It occurs to me that the bus pass for the over-60s would become a benefit. We are on very difficult ground if we conclude that the regulations raise the issue of what is a benefit in the light of the huge range of other things that would be caught under such a decision. I therefore continue to invite the committee to accept the Scottish Government's view on the issue and not to draw the Parliament's attention to the potential devolution issue that our legal advice has said might exist.

**The Convener:** Does anyone take the contrary view?

**John Scott (Ayr) (Con):** I take the contrary view and, as ever, I am grateful to our advisers for providing us with detailed legal advice with which, regrettably, the Scottish Government does not agree.

I am concerned about whether the legal basis for making the regulations is sound and free from the risk of challenge. I suspect that it is not and that sufficient doubt is raised as to whether the terms of the devolution settlement as at the date of making the regulations have been respected.

Specifically, I consider that the issue requires to be assessed in terms of the requirements in the Scotland Act 1998. Notwithstanding the fact that both sets of regulations are made under the powers in section 80 of the Local Government Finance Act 1992, the purpose of the provisions of these regulations must be considered, having regard to their effects in all the circumstances. That purpose must then be compared with the reservations in schedule 5—in this case, section F1, which reserves social security schemes including the making of any form of financial assistance to individuals in relation to liability for local taxes. The assessment of the purpose must be considered in relation to the provisions in the regulations, and so, in the legal analysis, comparisons with other enactments that make reductions or discounts from tax liability for other purposes are of limited or no relevance to the inherent validity of these regulations.

**Stewart Stevenson:** I am grateful to the member for highlighting the fact that, for something to become a benefit, it is necessary that it provide financial assistance. Financial assistance is not provided in this case; it is merely a reduction in liability, which is different from what existed in relation to the benefits system that is being taken away and replaced. That is precisely why the regulations fall outside the definition of "benefits".

I do not intend to go on about this at great length, because I suspect that the easiest way for us to proceed is for committee members to indicate which side of the argument their preference is for.

**John Scott:** I do not intend to go on at great length either, but the committee will forgive me for going on again. I point out that the committee's purpose is to draw our concerns to the attention of other committees. That is what we are doing. To not make other committees aware of our concerns when we have legitimate reasons to be concerned would be a failure of our duty in the Parliament.

**The Convener:** That is an interesting proposition, although I am not sure that I agree entirely. Part of the committee's purpose is to

make decisions that are within its remit. It is not our purpose to make any decision within another committee's policy remit, but if we are concerned about the Government's power to make a regulation, it is surely within our remit to decide whether that is able to be challenged.

**John Scott:** In that regard, is it possible, should we divide on the matter, for a minority report to be made to the committee to which the recommendation would go?

**The Convener:** My advice is that that is ultimately for the committee to decide. However, I make the point first that the discussion is straightforwardly on the record and, secondly, that it is therefore perfectly possible for anyone in the other committee to understand that the discussion has taken place, and for any member to bring that to the committee's attention.

We could, as a committee, submit a minority report with the committee report, but—to return to my basic point—it is our business to make such decisions; I do not have a problem with that. We are looking at advice, as we do week by week, and we occasionally have to come to decisions about whether we think that something is important and what we believe is significant. I personally do not have any difficulty in accepting the Government's line on the matter, and I would not want the matter to be pursued. I understand that there is an argument, but I do not think that it is valid in the context. That is the crucial bit. Do any other members want to contribute?

**John Pentland (Motherwell and Wishaw) (Lab):** A fortnight ago, we discussed something that is relevant to the report. At that time, I agreed with John Scott that we should perhaps take on board legal advice.

I take on board that we do not always have to do that. However, we made the point last time that, where something is important and might raise issues with regard to devolution, it is only right and pertinent that we should exhaust the question whether it is right or wrong. To that extent, I would probably support John Scott if he chose to present an amendment to the report.

**The Convener:** It is clear that we will have to vote on the matter. We are back where we were, but this time I have a slightly better form of words to put to the committee.

The proposition is that the committee accepts the Scottish Government's view that the regulations are *intra vires*, and that we will not draw them to the attention of the Parliament on the basis that they raise a devolution issue. Are we agreed?

**Members:** No.

**The Convener:** Plainly we are not, so we will have to divide.

**For**

Don, Nigel (Angus North and Mearns) (SNP)  
Eadie, Jim (Edinburgh Southern)(SNP)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

**Against**

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

**The Convener:** The result of the division is: For 4, Against 3, Abstentions 0.

The proposition is passed, which I think deals with the issue.

**John Scott:** If I may, convener, I will ask whether the three of us will be allowed to make a minority recommendation to the committee to which the report will go.

**The Convener:** That is a separate question, on which Stewart Stevenson wants to contribute.

**Stewart Stevenson:** I merely encourage the member not to proceed in that way. Since there is no report on the subject, it is difficult to envisage a minority report in that context. The view of the minority of committee members is on the record and very clear. I am unclear about how the committee can agree that there should be a minority report with which the majority of committee members have disagreed. It would be unhelpful for us to have to vote against our submitting a minority report—which is the logical position that I would have to take—when the member can, as a member of Parliament, ensure that the committee's on-the-record view is in front of anyone in Parliament for whom that would be appropriate.

11:00

**Hanzala Malik (Glasgow) (Lab):** Given the importance of this issue, John Scott's request is not unreasonable. I am not suggesting that any instrument that comes before the committee is not important, but there is a certain gravity to this issue that had led us to split twice. I, for one, would be comfortable for a minority report to go forward. I am sure that, if the committee votes down the request, there are other vehicles for taking this forward, but agreeing to it would show good will and demonstrate that the issue was important enough to be considered in such a way.

**Stewart Stevenson:** We have already voted not to report. We are now being invited to report.

**Hanzala Malik:** We have not agreed to not report.

**John Scott:** I am inviting the committee to submit a minority report, given the importance of the issue.

**Stewart Stevenson:** As far as I am aware, committees do not submit minority reports. The committee's view is clear.

**John Scott:** I seek a ruling from the convener.

**The Convener:** It is a perfectly fair point, John. I think that I am with Stewart Stevenson on this; if we have agreed not to report, we do not report. I think that simply saying that we did not report is in itself a report.

**John Scott:** So there is no way of holding the Government to account.

**The Convener:** With respect to a parliamentary colleague who has greater experience than I have, I do not think that that is true. There are many ways of raising the issue, but the committee has quite clearly decided that we support the Government's view on whether the instrument is *intra vires*.

**Stewart Stevenson:** I realise that I am making a rod for my own back, convener, but I want to be helpful and retain the committee's common purpose. Procedurally, it is open to any member to oppose the motion when it comes before the Parliament for approval.

**Hanzala Malik:** I come back to my point that the issue is very important. If the committee decides not to support a request for a minority report, that is fine—it is the committee's decision—but instead of going round in circles I want to bring this to an end and formally move that we submit a minority report.

**The Convener:** I am very happy to put the general proposition to the vote, but I am still struggling with the logic of being asked to report, having decided not to report. However, I take your point, so I suggest that we vote on the proposition that there be a minority report that we should have reported what we have decided not to report. Who is in favour of reporting that we decided—*[Interruption.]* I am sorry, I propose that we make no report on this issue, including a minority report. Does that proposition sound sensible?

**Stewart Stevenson:** Just to be clear, convener, you are asking us to divide on the proposition that there be no minority report.

**The Convener:** I need to get this clear. *[Interruption.]* I am sorry, I just needed to get the process straight. Given that Hanzala Malik wants to make a proposition, it is actually his job to do the proposing. I do apologise, Hanzala. As I have said, I am happy to have another vote.

**Hanzala Malik:** I am just proposing that we have a minority report.

**Stewart Stevenson:** In the name of the committee.

**Hanzala Malik:** Yes.

**The Convener:** Do members agree with the proposition?

**Members:** No.

**The Convener:** There will be a division.

#### For

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

#### Against

Don, Nigel (Angus North and Mearns) (SNP)  
Eadie, Jim (Edinburgh Southern)(SNP)  
MacKenzie, Mike (Highlands and Islands) (SNP)  
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

**The Convener:** The result of the division is: For 3, Against 4, Abstentions 0.

I think that that is the logical conclusion. After all, if we decide not to report, we have decided not to report. Can we leave the matter there, please?

Further points have been raised on the regulations. The meaning of "income-related benefit" in regulation 9 could be clearer. The expression itself is not defined by the regulations, and it would have been clearer to have defined it for the purposes of regulation 9 in respect of the fact that it is intended to exclude for those purposes "qualifying income-related benefits" as defined in regulation 2(1).

Moreover, the meaning of regulation 27(1)(v)(i) could have been made clearer by referring to an applicant who owns property in Scotland, rather than one who owns the freehold interest in property, which is, of course, the terminology that applies in England.

Does the committee agree to draw the regulations to the attention of the Parliament on reporting ground (h), as their meaning could be clearer?

**Members indicated agreement.**

**The Convener:** Does the committee agree to note that the Scottish Government has undertaken to lay an amendment to correct the second point, and that this should be done as soon as possible?

**Members indicated agreement.**

**The Convener:** Does the committee agree to recommend that an amendment is made to clarify the meaning of "income-related benefit" in regulation 9?

**Members indicated agreement.**

**The Convener:** I also note that in the definition of "official error" in regulation 2(1), the phrase



“the Upper Tribunal of a court”

should refer to “the Upper Tribunal or a court”; the inclusion of regulation 4(3) is a drafting error in 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; and in regulation 29(8)(c), the citation of the Children and Families (Wales) Measure omits 2010 as the year of the instrument.

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

**Members** *indicated agreement.*

**The Convener:** Does the committee agree to note that the Scottish Government has undertaken to correct the first and second errors by laying an amending instrument and to recommend that the amendment should correct the third error?

**Members** *indicated agreement.*

### **Welfare of Animals at the Time of Killing (Scotland) Regulations 2012 (SSI 2012/321)**

**The Convener:** Paragraphs 9 to 11 of schedule 1 to the regulations raise a devolution issue in that it is not clear whether they are compatible with European Union law. It is doubtful whether the provisions are properly within the ambit of article 26 of Council regulation (EC) No 1099/2009 on the protection of animals at the time of killing.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (f) as they raise a devolution issue?

**Members** *indicated agreement.*

**Hanzala Malik:** For the sake of clarity, I seek assurance that the regulations will not affect the religious slaughter of animals, as has historically been the case. Will they change the position on that matter?

**The Convener:** I would be grateful if one of our legal advisers could confirm that.

**Graham Crombie (Legal Adviser):** We do not understand the regulations to materially affect those practices, although there will be some changes to, for example, licensing regimes.

**Hanzala Malik:** Again for the sake of clarity, there will be no legislative change with regard to religious slaughter. The regulations are simply about certification and the rights of trade personnel.

**Graham Crombie:** That is my understanding.

**Hanzala Malik:** Thank you for that.

**The Convener:** Part 1 of schedule 5 to the regulations appears to be defectively drafted, in that it erroneously purports to repeal paragraph 2 of schedule 9 to the Deregulation and Contracting Out Act 1994—which it cannot do because the provision does not extend to Scotland—when the Scottish ministers’ intention was instead to repeal paragraph 3 of that schedule.

The regulations also appear to be defectively drafted in that part 2 of schedule 5 revokes paragraph 158 of part II of schedule 2 to the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820), which modifies regulation 7 of the Welfare of Animals (Slaughter or Killing) Regulations 1995 (SI 1995/731), without also revoking regulation 7. It appears that the Scottish ministers’ intention was to revoke regulation 7 and that the revocation of paragraph 158 was consequential on that, but the revocation of regulation 7 has been omitted.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (i) as the drafting appears to be defective?

**Members** *indicated agreement.*

**The Convener:** The form or meaning of regulation 25(4) could be clearer, in that it is unclear what the test of “good cause being shown” to allow an appeal to be received late involves and how it differs from the default test of “special cause shown” in rule 2.6 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 (SI 1999/929).

Finally, the form or meaning of paragraphs 3 and 4 of schedule 4 could be clearer, in that they modify the definitions of slaughter in the Foot-and-Mouth Disease (Scotland) Order 2006 (SSI 2006/44) and the Foot-and-Mouth Disease (Slaughter and Vaccination) (Scotland) Regulations 2006 (SSI 2006/45) so that they read “‘slaughter’ includes causing the death of an animal by any process other than slaughter”. Although it is possible to construe this as a reference to killing by any means, it appears to be dependent on knowing that slaughter as used within the definition would ordinarily have the technical meaning of killing for human consumption. It is not clear that that would be readily apparent to end users of the regulations without specialist knowledge of the subject matter.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (h) as the meaning could be clearer?

**Members** *indicated agreement.*

**Civic Government (Scotland) Act 1982  
(Metal Dealers' Exemption Warrants) Order  
2012 (SSI 2012/324)**

**Plant Health (Scotland) Amendment (No 2)  
Order 2012 (SSI 2012/326)**

**Crofting Register (Scotland) Amendment  
Rules 2012 (SSI 2012/327)**

**Crofting Register (Fees) (Scotland)  
Amendment Order 2012 (SSI 2012/328)**

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

**The Convener:** The committee might also wish to note that the Crofting Register (Scotland) Amendment Rules 2012 and the Crofting Register (Fees) (Scotland) Amendment Order 2012 respond to errors identified by the committee in its consideration of the principal instruments at its meeting on 20 November.

Is the committee content with that?

**Members** *indicated agreement.*

**The Convener:** I should add that we are also very pleased that the Government has relaid the instruments.

**John Scott:** I agree and put it on record that we are very grateful to the Government for doing that so promptly.

**The Convener:** Indeed.

**Public Body Consent  
Memorandum**

**Draft Public Bodies (Abolition of British  
Shipbuilders) Order 2013**

11:11

**The Convener:** Item 4 is consideration of a United Kingdom Government order under part 1 of the UK Public Bodies Act 2011.

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

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

**The Convener:** We come to item 5, which is in private.

11:12

*Meeting continued in private until 11:23.*

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e-format first available  
ISBN

Revised e-format available  
ISBN 978-1-4061-9466-1

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Printed in Scotland by APS Group Scotland