



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 5 March 2013

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

8th 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 3

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 5 March 2013

[The Convener *opened the meeting at 10:40*]

Draft Instrument not subject to
Parliamentary Procedure

Public Services Reform (Functions of the
Common Services Agency for the Scottish
Health Service) (Scotland) Order 2013 (SG
2013/12)

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

The order that we are considering under agenda item 1 must comply with various *vires* restrictions that are listed in section 18 of the Public Services Reform (Scotland) Act 2010. Although the general objective of the order is, of course, a policy matter, whether the policy can be achieved through the order process is properly a matter for the committee to consider. If the *vires* restrictions are not met, the policy would have to be delivered through the introduction of a bill.

The legal advisers have identified a number of issues for members to consider regarding the *vires* tests that are set out in section 18 of the 2010 act. If members wish to obtain more information from the Scottish Government about those matters, the committee could do so by taking oral evidence from the Scottish Government at a later date. The procedure that is set out in the 2010 act specifically provides the opportunity for the committee to consider issues at this stage and to comment before the order is laid for approval by Parliament.

Does the committee agree to explore further with the Scottish Government, by taking oral evidence, whether the effect of the order will be proportionate to the policy objective, whether the order strikes a fair balance between the public interest and the interests of any person who might be adversely affected by it, and whether the order will remove any necessary protection?

Members indicated agreement.

The Convener: On that basis, we can expect to see officials fairly soon—probably next week.

Instruments subject to
Affirmative Procedure

Renewables Obligation (Scotland)
Amendment Order 2013 [Draft]

10:41

The Convener: There is an error in article 7, which would insert into the principal 2009 order—the Renewables Obligation (Scotland) Order 2009 (SSI 2009/140)—new article 22C, which relates to electricity that is generated by certain types of biomass station. In two places, the new article 22C(2) refers incorrectly to

“qualifying combined heat and power station”.

The correct definition in article 2 of the principal order is

“qualifying combined heat and power generating station”.

Does the committee agree to draw the order to the attention of the Parliament on the general reporting ground in relation to a minor drafting error?

Members indicated agreement.

The Convener: Does the committee also agree to note that the Scottish Government has undertaken to amend the error at the next available opportunity?

Members indicated agreement.

Police Investigations and Review
Commissioner (Investigations Procedure,
Serious Incidents and Specified Weapons)
Regulations 2013 [Draft]

Police and Fire Reform (Scotland) Act
2012 (Consequential Modifications and
Savings) Order 2013 [Draft]

Local Government Finance (Scotland)
Amendment Order 2013 [Draft]

The committee agreed that no points arose on the instruments.

Instruments subject to Negative Procedure

Police Service of Scotland (Police Cadets) Regulations 2013 (SSI 2013/42)

10:43

The Convener: Paragraph 1 of part 3 of the schedule to the regulations appears to be defectively drafted, in that it refers to the Police (Minimum Age for Appointment) Regulations 2006—a statutory instrument that applies to England and Wales—rather than to the Police (Minimum Age for Appointment) (Scotland) Regulations 2006, as was apparently the Scottish ministers' intention.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Before you put questions to us, does the Government agree that the regulations are defectively drafted? You said that the relevant part “appears to be defectively drafted”. Do we know whether the Government agrees?

The Convener: I think that the Government has conceded that the regulations are defectively drafted, in the sense that they refer to the wrong piece of legislation. I think that that is in our briefing. [*Interruption.*] Our advice is that the Government concedes that an error has been made. The phrase “defectively drafted” is our term rather than the Government's.

Stewart Stevenson: It is just that we are putting on the record that the instrument “appears to be defectively drafted”, whereas the reality is that it is accepted that it has been defectively drafted.

10:45

The Convener: Let us be clear—the reporting ground is that we believe that the instrument is defectively drafted.

Stewart Stevenson: Okay. That is fine.

The Convener: As I understand it, the Government says that it believes that there is an error. It does not have to specify the ground—I think it merely has to acknowledge that there is an error.

Stewart Stevenson: So, it has been accepted that there is an error.

The Convener: Yes.

Stewart Stevenson: That is fine.

The Convener: Does the committee therefore agree to draw the instrument to the attention of Parliament on reporting ground (i), as the drafting appears to be defective?

Members indicated agreement.

Hanzala Malik (Glasgow) (Lab): I draw your attention to the Police Cadets (Scotland) Regulations 1968 (SI 1968/208), under which the cadet corps was established. I understand that there is no new legislation to establish the cadet corps. It represents a lost opportunity not to include that in the current legislation. The cadet corps is a historic service that the police force established and has maintained, and it is a good opportunity for young people to be involved with the police. To lose that opportunity is perhaps a weakness. Perhaps we could point that out.

The Convener: I thank you for your comments, but that is very much a policy matter. I encourage you to take that to your colleagues on the Justice Committee when it considers the regulations. I understand the point, but I do not think that it has anything to do with the drafting of the regulations.

Hanzala Malik: We are transferring the service from local police forces to a national police force, but we have not considered its continuation in any form. That is an opportunity lost. It might not necessarily just be an issue of policy; it might be that someone somewhere has forgotten that important element.

The Convener: Forgive me, but even if they have forgotten, it is still a policy issue. It really is. It is certainly not about the technical drafting of the regulations. That issue needs to go to your colleagues on the Justice Committee.

Does the committee agree to recommend that the Scottish ministers lay an amending instrument to address the defect at the first available opportunity?

Members indicated agreement.

Mike MacKenzie (Highlands and Islands) (SNP): This is an instance of where, had good practice been followed in consolidation, we would not be in the current situation. Obviously, the situation has persisted for some time. It might be worth the committee's while to note in its annual report that this example adds substance to the arguments that we continually make about the need to consolidate before we get into such situations.

The Convener: Indeed. The instrument saves and continues in effect the 1968 regulations together with 13 relevant amending instruments—that reinforces Mike MacKenzie's point. Regulation 2(3) will further modify the 1968 regulations. It is, accordingly, extremely difficult to ascertain the terms and conditions of service of police cadets, because the 1968 regulations have been amended extensively, are not available in amended form—save in an unofficial consolidation that has been prepared by the Scottish ministers—

and are not freely available in electronic form even in their original and unamended form. That reinforces Mike MacKenzie's point that this is a bad example, in that there is a lack of consolidation. The fact that it affects a small number of people is surely not relevant to the principle.

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

Members indicated agreement.

The Convener: The committee might wish to note the Scottish ministers' intention to request that the Scottish Police Authority provide a consolidated form of the 1968 regulations to each of the police cadets that are transferring to the police service of Scotland.

Does the committee agree to note that it would have been preferable, in the interests of accessibility of the subordinate legislation that is made under the Police and Fire Reform (Scotland) Act 2012, for the Scottish ministers simply to have consolidated the 1968 regulations rather than relying on the saving provisions of the instrument coupled with the existence of an unofficial and unpublished consolidation document?

Members indicated agreement.

National Health Service (Scotland) (Injury Benefits) Amendment Regulations 2013 (SSI 2013/52)

The Convener: New regulation 18B(1) will delegate power to the Scottish ministers to specify the period within which a claim for injury benefit must be made in order for entitlement to benefit to arise. That will permit specification of a substantive matter other than by subordinate legislation and, therefore, with no scrutiny by Parliament. Although the Superannuation Act 1972 permits the delegation of functions, the committee might consider that it is unusual for substantive requirements to be delegated in that manner. The committee might wish to note that the approach is inconsistent with new regulations 18A(2) and 21A(1), which set out substantive time limits.

Does the committee agree to draw the regulations to Parliament's attention on reporting ground (g), as they have been made by what appears to be an unusual or unexpected use of the powers that are conferred by the parent statute?

Members indicated agreement.

The Convener: The meaning of "injury allowance" in new regulation 4(11) could be clearer; the "NHS terms and conditions of service

handbook", by which the term is defined, is not fully identified by reference to the source of the material, and where copies of it can be consulted.

Does the committee agree to draw the regulations to Parliament's attention on reporting ground (h), as the meaning of "injury allowance" in new regulation 4(11) could be clearer?

Members indicated agreement.

The Convener: The handbook to which the Scottish ministers intend to refer did not exist when the regulations were made, nor when they were scrutinised by the committee. It was therefore not possible for the committee to discharge its scrutiny function as it would have wished.

Does the Committee agree to draw to the lead committee's attention the fact that the terms and conditions that affect entitlement to injury allowance, in respect of work-related injury or disease sustained or contracted after 31 March 2013, which have been removed from the current statutory scheme, were neither defined nor published at the time when the regulations were made?

Members indicated agreement.

The Convener: Instead of "that person", regulation 18B(3) should refer to "the person making the claim". The Government has undertaken to correct the provision when the principal regulations are next amended. However, it is not clear when that will happen, or indeed whether it will happen at all, given that the effect of the regulations is to close the scheme in respect of injuries sustained or diseases contracted after 31 March 2013.

Does the committee agree to draw the regulations to Parliament's attention under the general reporting ground, as regulation 18B(3) contains a minor drafting error?

Members indicated agreement.

The Convener: Does the committee also agree to recommend that the Government consider correcting the error in early course?

Members indicated agreement.

Electricity (Applications for Consent) Amendment (Scotland) Regulations 2013 (SSI 2013/58)

Fees in the Registers of Scotland (Consequential Provisions) Amendment Order 2013 (SSI 2013/59)

**Police Service of Scotland (Conduct)
Regulations 2013 (SSI 2013/60)**

**Police Service of Scotland (Senior
Officers) (Conduct) Regulations 2013 (SSI
2013/62)**

**Education (School Lunches) (Scotland)
Amendment Regulations 2013 (SSI
2013/64)**

The committee agreed that no points arose on the instruments.

**Scottish Law Commission
Reports**

10:53

The Convener: The purpose of agenda item 4 is for the committee to consider correspondence from the Standards, Procedures and Public Appointments Committee on Scottish Law Commission bills. Members have the correspondence along with a briefing paper from the clerk. The Standards, Procedures and Public Appointments Committee will consider the matter again at its meeting on 14 March and it has asked for a response by tomorrow, which is Wednesday 6 March. It would therefore be best if any comments were agreed today.

I suggest that we respond that we are content with the proposed standing orders rule changes. Do members have any comments on that?

Members: No.

The Convener: With regard to the committee's seeking policy input from subject committees, I suggest that it is not appropriate for a timescale for such input to be specified. Committees work well together on an informal basis and I see no reason to put in place a specific timescale. Do members have any comments on that?

Hanzala Malik: We are not suggesting a timeframe, but surely there is a wish that input will be received within a reasonable time.

The Convener: Yes. I am sure that the committee clerks will be capable of agreeing that. They would usually expect a response within a few weeks.

Stewart Stevenson: What has been described are circumstances in which, having been given a piece of Scottish Law Commission work to do in the expectation that there is no policy content, we reach a point at which we believe a policy issue may arise. It would not, of course, be for us to probe that in detail; that would be for the lead committee that was dealing with the policy. Therefore, we would not readily be in a position to come to a view on how big such an issue might be. That would be for the lead committee, which might conclude that the issue was substantial or might quickly conclude that it was a matter of substantial triviality. Therefore, we are never well placed to put a timescale on things.

As a matter of good practice, we should probably indicate by when it would be useful to our processes to have a response, but we should certainly not get ourselves locked in to timescales, because we will not attempt to assess the policy issue, which we will raise in a question. That is

precisely why it is appropriate not to formalise the schedule. It is really only the policy committee that can come to a conclusion, not us.

The Convener: Thank you for that eloquent justification.

Hanzala Malik: I am sorry, but I disagree with that. The whole point of an item's coming to the Subordinate Legislation Committee is that it has been held up in the Justice Committee. It will come to this committee because we will be trying to support the Justice Committee to get things done sooner rather than later. Anything that we send back to any committee should therefore go on the top of its agenda, so that the process is successful. If we send to a committee something that is then put into its scheme of things, if one can use that phrase, we will not succeed in trying to clear up the backlog, as there will be a backlog in the backlog.

In saying that there should be a reasonable timeframe, I am suggesting that, if we send something back to a committee, it should put it on to its next agenda to try to speed up the whole process, so that we can be successful in clearing the backlog.

That is just a suggestion.

The Convener: I entirely endorse your thoughts. Basically, you are absolutely right. However, I am conscious that—as Stewart Stevenson eloquently put it—the other committees will sometimes conclude that a matter is trivial and will not really be worried about it, but at other times they will conclude that a significant policy issue is involved, so they will stop and think about how on earth they will address that policy issue because we did not think that there was a policy issue to start off with.

Sometimes the Justice Committee or any other committee might be looking at an extensive stage 2 schedule, and may be unable to fit something in. We have to be slightly careful not to put in the standing orders something that we might instantly regret. There will not be too many of the bills in question, so I am in no hurry to suggest that we put in the standing orders something that we might subsequently realise was simply not helpful.

Hanzala Malik: I do not want to be unreasonable or to gild the lily, but I do not want the committee to have a backlog because other people have not supported what we have tried to do. I will leave it to the convener's discretion to decide the best method of achieving that, but the whole point is that, if people are asking the committee to take on additional responsibility to support clearing up the backlog, we do not want to add to that backlog. That is all I am saying.

The Convener: Yes. I am with you.

Stewart Stevenson: We are forgetting that the timetable for each stage of a bill is, of course, set by Parliament through motions from the Parliamentary Bureau; it is not as if the process is without time constraints. At the end of the day, a committee may have to go to the bureau and say, "This cannot be done within the timetable that Parliament has agreed," and Parliament must take another decision. That has happened in the past. We should not fail to note that there is a timetable, but that is done by a different process.

The Convener: Yes. I am getting the sense, largely by what people are not saying, that we are not arguing for a particular period of weeks. I suspect that, as with quite a number of things in the process, we will have to learn as we go along. We will do the bills one at time; we will not do terribly many in a hurry. Therefore, let us just see where we get to. There is a sense that nobody is arguing for a particular period of weeks.

We also need to think about a possible name change to reflect the committee's new role. I am all in favour of that; I see no reason for having a name that is wrong. When we know that something is changing, let us at least reflect that.

I propose that we call ourselves the delegated powers and law reform committee—as the clerk suggested before the meeting—not because we are the only people who ever consider delegated powers or do law reform, but because that name would cover the two things that we are being asked to deal with in the future. Are members happy with that proposal?

Members indicated agreement.

The Convener: Okay. Let us see what other people want to say about that.

That brings us to the end of the agenda item and therefore the end of the meeting. I thank members for the swift progress that has been made. Our next meeting will be next Tuesday.

Meeting closed at 11:00.

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