



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 30 April 2013

Session 4

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.uk or by contacting Public Information on 0131 348 5000

Tuesday 30 April 2013

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	877
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE	878
Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 [Draft].....	878
Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013 [Draft]	879
Public Services Reform (Scotland) Act 2010 Modification Order 2013 [Draft]	879
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	880
Firemen's Pension Scheme (Amendment) (Scotland) Order 2013 (SSI 2013/128)	880
Firefighters' Pension Scheme (Scotland) Amendment Order 2013 (SSI 2013/129).....	880
Action Programme for Nitrate Vulnerable Zones (Scotland) Amendment Regulations 2013 (SSI 2013/123)	881
Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2013 (SSI 2013/126).....	881
Environmental Information (Scotland) Amendment Regulations 2013 (SSI 2013/127)	881
INSTRUMENT NOT SUBJECT TO PARLIAMENTARY PROCEDURE	882
Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No 1, Transitional and Transitory Provisions) Order 2013 (SSI 2013/124).....	882
LAND AND BUILDINGS TRANSACTION TAX (SCOTLAND) BILL: AFTER STAGE 1	883
TRANSITIONAL PROVISIONS	884

SUBORDINATE LEGISLATION COMMITTEE

13th 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 30 April 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in
Private

The Convener (Nigel Don): I welcome members to the Subordinate Legislation Committee's 13th meeting in 2013. I ask members to turn off any mobile phones.

Item 1 is a decision on taking business in private. It is proposed that the committee takes item 7—consideration of the committee's third quarterly report for the parliamentary year 2012-13—in private. Do members agree to take item 7 in private?

Members *indicated agreement.*

Instruments subject to
Affirmative Procedure

Children's Hearings (Scotland) Act 2011
(Rules of Procedure in Children's
Hearings) Rules 2013 [Draft]

10:01

The Convener: Rule 9 of the rules appears to have been made by an unusual or unexpected use of the powers in section 177 of the Children's Hearings (Scotland) Act 2011 to make rules about the procedure relating to children's hearings, combined with the powers in section 195(2) to make incidental, supplemental or consequential provision. The committee might consider that it would have been a more usual or expected use of powers to have made the provisions contained in rule 9 by regulation under section 34, which specifically deals with imposing additional requirements on safeguarders.

However, this does not appear to affect the validity of rule 9. The Scottish Government adopted its approach because it considers that the matter is generally related to procedural issues, but the committee might consider the rule to be in the nature of a substantive requirement.

The committee might also wish to note a couple of matters. First, as a result of observations made by the legal adviser in connection with rule 56, the Scottish Government withdrew the rules that were initially laid on 15 April and relaid them on 23 April with changes to that rule.

Secondly, rule 33 sets out requirements for the provision of information in advance of certain hearings to specified persons involved in hearings. That applies when section 109(7), 115(5) or 117(5) of the 2011 act applies. Sections 115(5) and 117(5) are yet to be inserted into the act by the Children's Hearings (Scotland) Act 2011 (Modification of Primary Legislation) Order 2013. That order is yet to be laid in Parliament and, without sight of it, Parliament cannot be clear about the application and effect of rule 33 in the period permitted for scrutiny of the current rules. Although the committee may wish to welcome the fact that the Government has supplied the details of those subsections, the committee might also wish to encourage the Scottish Government to consider how such references to provisions that are yet to be made could be avoided in the programming of legislation.

Finally, part 21 of the rules makes specific provisions for hearings arranged under the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013 and

cross-refers in several places to those regulations, which are also yet to be laid before Parliament. Without sight of those regulations as laid and published, Parliament cannot be clear about the application and effect of part 21 in the period permitted for scrutiny of the current rules.

Does the committee therefore agree to draw the rules to the Parliament's attention on reporting ground (g), as rule 9 has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute, which is the 2011 act?

Members indicated agreement.

**Children's Hearings (Scotland) Act 2011
(Review of Contact Directions and
Definition of Relevant Person) Order 2013
[Draft]**

**Public Services Reform (Scotland) Act
2010 Modification Order 2013 [Draft]**

The committee agreed that no points arose on the instruments.

**Instruments subject to Negative
Procedure**

**Firemen's Pension Scheme (Amendment)
(Scotland) Order 2013 (SSI 2013/128)**

10:04

The Convener: There has been a failure to lay the 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. The committee may wish to note that, as a result of the policy adopted, the instrument required to come into force on 1 May 2013, given that its making depended on receipt of confirmation from the Department for Communities and Local Government of the applicable contribution rates, which occurred on 26 March. The committee may accordingly consider the failure to be acceptable, having regard to the circumstances in which the Scottish ministers found themselves.

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j), as there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the 2010 act?

Members indicated agreement.

The Convener: Does the committee find the explanation given by the Scottish Government for the failure to lay the instrument at least 28 days before it comes into force to be acceptable?

Members indicated agreement.

**Firefighters' Pension Scheme (Scotland)
Amendment Order 2013 (SSI 2013/129)**

The Convener: There has been a failure to lay the 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 with SSI 2013/128, which we have just considered, the instrument required to come into force on 1 May 2013, given that its making depended on receipt of confirmation from the Department for Communities and Local Government of the applicable contribution rates, which occurred on 26 March. The committee may therefore find the failure to be acceptable, having regard to the circumstances in which the Scottish ministers found themselves.

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j), as there has been a failure to lay it at least 28 days before it comes into force, as required by section 28(2) of the 2010 act?

Members indicated agreement.

The Convener: Does the committee find the explanation given by the Scottish Government for the failure to lay the instrument at least 28 days before it comes into force to be acceptable?

Members indicated agreement.

Action Programme for Nitrate Vulnerable Zones (Scotland) Amendment Regulations 2013 (SSI 2013/123)

Freedom of Information (Scotland) Act 2002 (Scottish Public Authorities) Amendment Order 2013 (SSI 2013/126)

Environmental Information (Scotland) Amendment Regulations 2013 (SSI 2013/127)

The committee agreed that no points arose on the instruments.

Instrument not subject to Parliamentary Procedure

Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No 1, Transitional and Transitory Provisions) Order 2013 (SSI 2013/124)

10:07

The committee agreed that no points arose on the instrument.

Land and Buildings Transaction Tax (Scotland) Bill: After Stage 1

10:08

The Convener: This item of business is consideration of the Scottish Government's response to the committee's stage 1 report on the bill. Members will have seen the briefing paper and the response from the Scottish Government. Do members have any comments or are we content to note the response and, if necessary, consider the bill again after stage 2?

Mike MacKenzie (Highlands and Islands) (SNP): This is a fairly good example of a lead committee perhaps not being fully aware of this committee's concerns. My understanding of the issue is restricted to what I have read in the lead committee's report. Although the lead committee refers to this committee's observations, I am not convinced that it fully understands the implications of what we were saying. I welcome the Government's response to our recommendations; the fact that it will come back with some idea of a provisional affirmative procedure is to be welcomed. I raise that in the context of discussions about how we can work more effectively with lead committees.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): It is probably worth noting that our concerns were mentioned a couple of times during the stage 1 debate. The matter has not passed the Parliament by.

The Convener: Are we content to leave it at that for the moment?

John Scott (Ayr) (Con): I endorse what other members said. It is important to acknowledge that the Government has taken account of what we said. We welcome that and we look forward to considering what it brings forward in due course.

The Convener: Indeed. We are content.

Transitional Provisions

10:10

The Convener: Item 6 is consideration of an update on litigation. For the record, the case reference is *Davies and another, trading as All Stars Nursery v the Scottish Commission for the Regulation of Care* [2013] UKSC 12. The case concerns the transitional arrangements for the transfer of regulation of care services from the Scottish Commission for the Regulation of Care to Social Care and Social Work Improvement Scotland, under the Public Services Reform (Scotland) Act 2010.

In 2012, the judges in the inner house of the Court of Session were divided in their interpretation of the manner in which two orders concerning transitional arrangements dealt with regulatory notices that had been served by the commission but remained under dispute at the time when the commission was dissolved. The court—in particular, Lord Marnoch, the judge in the minority—was critical of the drafting of the orders and the scrutiny that had been applied by the Parliament. The case was appealed to the Supreme Court, which agreed with Lord Marnoch and identified a gap in the transitional provisions.

Prior to the *Davies* case, the courts had identified a similar transitional gap in *IO and LO v Aberdeen City Council*. In his judgment, Lord Hardie criticised the scrutiny that the Scottish Parliament had applied to an instrument and suggested that procedures for considering transitional provisions should be reviewed by the then Scottish Executive and the Scottish Parliament.

In light of the *IO and LO v Aberdeen City Council* case, the Scottish Government committed to providing the committee with Executive notes—now policy notes—to accompany commencement orders that contain complex transitional provisions. The Scottish Government also undertook to provide a full 40 days between the making date and the appointed day for commencement orders that contain such complex provisions, to allow as much time for scrutiny as possible.

The arrangements appear to be working satisfactorily thus far, but the committee might think it appropriate to ask the Scottish Government to comment on the outcome of the *Davies* case and say whether it intends to review further its practice with regard to transitional arrangements. Further to that, the committee might want to consider how the issue can be highlighted more widely in the Parliament. For example, it might be helpful if I raised the issue at a Conveners Group meeting, in the first instance, with a view to the

committee's legal advisers providing a briefing to conveners.

Do members have comments?

Hanzala Malik (Glasgow) (Lab): Perhaps we could share the level of importance that we give particular items. That might help committee members in their consideration of the documents that come before them.

John Scott: This is a serious issue for the Parliament. Lord Hardie's comments were really quite withering.

Let us endeavour to learn from the experience. There was an unusual set of circumstances at the time when the transitional provisions orders in question were under scrutiny, at the end of session 3. Subject committees and this committee had an unusually large workload. To be fair, the legislation stood examination by the courts right up to the Court of Session, which agreed by a majority, notwithstanding that the Supreme Court overturned that court's judgment.

There is no doubt that the Davies case has put a lot of people and a lot of parties to great expense. We should endeavour to take the positives from the case and learn from it. We should continue to emphasise to all committees the importance of the Subordinate Legislation Committee's comments. In 2009—we were not members of the committee at the time—the committee pointed out that the matter was complicated, but perhaps it did not place enough emphasis on the difficulties of implementation, which has led to problems.

10:15

Stewart Stevenson: I endorse what John Scott said. In the context of parliamentary and Government process, the agreement that policy notes will accompany orders that contain complex transitional arrangements and that the Parliament will have 40 days to consider such orders is to be welcomed.

There is evidence of greater awareness of the significance of issues that the Subordinate Legislation Committee draws to the Parliament's attention via other committees and in other ways, but such cases illustrate the need for continued vigilance and care about what we do. We should take up the suggestion that we write to the Scottish Government. I expect that we will hear that what can be done has already been agreed, but there is now the context of the Supreme Court's decision.

The Convener: Does the committee agree to write to the Scottish Government to invite its view on the outcome of the Davies case and ask

whether it is reviewing its practice in relation to transitional arrangements as a result?

Members indicated agreement.

The Convener: Does the committee also agree to raise the profile of the issue in the Parliament, in the first instance by raising the issue with the Conveners Group? That seems to be a way forward.

Members indicated agreement.

The Convener: In passing, I will say that another good thing came out of the Davies case in that the Supreme Court noted that, if it takes five years for a case to get to it, people will have been seriously inconvenienced. That was an extremely good observation—I hope that it will work on that.

10:17

Meeting continued in private until 10:22.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78307-922-3

Revised e-format available
ISBN 978-1-78307-938-4

Printed in Scotland by APS Group Scotland
