



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 May 2013

Session 4

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SUBORDINATE LEGISLATION COMMITTEE

16th Meeting 2013, Session 4

CONVENER

Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (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:

Bruce Crawford (Stirling) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 5

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 21 May 2013

[The Deputy Convener *opened the meeting at 10:05*]

Interests

The Deputy Convener (Stewart Stevenson): I welcome members to the Subordinate Legislation Committee's 16th meeting in 2013 and ask everyone to turn off their phones. I am in the chair because we have received apologies from Nigel Don. I understand that Bruce Crawford is here as a substitute for Nigel—Bruce is nodding to confirm that.

Under agenda item 1, I welcome Christian Allard to the committee and, in accordance with section 3 of the code of conduct for members, I invite him to declare any relevant interests.

Christian Allard (North East Scotland) (SNP): Thank you very much for the welcome. I have no interests to declare.

The Deputy Convener: Thank you very much.

It would be appropriate to record our thanks to Jim Eadie, who was previously a member of the committee.

Decision on Taking Business in Private

10:06

The Deputy Convener: Under agenda item 2, it is proposed that the committee takes items 7 and 8 in private. Item 7 is consideration of the committee's fourth quarterly report for the parliamentary year 2012-13. Item 8 is consideration of the committee's approach to scrutiny of the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146). Do members agree to take those items in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Children's Legal Assistance (Scotland) Regulations 2013 [Draft]

10:07

The Deputy Convener: There is a drafting error in regulation 3(1), which provides that the "Advice and Assistance (ABWOR) (Scotland) Regulations 2003" are amended in accordance with the remainder of the regulation. The Scottish Government accepts that regulation 3 does not cite the title of the relevant Scottish statutory instrument in accordance with regulation 4 of the Scottish Statutory Instrument Regulations 2011 (SSI 2011/195), as it abbreviates "Assistance by Way of Representation" to "ABWOR". Does the committee therefore agree to draw the draft regulations to the attention of the Parliament on the general reporting ground, as they contain a drafting error?

Members indicated agreement.

The Deputy Convener: Does the committee also agree to note, however, that the Scottish Government considers that it is clear which instrument is being referred to, as the footnote to regulation 3(1) states the year and the SSI number of the regulations in question?

Members indicated agreement.

Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 [Draft]

The Deputy Convener: The meaning of regulation 5(1) could be clearer. That paragraph provides that a children's hearing or a sheriff that has designated a person to monitor compliance with a compulsory supervision order or an interim compulsory supervision order that contains a movement restriction condition must,

"where that person is no longer within the provision made under regulation 4, vary the designation accordingly."

The Scottish Government intends the requirement to vary the designation to apply when the person who has been designated in relation to monitoring compliance in terms of regulation 4(1)(c) has commenced the monitoring but subsequently no longer carries it out. Regulation 5(1) could be clearer in implementing that intention. Does the committee therefore agree to draw the attention of the Parliament to the regulations on reporting ground (h), as the meaning could be clearer?

Members indicated agreement.

Secure Accommodation (Scotland) Regulations 2013 [Draft]

The Deputy Convener: There appears to be a doubt about whether regulation 9 is *intra vires*. There appears to be a doubt about whether that regulation can validly be made in the exercise of powers that have been conferred by section 75 of the Children (Scotland) Act 1995, but which have been substantially amended by paragraph 2(8) of schedule 5 and paragraph 1 of schedule 6 to the Children's Hearings (Scotland) Act 2011, during the period before those provisions of the 2011 act are commenced for the purpose of making the regulations. Does the committee agree to draw the regulations to the attention of the Parliament on reporting ground (e), as there is doubt about whether regulation 9 is *intra vires*?

Members indicated agreement.

The Deputy Convener: Does the committee agree to note, however, that the Scottish Government intends to commence the amendments to section 75 of the 1995 act before the regulations are made, following the approval of the Parliament, but only for the purpose of making the regulations, and that if that is properly done, the doubt about the *vires* should be removed?

Members indicated agreement.

Instruments subject to Negative Procedure

Welfare Reform (Consequential Amendments) (Scotland) (No 3) Regulations 2013 (SSI 2013/142)

10:11

The Deputy Convener: Members will note that our legal advisers have suggested that the regulations raise a question about whether they relate to matters that are reserved by section F1 of part 2 of schedule 5 to the Scotland Act 1998 and that, as such, the committee may wish to report them as raising a devolution issue. The same issue was raised in relation to the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303), which are the principal regulations that the regulations amend, and which the committee has previously considered. The matter was also raised in connection with the Council Tax Reduction (Scotland) Amendment Regulations 2013 (SSI 2013/48) and the Council Tax Reduction (State Pension Credit) (Scotland) Amendment Regulations 2013 (SSI 2013/49).

The Scottish Government's view is that the principal regulations do not relate to any of the reserved matters that are described in section F1 of part 2 of schedule 5 to the 1998 act. When the committee considered the principal regulations and the amending regulations, a majority of committee members preferred the Scottish Government's view.

It is for the committee to decide whether it wishes to report the instrument or whether, as with the Council Tax Reduction (Scotland) Regulations 2012 and the amending regulations that the committee previously considered, it is content that no devolution issue has been raised. I invite comments.

John Scott (Ayr) (Con): We have rehearsed the arguments on previous occasions. Although in the past it has been the majority view of the committee that no devolution issue has been raised, I nonetheless adhere to the view that I have taken previously: that a devolution issue is raised and that we should report the regulations accordingly. It is self-evident that the regulations provide a benefit, and I maintain that position.

Bruce Crawford (Stirling) (SNP): I hear what John Scott says, but I am content that no devolution issue is raised. The Scottish Government's view is quite clear. It must follow that the United Kingdom Government's view is similar, otherwise it would not have passed the welfare reform legislation. It is clear that the regulations deal with a council tax issue and are

not to do with making social security provision. Therefore, I am content for us not to report any matter to the Parliament.

Mike MacKenzie (Highlands and Islands) (SNP): As the deputy convener is aware, we have discussed the matter at some length on a number of occasions. Therefore, I propose that we take a view on the proposition that the committee considers that the regulations are *intra vires* and that they should not be drawn to the attention of the Parliament.

The Deputy Convener: I will come back to a formal way of dealing with the issue, but that sounds like a possible way of doing so.

John Pentland (Motherwell and Wishaw) (Lab): I agree that a devolution issue is probably raised. The Scottish Government has had the opportunity to allay some of the fears about that. When the legal people say that there is sufficient doubt about whether the regulations have a proper legal basis, that leads me to believe, like Mr Scott, that a devolution issue is raised.

Hanzala Malik (Glasgow) (Lab): I am a little disappointed that the Scottish Government takes the view that it does, given that we have suggested that there is an issue that needs to be considered. It has been given the opportunity to respond, but it has come back with the same answer. It is interesting that the decision on the regulations seems to be being taken along party lines, rather than on the basis on which we would normally make decisions.

Nothing has changed to change my view. I think that an opportunity has been lost to address the issue. I would like the Government to reconsider its position, if that is at all possible.

The Deputy Convener: It is clear that the committee is of more than one view, so we will need to have a vote to allow us to come to a conclusion. I have a draft proposition that roughly follows the one that Mike MacKenzie put to us. The proposition is that the committee considers that the regulations are *intra vires* and should not be drawn to the attention of the Parliament. Are we agreed?

Members: No.

The Deputy Convener: There will be a division.

For

Allard, Christian (North East Scotland) (SNP)
Crawford, Bruce (Mid Scotland and Fife) (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 Deputy Convener: The result of the division is: For 4, Against 3, Abstentions 0. Therefore, the proposition is agreed to. I thank members for their assistance with that.

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2013 (SSI 2013/141)

Building (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/143)

Children's Legal Assistance (Fees) (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/144)

Children's Hearings (Scotland) Act 2011 (Modification of Subordinate Legislation) Order 2013 (SSI 2013/147)

Children's Hearings (Scotland) Act 2011 (Compulsory Supervision Orders etc: Further Provision) Regulations 2013 (SSI 2013/149)

The committee agreed that no points arose on the instruments.

**Landfill Tax (Scotland) Bill:
Stage 1**

10:17

The Deputy Convener: Agenda item 5 is consideration of the delegated powers in the Landfill Tax (Scotland) Bill at stage 1. The committee is invited to agree the questions that it wishes to raise in written correspondence with the Scottish Government on the delegated powers in the bill. On the basis of the responses received, the committee would expect to consider a draft report at its meeting on 11 June.

On section 5, which defines what constitutes a disposal of material by way of landfill, section 5(5) enables the Scottish ministers by order to vary

"the meaning of disposal of material by way of landfill."

Any such order may modify any enactment, including the bill itself. Does the committee agree to ask the Scottish Government why it is necessary for the power to permit the modification of any enactment, instead of permitting only the modification of that section or the bill more generally, and to ask why the negative procedure is considered to be appropriate when varying without textual amendment the meaning of disposal of material by way of landfill other than by providing for something to be such a disposal when it would not otherwise be, given that so doing affects the basis of the charge to tax and so goes to the bill's central principles?

Members indicated agreement.

The Deputy Convener: Section 6 enables the Scottish ministers to prescribe certain activities that take place on a landfill site as a taxable disposal. Does the committee agree to ask the Scottish Government why it is necessary for the power to permit the modification of primary legislation and why the negative procedure is considered to be appropriate when varying without textual amendment prescribed landfill activities other than by providing for something to be such an activity when it would not otherwise be, given that so doing affects the basis of the charge to tax and so goes to the bill's central principles?

Members indicated agreement.

The Deputy Convener: Sections 7 to 10 provide that certain disposals are not to be taxable disposals, although they would otherwise meet the criteria that are set out in section 3. In effect, those sections provide exemptions for certain disposals. Section 11 allows the Scottish ministers, by order, to provide that disposals that would otherwise be taxable are not taxable and conversely that disposals that would not otherwise be taxable are to be treated as taxable.

Does the committee agree to ask the Scottish Government why it is necessary for the power to permit the modification of any enactment, instead of permitting only the modification of sections 7 to 10 or the bill more generally, and to ask why the negative procedure is considered to be appropriate when extending without textual amendment the scope of exemptions from landfill tax, given that so doing affects the basis of the charge to tax and so goes to the bill's central principles?

Members indicated agreement.

The Deputy Convener: The Scottish landfill tax will be payable at a lower rate when the material that is disposed of consists entirely of "qualifying material". Section 13(4) gives the Scottish ministers the power to list in an order the materials that are to be qualifying materials. Does the committee agree to ask the Scottish Government why it is considered that specifying the qualifying materials is a "technical and administrative" matter, given the effect that listing materials as qualifying materials has on a taxpayer's liability, and to ask whether it would be more appropriate for the affirmative procedure to apply to the exercise of the power, save in circumstances when the provisional affirmative procedure already applies?

Members indicated agreement.

The Deputy Convener: Section 16(1) makes the operator of an authorised landfill site the person who is liable to pay the tax on each taxable disposal. Section 17(1) enables the Scottish ministers to make regulations extending that liability to the controller of a landfill site. Does the committee agree to ask the Scottish Government why it is necessary for the power to permit the modification of any enactment, instead of permitting only the modification of the bill, and to ask why it is considered appropriate that the extension of liability to controllers under the power should be subject to the negative procedure unless primary legislation is textually amended, given that that involves the extension of tax liability to persons who would not otherwise be liable?

Members indicated agreement.

Hanzala Malik: I certainly think that that would give clarity, convener.

The Deputy Convener: Sections 32 and 33 concern the keeping of records by registrable persons and about material at landfill sites. Section 32 confers power on the Scottish ministers to require registrable persons to preserve records of a prescribed description for up to six years, and section 33(1) confers a power to require persons

"to make records relating to material at a landfill site".

Does the committee agree to ask the Scottish Government why the power to require record keeping relating to material at landfill sites does not specify the category of persons to whom the requirements can be applied but instead allows the requirement to be imposed on "a person"?

Members indicated agreement.

The Deputy Convener: Section 35(1) permits the tax authority to delegate "any of its functions" other than functions of legislating to the Scottish Environment Protection Agency. Does the committee agree to ask the Scottish Government to explain how the delegation of functions will be identified and recorded in the interests of transparency and accountability?

Members indicated agreement.

Bruce Crawford: Before we conclude this item, convener, I think that, without seeking to improve the policy memorandum, we should also ask the Government for an overall view of how it has constructed the bill and why it has chosen this particular direction. After all, by being required to consider the tax-raising powers, the Parliament is in new territory. Tax law operates differently from other legislation and the Scottish Government, which has its own budget bill, might be able to make comparisons with the UK Government and its own financial provisions. It would be useful if the Scottish Government could give us more contextual stuff and, given the way in which tax law is designed, explain what kind of flexibility a Government has to respond either to the passing of a finance bill at Westminster or a budget bill up here.

The Deputy Convener: That seems to make perfect sense. Do members agree?

Members indicated agreement.

Annual Report

10:26

Meeting continued in private until 10:45.

10:25

The Deputy Convener: The next item of business is consideration of a draft annual report for the parliamentary year from 11 May 2012 to 10 May 2013. Under rule 12.9 of standing orders, the committee is obliged to report to Parliament at the end of each parliamentary year on its activities during that year. We have before us a draft annual report for the parliamentary year 2012-13. The report will be published next month to coincide with the publication of all other committee annual reports.

If members have no comments, is the committee satisfied with the contents of the annual report 2012-13?

Members *indicated agreement.*

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