



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 March 2012

Session 4

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SUBORDINATE LEGISLATION COMMITTEE
8th Meeting 2012, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)

*Mike MacKenzie (Highlands and Islands) (SNP)

Michael McMahon (Uddingston and Bellshill) (Lab)

*John Pentland (Motherwell and Wishaw) (Lab)

*John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Graham Crombie (Legal Adviser)

Judith Morrison (Legal Adviser)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament
Subordinate Legislation
Committee

Tuesday 20 March 2012

[The Convener *opened the meeting at 14:37*]

Decision on Taking Business in
Private

The Convener (Nigel Don): Welcome to the eighth meeting in 2012 of the Subordinate Legislation Committee. I encourage members to turn off their mobile phones if they have not already done so. I note that we have received apologies from Michael McMahon.

Agenda item 1 is a decision to take business in private. Do members agree to take in private item 5, which is consideration of a draft report to the Justice Committee on the Police and Fire Reform (Scotland) Bill, and item 6, which is consideration of the committee's approach to the consolidation of Scottish statutory instruments?

Members *indicated agreement.*

Instruments subject to Negative
Procedure

Civil Legal Aid (Scotland) Amendment
Regulations 2012 (SSI 2012/64)

14:38

The Convener: The next item is consideration of instruments subject to negative procedure. The regulations appear to be defectively drafted, in that they appear not to deliver the intended policy of transferring certain moneys from a general account held by the Scottish Legal Aid Board to the Scottish legal aid fund. Although the regulations expressly disapply obligations to make payment of those moneys contained in regulation 40(4)(e)(i) and (ii) of the Civil Legal Aid (Scotland) Regulations 2002, they do not disapply the obligation to deposit the moneys in a general account contained in regulation 40(4)(d) of the 2002 regulations. Furthermore, it appears doubtful whether reliance can be placed on a determination made by the Scottish ministers impliedly to disapply the express obligation in regulation 40(4)(d). Does the committee therefore agree to draw the regulations to the attention of the Parliament on reporting ground (i)?

Members *indicated agreement.*

John Scott (Ayr) (Con): I have to say that I am extremely concerned about these regulations because it seems that, as a result, two conflicting provisions will apply at the same time. That cannot be a good position to be in. The regulations would be subject to challenge and, although I might need to take advice on this matter, I understand that it might well be open to challenge not just by the immediate beneficiaries but by their heirs and successors. After all, diligent solicitors seeking to gather in funds for an estate might find that moneys were owed to it even though the person to whom they were owed had not claimed them. The regulations must be made much clearer and I very much share colleagues' views that they are defectively drafted.

The Convener: I will ask our legal advisers to comment on John Scott's point in a moment, but I also wonder whether they can tell us how it might be corrected. If the way forward is to make a single correction to disapply the appropriate regulation, we might want to suggest that to the policy committee.

John Scott: Absolutely.

Graham Crombie (Legal Adviser): Our advice to the committee is that disapplying the provision in regulation 40(4)(d) of the 2002 regulations might

well be a method of resolving this apparent difficulty and the tension in these regulations.

The Convener: What about John Scott's point about the possibility of successors seeking to recover moneys?

Graham Crombie: Ultimately, individuals will have to take their own legal advice on that matter. They might well wish to consider it in the course of in-gathering an estate.

The Convener: On the basis that our comments will be relayed to the Justice Committee, are members happy to leave the matter there and draw the Parliament's attention to the regulations on reporting ground (i)?

Members indicated agreement.

Food Hygiene (Scotland) Amendment Regulations 2012 (SSI 2012/75)

The Convener: The regulations raise the following devolution issue, which the committee might agree to draw to the Parliament's attention on reporting ground (f).

National measures on the specification of the special health mark for meat from animals that have been subject to emergency slaughter and the prohibitions on marketing meat products from such animals set out in new regulation 32A and new schedule 6A as inserted by these regulations into the Food Hygiene (Scotland) Regulations 2006 have been brought into force in Scotland in advance of such measures having been made in respect of the rest of the United Kingdom.

Although the provision made by these regulations is capable of recognising similar measures in the rest of the UK, those measures do not yet exist. In the absence of objective justification, it is incompatible with European Union law for the UK as a whole to discriminate between producers in Scotland and those in the rest of the UK when implementing the national measure provided in respect of emergency slaughter in EU regulations 853/2004 and 854/2004. It would not be possible to maintain this position indefinitely.

Does the committee therefore agree to draw the regulations to the Parliament's attention on reporting ground (f)?

Members indicated agreement.

John Scott: First, I declare an interest as a farmer who has had animals affected in this way.

I must reinforce what you have said, convener. I am extremely concerned that we are dealing with regulations that raise devolution issues and which, as a result, are not compatible with EU law. I have a great deal of sympathy with the Scottish Government in this matter and do not believe it to

be at fault at all—indeed, quite the reverse. It has simply done as it has been obliged while others elsewhere have failed. As I understand it, this puts the Food Standards Agency in an awkward position and it means that we would bring forward legislation that we cannot reasonably be expected to enforce. What is the point of that? The first principle of law is that if you are not prepared to implement and enforce the legislation that you bring forward, it is pointless and meaningless and just bad law.

I hope that I am not being too exuberant in my condemnation, but we need to face the fact that, through no fault of its own, the Government finds itself in an untenable position. I suggest that we revert to the position we were in before, if that is possible.

James Dornan (Glasgow Cathcart) (SNP): It is clear from our advisers' comments that we are going to do what John Scott has suggested; indeed, we have already made that clear. After all, as John has pointed out, the issue lies not with the Scottish Government but with the tardiness of the Westminster Government. Nevertheless, there is clearly an issue that has to be dealt with.

The Convener: We have the option of telling the Scottish Government that we recognise that what has happened is not its fault and suggesting that it defer the matter until the rest of the UK has indicated that it is going to catch up. Of course, that raises the question why the UK has delayed in the first place and what confidence anyone will have in a revised timetable. The Government might want to consider that.

Another slight concern is that, if the regulations are incompatible with EU law when first introduced because the rest of the UK has not caught up, they might, as John Scott said—and I do not think that he was being overexuberant—simply be bad law. It is bad law to generate a criminal offence that we are not going to enforce and which is in any case unenforceable because it is inconsistent with EU law. Can our advisers comment on whether, if the law is bad ab initio, it can be anything other than bad law even when the rest of the UK has caught up?

14:45

Judith Morrison (Legal Adviser): If the Scottish Government does not have the power to make it because it would be incompatible to make it, then it is bad law ab initio. The question is whether in fact that is the situation.

The Convener: So the answer, as always, is that we do not know and that the only place we will find out is in court, which is the last place we want to find ourselves. We certainly need to bring this discussion to the attention of the appropriate

policy committee so that it, too, is aware of the issues.

Having agreed to draw the regulations to the Parliament's attention on reporting ground (f), does the committee acknowledge that the situation occurred as a result of the remaining UK Administrations delaying the implementation of these measures after the Scottish ministers had made the regulations rather than through any fault with the regulations themselves? I think that we have already agreed that, but I put the question anyway. Are members agreed?

Members *indicated agreement.*

The Convener: Nevertheless, the situation that arises needs to be addressed. In recognition of the resulting difference of treatment between Scotland and the rest of the UK, the Food Standards Agency will be writing to enforcement authorities and the Crown Office and Procurator Fiscal Service to advise that no enforcement action should be taken until equivalent provisions are in force throughout the UK. Does the committee agree that it is most unsatisfactory to adopt a policy of ignoring the effect of subordinate legislation and electing not to enforce it? After all, we must have certainty over the actions that are to be subject to criminal sanction and those that are not.

John Scott: I agree. In fact, I would word it a bit more strongly and would call the situation "untenable" or "unreasonable" rather than "unsatisfactory". You can choose whichever word you like, but I would certainly beef up the term "unsatisfactory".

The Convener: I have already agreed with your use of the term "bad law", John. I think that we also agree that the Scottish Government has been hung out to dry here.

Chic Brodie (South Scotland) (SNP): Could some sort of checklist be put in place to ensure that we do not have this kind of thing time after time? Surely there could be a tick-box system showing all the European laws that have been enacted, whether the UK is affected, whether Scotland is affected and so on.

The Convener: The Scottish Government recognises that it is subject to the Scottish Parliament and the UK Government is subject to the UK Parliament. I do not think that the UK Government can do anything more than try.

Chic Brodie: I am talking about all European laws or changes to statutes that have been enacted.

The Convener: Forgive me, Chic, but there is a difference between directives and regulations.

John Scott: Mr Brodie raises a very valid point. Can we not have better co-ordination between national and devolved Governments to ensure that each progresses at the same rate and that, when one goes to the trouble of implementing legislation that it is obliged to implement and the others fail to do so, someone somewhere is able to say what is happening?

The Convener: We can ask the Scottish Government whether it was unaware that the other Administrations were behind with implementation. We can also raise the matter with the FSA, which has a UK-wide remit. Perhaps it, too, should have overseen the matter.

John Scott: Absolutely. I am certain that Professor Milne will be very pleased to hear from you, because this is exactly the sort of matter that should be co-ordinated at that level.

The Convener: Finally, does the committee consider that it would be possible to resolve the matter if the implementation of these measures were to be postponed until there is agreement that identical measures will be taken throughout the rest of the United Kingdom? That certainly seems to be the obvious solution.

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

General Teaching Council for Scotland (Legal Assessor) Rules 2012 (SSI 2012/86)

14:50

The committee agreed that no points arose on the instrument.

Public Bodies Act 2011

Advisory Committee on Hazardous Substances (Abolition) Order 2012 [Draft]

14:50

The Convener: The next item is consideration of a draft United Kingdom Government order under section 9 of the UK Public Bodies Act 2011. This is the second such order that the committee has considered.

As members will recall, section 9 of the 2011 act requires the Scottish Parliament's consent to any order that falls within its legislative competence. The Subordinate Legislation Committee will consider and report on such orders on the same grounds as any other laid before the Parliament.

The draft order abolishes the Advisory Committee on Hazardous Substances, which will be reconstituted as an independent scientific advisory committee with new terms of reference. The list of revocations in the schedule to the draft order does not include the reference to the Advisory Committee on Hazardous Substances contained in the schedule to the Scottish Parliament (Disqualification) Order 2010 (SI 2010/2476). The draft order should revoke that reference, although the omission will not adversely affect the order's operation and there might be a suitable opportunity to remove the reference using existing powers at a future date.

Does the committee therefore agree to draw the draft order to the Parliament's attention on the general reporting ground?

Members *indicated agreement.*

14:52

Meeting continued in private until 15:36.

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e-format first available
ISBN 978-1-4061-8566-9

Revised e-format available
ISBN 978-1-4061-8578-2

Printed in Scotland by APS Group Scotland