



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

Thursday 25 February 2016

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STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
5th Meeting 2016, Session 4

CONVENER

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

DEPUTY CONVENER

*Mary Fee (West Scotland) (Lab)

COMMITTEE MEMBERS

*Cameron Buchanan (Lothian) (Con)

*Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)

*Fiona McLeod (Strathkelvin and Bearsden) (SNP)

*Michael Russell (Argyll and Bute) (SNP)

*Dave Thompson (Skye, Lochaber and Badenoch) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Louise Miller (Scottish Parliament)

CLERK TO THE COMMITTEE

Gillian Baxendine

Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 25 February 2016

[The Convener opened the meeting at 09:30]

Delegated Powers Procedures (Correspondence)

The Convener (Stewart Stevenson): I welcome members to the fifth meeting in 2016 of the Standards, Procedures and Public Appointments Committee. I remind everyone present to switch off mobile phones as they affect the broadcasting system. We have received no apologies today.

Agenda item 1 is consideration of correspondence from the Scottish Government on delegated powers procedures in relation to an order that was incorrectly laid under the negative procedure. The Minister for Parliamentary Business suggests that an announcement be placed in section H of the *Business Bulletin* to clarify what happened to the order during its parliamentary process. I am minded to accept that as a reasonable response. Does anyone else wish to comment?

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): I wish to ask a question and then make some comments, convener.

First of all, is what is stated in the second paragraph of the minister's letter absolutely correct? My understanding is that the problem arose because an instrument was laid under the negative procedure when it should have been laid under the affirmative procedure. However, the letter from the minister states:

"The legal situation was resolved and the desired policy outcome delivered by immediately laying a laid-only commencement order and a negative procedure instrument".

Does the minister mean "negative"? Or is this a technicality that I just do not understand?

The Convener: It is certainly correct. As a member of the Delegated Powers and Law Reform Committee, I have been on the other side of the issue and what I say is partly informed by that. The order should have been laid under the affirmative procedure but it was laid under the negative procedure. I will just read again what the minister has said, because I think that we ought to be able to close this off. *[Interruption.]* No, I am not able to address the issue from my knowledge. We

had better just check the position, because Patricia Ferguson makes a good point about what the letter states. From our point of view, however, the issue is more straightforward.

Patricia Ferguson: My comment is not about the letter but about the proposed notice, paragraph 1 of which states that the

"above Order was purportedly made".

It was not "purportedly made"—it was made. Paragraph 4 also refers to the order being "purportedly made" when it states:

"Accordingly that the instrument purportedly made and laid as set out above and not being an instrument laid before and approved by the Parliament was not a Scottish Statutory Instrument and had no legal effect."

To me, that is not as clear as it needs to be if we are to effect what we said we wanted to effect, which is to make sure that the parliamentary record shows clearly what happened.

I do not want to split hairs or dance on the head of a pin over this, but I have drafted an alternative form of words that I think works a bit better, without trying to take away from the meaning:

"Accordingly, the instrument made and laid as set out above was not a properly approved instrument and therefore had no legal effect and is not, in effect, a Scottish Statutory Instrument."

I also propose a paragraph 5, which states:

"Ministers have achieved the desired policy outcome by laying a laid-only commencement order"

and a negative or affirmative procedure instrument, whichever it is.

I do not understand why we cannot be clear about all that. Surely that is the purpose of trying to get some words on the record.

The Convener: Before I go to Mike Russell, I want to take some advice. I think that the word "made" relates to when the instrument has legal effect. Is that correct?

Patricia Ferguson: I have no problem with that word.

The Convener: No, but I just want to be clear about the use of the word "purportedly". I am simply seeking a factual piece of advice, if it can be given.

Louise Miller (Scottish Parliament): I have no knowledge of the background to this particular instrument, but the word "purportedly" might have been used because something done under the wrong power or procedure has rendered its making null and void.

The Convener: So it was not made.

Louise Miller: That is right.

The Convener: I would like to pin down where the word “purportedly” comes from. I am not taking a position on anything else whatsoever at this stage.

Louise Miller: I have no prior knowledge of this instrument, and I do not advise the Delegated Powers and Law Reform Committee, but what I have already said might explain why that wording has been used.

Michael Russell (Argyll and Bute) (SNP): Patricia Ferguson makes a very important point, because there is an illogicality and inconsistency between Joe FitzPatrick’s letter and the proposed notice. First, paragraph 2 of the letter states:

“The erroneous instrument has not been published on legislation.gov.uk nor will it be printed in the bound volume ... so in practical terms it does not exist.”

However, it exists; it went through the system and cannot be conjured out of existence. It might not have been “made” legally, but it exists. Saying that it does not exist is therefore philosophically wrong.

Secondly, I think that the use of the word “purportedly” is a problem because of inconsistency. Paragraph 1 of the proposed notice states that

“the above Order was purportedly made”,

but paragraph 3 uses the phrase

“provides that it is not made”.

It might be better to say that the instrument was made invalidly, because I am unhappy with the word “purportedly”. Even if it is the correct legal term, if it appeared in the *Business Bulletin* it would seem mealy-mouthed—to use another term—and might be seen as an attempt not to admit that there had been a mistake. I am therefore not satisfied with the proposed notice as it is and I think that a bit of work needs to be done on it.

Mary Fee (West Scotland) (Lab): My point follows on from Mike Russell’s point in relation to the word “purportedly”. Perhaps Ms Miller might clarify this further but, to my mind, her reasoning for the use of “purportedly” gives the word a meaning that I do not believe it has, which I think confuses the issue even further.

Louise Miller: I do not think that “purportedly” is a legal term. Something else could be substituted for that word.

The Convener: Factually speaking, I think that we are perfectly clear that a document existed and was published and described in the *Business Bulletin* as a negative instrument in order to give effect to it et cetera. That is beyond debate. It would probably be helpful if the situation was described in terms as straightforward as those that I have just used. The Government asserts, and the

DPLR Committee has accepted, that because the document had no legal effect, the legal issues around it are resolved. However, the question for us is whether the parliamentary process has been resolved. I think that we are all quite clear that, without having something in the *Business Bulletin*, the parliamentary process is incomplete and will not be understood by external people.

Dave Thompson (Skye, Lochaber and Badenoch) (SNP): I agree with the convener. Would a simple way of dealing with the matter be to delete the reference to “purportedly made” and say that the instrument was improperly laid? Is that not the essence of the problem?

The Convener: Let us go back to Patricia Ferguson, who raised the subject.

Patricia Ferguson: The issue is a wee bit more than what Dave Thompson has suggested. His point is right, but originally our objection to there being nothing on the record was that it meant that we were in limbo and that there was no clear explanation for Parliament or anyone outside about what we were actually talking about. When I read the proposed notice, I just thought that a clearer form of words was needed. I apologise to any Government civil servants who might be listening—there are some who are absolutely excellent; indeed, the vast majority are—but the wording in the notice struck me as the kind of thing that might have been drawn up by someone in a fit of pique at our interest in the matter.

In a spirit of helpfulness, I drafted the wording that I have read out to the committee, which I think is clearer than the notice without taking away from the meaning. Again, my suggested wording is:

“Accordingly, the instrument made and laid as set out above was not a properly approved instrument and therefore had no legal effect and is not, in effect, a Scottish Statutory Instrument ... Ministers have achieved the desired policy outcome by laying a laid-only commencement order”

and—if we get this issue cleared up—either a negative or an affirmative procedure instrument.

I think that Parliament, as well as this committee, has to understand what is going on. The words in the proposed notice that the minister has given us do not actually tell us, as his letter does, about the policy outcome having been achieved, and I felt it important to add that point to the proposed notice. I can give my wording to the committee clerk.

Dave Thompson: I think that Ms Ferguson’s proposed wording is fine. Having heard the words for a second time, they have maybe sunk in a wee bit. However, I have one little query about the use of “made and laid”. The instrument was certainly laid, but was it made? If it was improperly laid, it would not have been made. Could we delete the words “made and”?

The Convener: As far as the process is concerned, we are not masters of what ultimately gets published, but Patricia Ferguson's proposed wording sounds perfectly reasonable to me. I therefore propose that we tell the minister that that is our view of what should be published in the *Business Bulletin*. Ultimately, it is for the Government to decide what is published, but given that the Parliament controls the *Business Bulletin* and given that what we are talking about are the *Business Bulletin*'s contents, our comments to the Government on the matter should be taken very seriously. The Government has to provide the contents in this case, but we are suggesting what it should say.

On that basis, I suggest that we send the Government our comments, including the uncertainties that Dave Thompson identified, for it to deal with. We will take a position thereafter, if we feel the need to do so. Is everybody content to take that approach?

Patricia Ferguson: I just want to say for Dave Thompson's benefit that I was trying to change as little as possible of the Government's version, so that is why I took the phrase "made and laid". If those words are wrong, though, they should obviously be changed.

Michael Russell: It is only in quantum physics that something can exist and not exist at the same time, so Ms Ferguson might want to point that out to the Government. I do not really want to get into that, though, and neither does Ms Ferguson, but that is the Government's reality.

The Convener: Indeed, professor. It is the Heisenberg uncertainty principle.

Michael Russell: And Schrödinger's cat springs to mind, too, but there you are.

The Convener: Right. That concludes our discussion of agenda item 1 and therefore the public part of the meeting. We now move into private session.

09:41

Meeting continued in private until 10:07.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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