



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 2 March 2010

Session 3

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SUBORDINATE LEGISLATION COMMITTEE

7th Meeting 2010, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

DEPUTY CONVENER

*Ian McKee (Lothians) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)

Margaret Curran (Glasgow Baillieston) (Lab)

*Bob Doris (Glasgow) (SNP)

*Helen Eadie (Dunfermline East) (Lab)

*Rhoda Grant (Highlands and Islands) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)

Ross Finnie (West of Scotland) (LD)

Christopher Harvie (Mid Scotland and Fife) (SNP)

Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Roseanna Cunningham (Minister for Environment)

CLERK TO THE COMMITTEE

Douglas Wands

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 2 March 2010

[The Convener *opened the meeting at 14:15*]

Water Quality (Scotland) Regulations 2010

The Convener (Jamie Stone): I welcome everyone to the seventh meeting in 2010 of the Subordinate Legislation Committee. We have apologies from Margaret Curran. Everyone should switch off their BlackBerrys and mobile phones.

It is my great pleasure to welcome Roseanna Cunningham, the Minister for Environment, and her officials. David Williamson is the drinking water policy manager and Elizabeth Rutherford is a Scottish Government legal officer. Minister, I invite you to make an opening statement.

The Minister for Environment (Roseanna Cunningham): Thank you for inviting me to discuss the regulations, which will introduce measures to complete the transposition of European Council directive 98/83/EC, the drinking water directive.

The committee has asked me to explain in more detail the circumstances of the infraction and the reason for the choice of negative procedure for the regulations. Our position is that we have absolutely no room for manoeuvre. The European Commission has imposed a compliance deadline of 20 April 2010 and the consequences of failing to meet that deadline could be significant for Scotland. The process of developing and bringing into force the necessary legislative changes takes time and means that we have had to seek opportunities to reduce timescales wherever possible in order to meet that deadline.

I acknowledge that it is the convention for statutory instruments that amend primary legislation and create new offences to be subject to affirmative procedure. However, the use of negative procedure is still competent and has been chosen to maximise opportunities for consultation and allow sufficient time for robust drafting. I certainly do not want to curtail opportunities for full and transparent parliamentary consideration, and my letter of 22 January was intended to alert the committee to the need to bring into force urgent amendments to our water quality legislation. I have also written to give the convener of the Rural Affairs and Environment Committee the same early warning. My officials

have been working with key stakeholders, such as the drinking water quality regulator for Scotland, Scottish Water and the Convention of Scottish Local Authorities, to agree the measures that are necessary to complete the transposition and, of course, I am here.

Despite potential committee concerns about the choice of parliamentary procedure, the bottom line is that we have to ensure that we are compliant by 20 April 2010. Failure to do that will result in the escalation of the infraction and possible imposition of significant financial penalties. I certainly do not want Scotland to be a test case for the abbreviated infraction process that was introduced by the Lisbon treaty. Failure would also put us in breach of the Scotland Act 1998, which obliges us to comply with European community law.

I should explain that the Commission has been concerned about the United Kingdom's transposition of the drinking water directive for some time but, following exchanges of correspondence and meetings with the Commission, the UK believed that its transposition had satisfied the Commission. The principal concern throughout those exchanges related to non-transposition in respect of private water supplies at a UK level. The non-transposition had already been addressed in Scotland by the Private Water Supplies (Scotland) Regulations 2006, and other parts of the UK were working to address the issue. So it came as something of a surprise, on 20 November 2009, when the Commission provided a reasoned opinion, which is the next stage of the infraction process, that set out its continuing concerns about our transposition. The majority of the Commission's continuing concerns as they relate to Scotland are of a minor and technical nature. To address those, we intend to amend our public and private water quality regulations to provide the necessary degree of clarity and legal certainty that the Commission seeks.

The other concerns relate to our obligations on water quality failures that are attributable to the internal distribution system—the pipework, fittings, storage tanks, and so on—in premises and establishments where water is supplied to the public, such as schools, hospitals and restaurants. In practice, we already have procedures in place. Local authorities are the normal enforcement agents for water quality failures in such buildings, but the Commission argues that our current arrangements are

“too vague to ensure clear and legally binding compliance with the directive”.

So the fact that we are compliant in practice is not sufficient for the Commission.

To fully address the Commission's concerns, we have had to amend the Water (Scotland) Act 1980 and create an offence of non-compliance with a requirement to take remedial action in respect of failures in buildings where water is supplied to the public. The amending instrument is intended to formalise existing arrangements in our domestic legislation, and to provide legal assurance to the Commission that water quality failures in buildings where water is served to the public are immediately investigated and the necessary remedial action taken, bearing in mind the risks to human health posed by the failure. Overall, the instrument will have minimal impact on the role of enforcement authorities in ensuring safe drinking water, since it will reflect what already happens in practice.

The measures introduced by the instrument are considered to be necessary to comply with the reasoned opinion. They support the overriding objective of the directive to ensure the provision of clean and wholesome drinking water and they will have no additional financial impact on businesses. They must be in force by 20 April this year.

I am happy to take questions.

The Convener: Thank you, minister. Can you give us more detail of what the regulations will contain, particularly with reference to creating offences, imposing penalties and amending primary legislation?

Roseanna Cunningham: We must ensure that remedial action is undertaken when there is a failure that is attributable to the internal system. That is the overriding issue. Remedial action is mandatory, so we have to include a penalty provision to ensure compliance where voluntary or persuasive means have not worked.

This is slightly difficult, because there is not a problem in practice. It is not that we are having to plug—I am sorry; I did not want to make a pun. We are not having to deal with a problem that has arisen on the ground. In practice, there is no difficulty. The problem is that the Commission has looked at the words that we have and has decided that they do not suit the scenario.

We have to introduce a penalty provision to ensure compliance. We have to enable the local authority to serve a notice of improvement on the owner of a building if the internal distribution system that I talked about earlier is not up to scratch. Failure to comply with such a notice without reasonable excuse will be an offence, and there will be a summary conviction of a fine not exceeding level 5 on the standard scale. I am not quite sure what level 5 is off the top of my head, but the scale is applied throughout Scotland.

For comparison, a similar offence was introduced into the 1980 act by the Private Water

Supplies (Notices) (Scotland) Regulations 2006 of failure by the relevant person to comply with a notice that was served by the local authority. The new regulations are, therefore, a mirror of existing legislation, and the penalty will be the same. The new regulations basically do the same thing as the earlier regulations.

In order to meet our obligations, the amending instrument will place a general duty on local authorities to investigate the cause of a water quality failure in a public building. It will also require the local authority to instruct remedial action through service of the notice to which I just referred. It will also require local authorities to ensure that affected consumers are notified of any potential risk to their health and any remedial action that has been taken. We already do those things if such a problem occurs, but we have not put down in black and white that we are doing it. The scenario is slightly odd; it is putting a belt and braces on existing practice.

The majority of the Commission's concerns are fairly minor and technical, in that they require small amendments. The most straightforward changes that need to be made are: creating a duty to verify that potential contamination from disinfection by-products is kept to a minimum; ensuring that remedial action is taken when it is needed to protect human health; notifying consumers of remedial action in relation to non-compliance; ensuring that there are no derogations for microbiological parameters; and clarifying sampling frequencies. None of those more minor technical amendments will have a significant impact on the role or functions of either local authorities or Scottish Water in relation to water quality.

I repeat that all of that already happens; it is just not spelled out in the legislation. The Commission is simply asking us to spell it out.

The Convener: As no one wants to follow up on that point, Dr Ian McKee will ask the next question.

Ian McKee (Lothians) (SNP): I thank the minister for her explanation. I listened to your comments about why you have chosen to use negative rather than affirmative procedure to amend primary legislation. That is not the usual procedure. Can you confirm that the use of affirmative procedure would, in your opinion, delay things inordinately and therefore put us in breach of the European directive?

Roseanna Cunningham: There are different aspects to consider. For example, consultation is also important. We have tried to strike a balance that will allow us to ensure that we carry out a proper consultation and get the regulations through the Parliament in the time that is available. I know that the convention is for that to be done by

affirmative procedure, but we are not in the usual scenario, because this came like a bolt out of the blue. We were not expecting this to happen, so we were not prepared for it. We have had to go from a standing start to where we are now in a relatively short time, including the two-week recess, which does not help when it comes to trying to fit in with committee timetables and so on.

If my calculations are correct, use of the affirmative procedure would have required the amending regulations to have been laid by 24 February to accommodate the Easter recess, but that was not possible. When we tracked back from 20 April, we realised that there was not much alternative but to use negative procedure. Although that is not ideal, it is competent.

Rhoda Grant (Highlands and Islands) (Lab):

You were told in November that there was an issue. The Commission gave you two months to deal with the issue and it has given you a three-month extension. That is five months in total, which seems to be a reasonably long time. I understand what you are saying about coming to the issue from a standing start, rather than having done background preparation, but, given that the amendments are minor and technical, would there not have been enough time?

Roseanna Cunningham: Five months is the period from 20 November to 20 April. Part of the issue goes back to my response to the previous question. It is necessary to track back. To have had affirmative regulations in force by 20 April, we would have had to have everything in place earlier than this and we were not notified until 20 November—remember that the Parliament rose on 18 or 19 December, just four weeks after that. It was not possible to deal with the issue in that time.

The process of developing and bringing into force the various changes is complex and time consuming and it has involved extensive discussions with the other United Kingdom Administrations; we have not been doing it on our own. We have had to have discussions at Westminster and with the other devolved Administrations, as well as with key stakeholders, to agree what the minimum measures would be that would comply with the Commission's opinion. Before that process started, all the UK Administrations had to assess whether we were going to accept or challenge the reasoned opinion. We were notified of the opinion on 20 November and then we looked at it and thought about whether we would challenge it, which took a bit of time because that involved all the Administrations. Once that decision was made, it was necessary to decide what the minimum requirements would be, which also took a certain amount of time.

14:30

Basically, what it came down to was that it was not possible to do what was required by 20 January, which was the Commission's initial requirement, so the UK had to prepare detailed arguments to get a three-month extension. Those detailed arguments also involved all the Administrations. That all goes on behind the scenes and involves the same officials who have to lay regulations before the Parliament. That is what has been happening. First, do we appeal or challenge the opinion in any way? Secondly, if we are not going to appeal or challenge it—again, this is a UK-wide discussion—what is the minimum requirement that we will have to fulfil to comply? Thirdly, we realised that it would be physically impossible to do what was required by 20 January 2010, so the officials had to prepare a case for the extension to April. Now those same officials are having to do the work to bring the regulations before the Parliament.

The period of five months was not originally that; it was three months. It became five months because of work that was done by the various officials in the various Administrations, but that all takes time. It has proved impossible to do it all within the timescales that would have been required for affirmative procedure to be used.

Jackson Carlaw (West of Scotland) (Con): I ask you to comment on the matter in the context of precedent. You have explained pretty fully why you have concluded that the negative procedure is applicable—in this case, to comply with the deadline. Can you comment on the time that the Commission has allowed? Has it allowed a standard time? Does it follow, as a result of this, that it will probably be necessary to adopt the negative procedure more regularly when dealing with such transposition failures?

Roseanna Cunningham: The difficulty is that the Commission allows only two months to respond to a reasoned opinion, which would have been from November to January. My personal opinion is that, by any stretch, that is a wholly impractical way of doing things and does not take into account the standing orders and procedures that the various Administrations have in place. We were able to make the case to get the extension to April, which is something that we would always have to do.

I am trying to think whether it would ever be possible to get an affirmative instrument in place in two months. The problem is that the regulations amend primary legislation, which creates a bigger issue. We would certainly not want to apply it as a precedent in this Parliament; it is not something that we would want to do other than on occasions when we had to, but there is probably an issue about the two-month deadline imposed by the

Commission. I want to say that the Commission, not having to deal with parliamentary procedures, perhaps does not have an entirely clear understanding of what parliamentary process imposes in respect of responsibilities, timescales and all the rest of it. There is perhaps an issue, but the Commission gave us the extension, so perhaps it is fairly accepting of the idea that that is something that would have to happen.

I am being reminded that, as I said in my opening remarks, one of the complications that we now face as a result of the Lisbon treaty is a very amended infraction process, which allows the Commission to move a lot faster at its end, whereas in the past the infraction process—I will not say that it has been slightly more relaxed, because that would give the wrong impression—has not created as much of a difficulty as it looks as if it might do now. This case is part and parcel of that. I alluded to the fact that I do not want to be a test case for the new process if we can avoid it; we would rather somebody else be the test case for it.

Jackson Carlaw: You are saying that the committee should note that this procedure is not necessarily the one that the Government would prefer to use.

Roseanna Cunningham: It absolutely is not.

Jackson Carlaw: The Government feels obliged to use this procedure and we must note that it is perfectly possible that it will not be an exception and that there could be circumstances in which we face the same scenario in future.

Roseanna Cunningham: There is always the possibility of that. It is unfortunate that in this situation our practice complies. In effect, all that is being asked of us is that we put our practice down in black and white. This is not a discovery of something that we were doing wrong. Nothing that we have done was wrong; the Commission just does not like the wording of the legislation. It is unfortunate that we have to go through this process to fix something that is not a problem on the ground.

Rhoda Grant: The Governments of the UK applied for a three-month extension. Could they have applied for a longer extension?

Roseanna Cunningham: No. We think that three months is the maximum. There will never be more than five months from a reasoned opinion. Of course, depending on the time of year that this happens, the recess is a problem. This happened when the Parliament was in recess for two weeks over Christmas and the new year. It was then in recess for a week in February and it will, again, be in recess over Easter. In addition to everything that has been going on in the background, five weeks has had to be taken out of the timetable for

all that. If this had happened at a slightly different time of year, the situation might not necessarily have been as bad. That said, if it had happened in May or June, I am not sure how we would have managed.

Helen Eadie (Dunfermline East) (Lab): That raises a question about other areas of your portfolio where transposition is an issue. Your portfolio probably has the greatest number of such issues. I am thinking of environmental protection and so on. Not so long ago, I made a freedom of information request to the civil service on transposition and it struck me that there were a number of areas where EC directives had not been transposed into Scots law. I am concerned about that. Do you regularly ask your officials to produce up-to-date reports on all areas where transposition should be happening in Scotland? Something like this might not have happened if you had such briefings. Instead of having to hear about things from the UK Government or elsewhere, officials would flag up issues for you.

Roseanna Cunningham: Cabinet gets that. I am not high enough up the food chain.

Helen Eadie: I assume that the Cabinet minister would relay the information to you. Given that the environment is the biggest area where—

Roseanna Cunningham: I confess that I have not seen a report in those terms. I am not saying that such reporting is not happening, but it may not be happening in the structured way that you suggest may be appropriate. Are you referring to things that you think have not been transposed or should be in the process of being transposed?

Helen Eadie: Yes. The document that I was given was born out of work in this committee that drew attention to the fact that transposition of EC directives had not been taking place timeously at Scottish level in a number of areas. If Government ministers were to get detailed reports of where we are with transposition, issues such as this, where transposition has not taken place, would emerge more swiftly.

Roseanna Cunningham: In fairness, the current practice has been in place since 1999. Officials are doing what they have always done and—

Helen Eadie: I am sorry to interrupt, but the point is that if it is not right, it is not right. It would have been not right in our case had we been doing that. The bottom line is: it is not right.

Roseanna Cunningham: That is fair enough, but that is not what is happening in this case. This is a transposition. The Commission simply wants us to do things slightly differently from the way in which we have done them. This is not a failure to transpose; it is a different issue altogether. The

way in which we do transpositions is pretty much the way in which officials have developed the process over the 10 years. We are working to the best process by which to do things. At times over the past 10 years, the Government has transposed in a hurry and—

Helen Eadie: But there is a weakness in the system.

Roseanna Cunningham: I appreciate that. In theory I can look at a way of changing things, but the question is whether the problem is big enough to need fixing by means of the overall scenario that you suggest might need to be put in place. This is a bit off the topic.

The Convener: With respect, minister, and Helen Eadie, we are straying slightly from the subject.

There being no further pertinent questions, I thank you and your officials for joining us, minister. The session was useful. We appreciate your co-operative approach.

Roseanna Cunningham: Thank you. It occurs to me that I should perhaps also have written to the European and External Relations Committee, which may have an interest in some of the issues that arise from all this.

Helen Eadie: I am sorry, convener, but the Government and the Parliament have offices in Brussels where officials are charged with ensuring that the Government and Parliament get all this information in good time and in advance. Is that system not working smoothly?

Roseanna Cunningham: Yes. It is working in the way that it has always worked. I did not ask for a briefing on how those officials have been involved. I brought to the committee only the direct issue.

The Convener: I must exert my authority and close down the discussion. Helen Eadie's point is now on the record, but it is not pertinent to today's business. Thank you all the same. Thank you again, minister.

Roseanna Cunningham: Thank you.

Housing (Scotland) Bill: Stage 1

14:42

The Convener: Under item 2, we take our first look at the Housing (Scotland) Bill at stage 1. There are a number of delegated powers provisions in the bill. I suggest that we deal only with the powers on which our legal advisers have proposed that we might wish to raise questions with the Scottish Government. I suggest that we consider the Government response to the points that we raise today at our meeting on 23 March, when we will also consider our stage 1 report. Are we agreed?

Members indicated agreement.

The Convener: The first point is on section 24(1)(b), which is on the power to prescribe legislative registration criteria to be eligible for inclusion in the register of social landlords. The question is twofold. First, why is it not possible to specify in the bill the legislative registration criteria that are contemplated, and to limit the power to a residual power to modify those criteria in the light of operational experience or changes in circumstances? Secondly, which initial legislative registration criteria, if any, does the Government intend to prescribe on commencement of the bill? Do we agree to put those questions?

Members indicated agreement.

The Convener: The second point is on section 31. Ministers must set out in the Scottish social housing charter the standards and objectives that social landlords should aim to achieve when performing housing activities. The question is threefold. First, what is intended by the statement in paragraph 16 of the delegated powers memorandum that the charter

“would be binding on social landlords”?

Secondly, if the charter is intended to be binding in the sense of imposing obligations on social landlords and having legal effect, why has the Scottish Government chosen to make the charter by this mechanism, rather than by statutory instrument? Thirdly, how is the charter to be enforced and what will be the sanctions for non-compliance? Pretty crucial questions. Do we agree to put those questions?

Members indicated agreement.

Draft instruments subject to Approval

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2010 (Draft)

14:44

The Convener: Under item 3, there are two affirmative instruments for our consideration. On the first, are members content to report that the points that were raised with the Scottish Government concerning the draft order in council, as initially laid on 12 February 2010 and subsequently withdrawn, have been satisfactorily addressed within the order now before us, and that we are now content with it?

Members *indicated agreement.*

Census (Scotland) Order 2010 (Draft)

The committee agreed that no points arose on the instrument.

The Convener: We may wish to note in our report the minor typographical error in the heading to schedule 3. The reference to group VII should be to group VI. If the Parliament approves the order, the Government will correct the error before the order is submitted to Her Majesty. Is that agreed?

Members *indicated agreement.*

Instruments subject to Annulment

Building (Scotland) Amendment Regulations 2010 (SSI 2010/32)

14:45

The Convener: Can we agree to report that we are content with the Scottish Government's explanation of the enabling powers, but that we consider that the provision at the end of regulation 3(1), that

"any reference in the Building (Scotland) Act 2003 to building regulations is to be construed accordingly",

has no useful effect that is distinct from the transitional provisions in the remainder of that regulation?

Members *indicated agreement.*

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2010 (SSI 2010/38)

The Convener: Can we agree to report that the order was defectively drafted, in that a number of the proposed fixed line operators were not properly defined for the purposes of the order?

Members *indicated agreement.*

The Convener: We welcome the Scottish Government's commitment to lay a corrective instrument prior to the proposed coming into force date of 1 April 2010.

Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2010 (SSI 2010/45)

The Convener: The Government's response on regulation 2(6)(b) confirms that the intended effect of the provision is to enable councillors to claim reimbursement only for the receipted costs of chartering a boat to travel between two islands within an islands council area, whereas the paragraph provides for the recovery of the receipted costs of chartering a boat without the restriction that the charter should be between islands in an islands council area. Can we agree to report that regulation 2(6)(b) appears to be defectively drafted?

Members *indicated agreement.*

The Convener: The regulations will be of enormous interest to our colleagues Tavish Scott, Liam McArthur, and Alasdair Allan.

**Non-Domestic Rates (Renewable Energy
Generation Relief) (Scotland) Regulations
2010 (SSI 2010/44)**

**Advice and Assistance and Civil Legal Aid
(Priority of Debts) (Scotland) Regulations
2010 (SSI 2010/57)**

**Refuges for Children (Scotland)
Amendment Regulations 2010 (SSI
2010/59)**

**Management of Extractive Waste
(Scotland) Regulations 2010 (SSI 2010/60)**

**Town and Country Planning (Prescribed
Date) (Scotland) Amendment Regulations
2010 (SSI 2010/61)**

**Housing Revenue Account General Fund
Contribution Limits (Scotland) Order 2010
(SSI 2010/62)**

**Pharmacy Order 2010 (Commencement No
1) Order of Council 2010 (SI 2010/299)**

**General Pharmaceutical Council
(Constitution) Order 2010 (SI 2010/300)**

*The committee agreed that no points arose on
the instruments.*

**Instrument not laid before the
Parliament**

**Act of Sederunt (Rules of the Court of
Session Amendment No 2) (Causes in the
Inner House) 2010 (SSI 2010/30)**

14:47

The Convener: There was some correspondence between our advisers and the Lord President's office on the act of sederunt. Do we find the explanation provided by the Lord President's private office about the continued application of schedule 3C to the Civil Jurisdiction and Judgments Act 1982 in certain cases to be satisfactory, but note that it might be more helpful to the reader if the reference to schedule 3C in footnote (a) to the proposed new rule 38.8 was more comprehensive?

Members *indicated agreement.*

The Convener: Thank you. The next meeting will be a week from today, on 9 March, at the same time.

Meeting closed at 14:47.

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