



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 25 May 2010

Session 3

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2010

Applications for reproduction should be made in writing to the Information Policy Team, Office of the Queen's Printer for Scotland, Admail ADM4058, Edinburgh, EH1 1NG, or by email to:
licensing@ogps.gov.uk.

OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by
RR Donnelley.

Tuesday 25 May 2010

CONTENTS

	Col.
INTERESTS	3159
DECISION ON TAKING BUSINESS IN PRIVATE	3160
SUBORDINATE LEGISLATION	3161
Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No 2) (Scotland) Regulations 2010 (Draft)	3161
Arbitration (Scotland) Act 2010 (Consequential Amendments) Order 2010 (Draft)	3162
Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No 1) (Scotland) Regulations 2010 (SSI 2010/166)	3163
ANNUAL REPORT	3165

JUSTICE COMMITTEE
17th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 25 May 2010

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

Interests

The Convener (Bill Aitken): Good morning ladies and gentlemen. I invite everyone to ensure that their mobile phones are switched off.

The first item of business is a declaration of interests from Dave Thompson, who replaces Angela Constance on the committee. I welcome Mr Thompson; I trust that he will find the work of the committee stimulating and enjoyable. First, however, under the statutory requirements I have to ask him to make a declaration of any relevant interest.

Dave Thompson (Highlands and Islands) (SNP): Thank you for your welcome, convener. It is a great pleasure to be on the Justice Committee. I have nothing to declare other than what is in my official declaration.

The Convener: Thank you. At this point, it is also appropriate to record our thanks to Angela Constance for her service to the committee. Her contributions were exceptionally valuable when we were considering the Criminal Justice and Licensing (Scotland) Bill, when her experience as a criminal justice social worker was apparent and helpful. I have written on the committee's behalf to thank her for her service.

Decision on Taking Business in Private

10:06

The Convener: The next item is a decision on taking business in private. The committee is invited to decide whether to take in private item 9, which is consideration of a letter from the Parliamentary Bureau on the scrutiny of Scottish Law Commission bills, and future consideration of draft reports on subordinate legislation as listed in the agenda. I also propose that we take an item on the committee's work programme in private next week. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No 2) (Scotland) Regulations 2010 (Draft)

10:07

The Convener: Our next item of business is consideration of subordinate legislation. I draw members' attention to the instrument and to the cover note, which is paper 1. The Subordinate Legislation Committee had no points to make on the instrument.

I welcome Kenny MacAskill MSP, the Cabinet Secretary for Justice; James How, head of the access to justice team; and Fraser Gough, from the Scottish Government legal directorate. I invite Mr MacAskill to make an opening statement.

The Cabinet Secretary for Justice (Kenny MacAskill): The Tribunals, Courts and Enforcement Act 2007 created a new common framework for tribunals in England and Wales and tribunals with cross-United Kingdom jurisdiction. The 2007 act creates two new tribunals—the first-tier tribunal and the upper tribunal, which are collectively known as the tribunals—which take over functions from a range of existing tribunals.

Two sets of regulations will enable state-funded legal representation to continue to be available following the transfer, and it is the affirmative regulations that we are discussing. The Government takes very seriously access to publicly funded legal assistance for people who could not otherwise afford it, and we do not intend that those who seek such help should be worse off as a result of the transfer of tribunal jurisdictions. I propose that the committee recommends that the draft Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No 2) (Scotland) Regulations 2010 be approved.

The Convener: Do members have any questions?

Robert Brown (Glasgow) (LD): I just want some clarification. Executive notes are often of help in these situations, but they sometimes lose sight of the wood for the trees. Am I right that the essence of the regulations is simply a transfer to the new tribunals of the existing assistance by way of representation arrangements? There are no additions or subtractions from where we began, with the possible exception of some extensions of jurisdiction.

Kenny MacAskill: Yes, that is it. The regulations basically ensure that ABWOR is available.

The Convener: There being no other questions, we will proceed to agenda item 4, which is formal consideration of motion S3M-6284.

Motion moved,

That the Justice Committee recommends that the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 2) (Scotland) Regulations 2010 be approved.—[*Kenny MacAskill.*]

Motion agreed to.

Arbitration (Scotland) Act 2010 (Consequential Amendments) Order 2010 (Draft)

The Convener: I draw members' attention to the second instrument and to the cover note, which is paper 2. The Subordinate Legislation Committee had no points to make on the instrument.

I point out that the Justice Committee is dealing with this instrument for reasons of expediency. The instrument follows on from the Arbitration (Scotland) Act 2010, which was scrutinised at stages 1 and 2 by the Economy, Energy and Tourism Committee. I also point out that no precedent is being set in relation to any future instruments arising from the act, lest there should be other applications for us to deal with subordinate legislation that might be a little bit more controversial than that which is before us today.

In respect of this instrument, the Cabinet Secretary for Justice is joined by Hamish Goodall, the Arbitration (Scotland) Bill team leader, and Graham Fisher, of the Scottish Government legal directorate.

I invite Mr MacAskill to make an opening statement.

Kenny MacAskill: This order makes some minor, non-controversial amendments to certain pieces of reserved legislation, in consequence of the passing of the Arbitration (Scotland) Act 2010, which received royal assent in January. As you said, convener, during stages 1 and 2 of its passage, the bill was considered by the Economy, Energy and Tourism Committee, not the Justice Committee, and it might be helpful if I took a moment to explain briefly how arbitration works, for the benefit of any members who are unfamiliar with the concept.

Arbitration is a private form of dispute resolution outside the public civil courts, in which one or more arbitrators gives a binding ruling on a dispute that parties to the dispute have agreed to refer for decision. In choosing arbitration, parties give up the right to go to court. Arbitration is, therefore, one form of alternative dispute resolution, like mediation.

The 2010 act reforms, modernises and codifies the Scots law of arbitration, which was previously out of date, obscure and incomplete. It is hoped that the reform of the law will encourage the use of arbitration domestically and will, eventually, attract international arbitration business to Scotland.

Basically, the order amends references to part I of the Arbitration Act 1996 in the listed pieces of reserved legislation. The 1996 act governs arbitration in the rest of the United Kingdom. The Scotland Act 1998 specifically allows the Scottish Parliament to make limited consequential amendments to reserved legislation in consequence of acts of the Scottish Parliament.

The very limited amendments that we are concerned with today are considered necessary only because, where a procedural code in or under the particular reserved statutes makes no provision, the general law of arbitration in Scotland in the 2010 act might be argued, rightly or wrongly, to fill those gaps in Scotland. We think it unlikely, but it is important to keep the law clear in order to avoid spurious arguments in court.

We are happy to take any questions that members might have.

The Convener: There being no questions, we can move to formal consideration of the motion to recommend approval of the instrument.

Motion moved,

That the Justice Committee recommends that the Arbitration (Scotland) Act 2010 (Consequential Amendments) Order 2010 be approved.—[*Kenny MacAskill.*]

Motion agreed to.

10:13

Meeting suspended.

10:13

On resuming—

Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No 1) (Scotland) Regulations 2010 (SSI 2010/166)

The Convener: The third piece of subordinate legislation before us today is a negative instrument. I draw members' attention to the instrument and to the cover note, which is paper 3. The Subordinate Legislation Committee did not draw any matters to the attention of the Parliament in relation to the instrument. Do members have any comments?

Robert Brown: I have a query. Regulation 3(3) talks about the withholding of payments to solicitors when assistance by way of representation has been provided in relation to

proceedings before certain bodies and the board finds that its provision

"was not (wholly or partly) in accordance with the relevant rules ... or ... was otherwise unjustified".

Obviously, nobody has any objection to payments being withheld in such a circumstance. However, the explanatory note says that that will happen when a solicitor has not correctly applied the relevant tests, whereas regulation 3(3) seems to be more general and objective than that, and to indicate that it would apply when the board itself has made judgments.

I am concerned that there is not an ex post facto withdrawal of funding in a situation in which people have done work in good faith. I would like to know how far the provision goes. It might simply repeat something that was in the earlier orders, or it might be something new. I am not entirely clear about the background to it. It is not a matter that should hold up our approval of the instrument, but it is a query to which I would like an answer.

The Convener: I am perfectly happy for us to query the issue. However, I think that the intent might concern the ability to recover money in a situation in which a payment has been made erroneously, not one in which there has been a retrospective withdrawal of the consent for payment.

Robert Brown: With respect, I do not think that that is quite right. I think that it concerns a situation in which a solicitor is certified as being suitable for ABWOR payments, in terms of the rules, and has got that wrong in some respect, according to the guidance from the Scottish Legal Aid Board. I am interested in how the whole scheme operates. Does it go too far? Does it lead to any injustice? Is there a problem with it? I suspect that there is not and that I am making an issue about not very much, but I would like a little more information about the background.

The Convener: That is quite appropriate. I suggest that we note the order and write to the Scottish Government accordingly. Does the committee agree to that suggestion?

Members indicated agreement.

Annual Report

10:15

The Convener: Item 8 is our annual report. I draw members' attention to paper 4, to which the draft report is attached. Members will be aware that it is a requirement that we report to the Parliament on the extent and nature of our activities during the previous year. The report before us is reasonably straightforward. I know that members will have gone through it in their usual manner. Is there any need for me to go through each paragraph seriatim?

Stewart Maxwell (West of Scotland) (SNP): I want to make a minor and, I hope, agreeable change to the drafting of paragraph 1. I request that the end of the paragraph is changed to read "an inquiry into the Scottish Government's decision to agree to Abdelbaset al-Megrahi's application for compassionate release." I believe that that would be more factual than the existing phrase, which refers to

"the Scottish Government's decision to release Abdelbaset al-Megrahi."

Given the delicate nature of the whole situation, it is more straightforward to use that factual wording.

The Convener: Yes.

Robert Brown: Sorry, what was the suggestion?

Stewart Maxwell: Do you want me to read it again?

Robert Brown: Yes.

Stewart Maxwell: The end of the last sentence of paragraph 1 would read "an inquiry into the Scottish Government's decision to agree to Abdelbaset al-Megrahi's application for compassionate release."

Robert Brown: I think I agree with that. However, the inquiry was not really into the decision but into the process of the decision, was it not? Perhaps that is getting a bit too subtle.

Stewart Maxwell: You are right. We inquired into not the decision but the process. That could be changed.

The Convener: The end of the paragraph would therefore read "the process surrounding the decision to agree to the application for compassionate release in respect of Abdelbaset al-Megrahi."

Stewart Maxwell: Yes.

The Convener: Is everybody quite relaxed about that?

Nigel Don (North East Scotland) (SNP): Forgive me, but it was not actually the Scottish Government's decision; it was a ministerial decision. Should the phrase not be "the cabinet secretary's decision"? The decision was made by a person, not by the Government. Sorry—I do not think that it actually matters.

Robert Brown: The legislation provided for it to be a Government decision, but it was in fact taken by the minister.

Nigel Don: Okay. In that case, I am happy. If that is what the legislation says, that is fine.

The Convener: Right. I think that that has tidied it up.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): What have we agreed? Is the wording "an inquiry into the process surrounding the Scottish Government's decision to agree to release Abdelbaset al-Megrahi on compassionate grounds"?

The Convener: The final phrase is "undertaking an inquiry into the process surrounding the Scottish Government's decision to agree to the application for compassionate release by Abdelbaset al-Megrahi." There being no other points, is that agreed?

Members indicated agreement.

10:19

Meeting continued in private until 10:36.

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

Members who wish to suggest corrections for the archive edition should mark them clearly in the report or send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00

Meetings of the Parliament annual subscriptions: £350.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75

Annual subscriptions: £150.00

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

Scottish Parliament

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille, large print or audio), please contact:

Public Information Service

The Scottish Parliament
Edinburgh EH99 1SP

Telephone: 0131 348 5000

Fòn: 0131 348 5395 (Gàidhlig)

Textphone users may contact us on **0800 092 7100**.

We also welcome calls using the Text Relay service.

Fax: 0131 348 5601

E-mail: sp.info@scottish.parliament.uk

We welcome written correspondence in any language.

Blackwell's Scottish Parliament Documentation

Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries

0131 622 8283 or

0131 622 8258

Fax orders

0131 557 8149

E-mail orders, subscriptions and standing orders
business.edinburgh@blackwell.co.uk

Blackwell's Bookshop

**53 South Bridge
Edinburgh EH1 1YS
0131 622 8222**

Blackwell's Bookshops:

243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Accredited Agents

(see Yellow Pages)

and through other good booksellers

e-format first available
ISBN 978-1-4061-6452-7

Revised e-format available
ISBN 978-0-85758-001-6

Revised e-format ISBN 978-0-85758-001-6