



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 January 2011

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SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting 2011, Session 3

CONVENER

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

DEPUTY CONVENER

*Bob Doris (Glasgow) (SNP)

COMMITTEE MEMBERS

*Helen Eadie (Dunfermline East) (Lab)
*Rhoda Grant (Highlands and Islands) (Lab)
*Alex Johnstone (North East Scotland) (Con)
*Ian McKee (Lothians) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Ross Finnie (West of Scotland) (LD)
Karen Gillon (Clydesdale) (Lab)
Christopher Harvie (Mid Scotland and Fife) (SNP)

*attended

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament Subordinate Legislation Committee

Tuesday 25 January 2011

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

Decision on Taking Business in Private

The Deputy Convener (Bob Doris): I open the meeting to the public and welcome members to the second meeting in 2011 of the Subordinate Legislation Committee. Apologies have been received from Jamie Stone and Elaine Smith. Can all members and anyone else who is present turn off any mobile phones or BlackBerrys that they might have?

It is proposed that the committee discuss items 7, 8 and 9 in private. Can I have members' agreement to take those items in private?

Alex Johnstone (North East Scotland) (Con): Agreed!

Members *indicated agreement.*

The Deputy Convener: Thank you, Mr Johnstone.

Draft Instruments subject to Approval

**Public Appointments and Public Bodies
etc (Scotland) Act 2003 (Amendment of
Specified Authorities) (No 2) Order 2011
(Draft)**

**Scottish Public Services Ombudsman Act
2002 Amendment Order 2011 (Draft)**

**Retention of Samples etc (Children's
Hearings) (Scotland) Order 2011 (Draft)**

14:15

The committee agreed that no points arose on the instruments.

Draft Instrument subject to Annulment

Disposal of Court Records (Scotland) Amendment Regulations 2011 (Draft)

14:16

The Deputy Convener: We have an unusual procedure in front of us today—a draft negative instrument. The regulations must lie for 40 days, during which time the Parliament can decide that they should not be made. However, our legal advisers have not raised anything that the committee should be concerned about. Is the committee therefore content with the regulations?

Members *indicated agreement.*

Instruments subject to Annulment

Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

14:16

The Deputy Convener: Does the committee agree to report the regulations on the basis that the use of the expression “one or more”, which is used at regulation 2(e) to (g) in the context of the intended prescription of persons or a class or classes or person for the purposes of section 227ZL(2) of the Criminal Procedure (Scotland) Act 1995, appears to represent an unusual or unexpected use of the powers conferred by the parent statute?

Helen Eadie (Dunfermline East) (Lab): When I read the legal brief, I was concerned to see mention of an

“unusual and unexpected use of the powers”.

The legal brief suggests that, for example, although the Government will only be required to consult one or more bodies, a local authority could have 200 or 300 community councils within its area. I am not accusing any Government of being Machiavellian, but there might be a particularly Machiavellian Government one day and it might choose to consult that one community council that it knew to be on its side in a particular argument. That causes me extreme concern. I do not think that it was ever the intention behind the primary legislation to take that route.

When we make our recommendation to the lead committee, which I understand to be the Justice Committee, our serious concerns should be expressed. I would not go so far as to say that the regulations are *ultra vires*, but who knows? Perhaps that should be considered by people who are better qualified than I. I do not think that we should just nod the regulations through. We must express our profound concerns to the lead committee.

Ian McKee (Lothians) (SNP): I hear what Helen Eadie said, but this is a technical committee and the clerks' recommendation covers what she said. It is for the subject committee to discuss the issue further. We have drawn that committee's attention to the regulations, which is all that we need to do.

Helen Eadie: I would like the committee's report to draw my comments to the lead committee's attention, if the clerks would be so kind.

The Deputy Convener: If I may say so, Helen Eadie makes some reasonable points. The legal team has used the expression “unusual or unexpected”. The regulations might be *intra vires* but their policy intention is unclear. We must flag up our concerns about the use of the power, even if it appears to be competent. As Dr McKee said, whether that is a policy intention is for the subject committee to consider.

Helen Eadie has done a service to the committee by raising the point and the clerks will make sure that the lead committee is notified of it.

Helen Eadie: Thank you.

The Deputy Convener: May I assume that the committee is agreed?

Members *indicated agreement.*

Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3)

Council Tax (Discounts) (Scotland) Amendment Order 2011 (SSI 2011/5)

The committee agreed that no points arose on the instruments.

Helen Eadie: We have been lobbied by the National Union of Students Scotland on SSI 2011/5 but, having read the concerns and representations, I think that those matters would be better addressed by the lead committee. I just want to put that on the record so that the NUS does not think we do not read its communications.

Rhoda Grant (Highlands and Islands) (Lab): Can we highlight to the lead committee the fact that we have had representations that it should deal with and leave it at that?

The Deputy Convener: That would be a reasonable thing to do, although I do not know that it will lead anywhere. I suspect that the lead committee will analyse the policy intention of the order but, if we have all been lobbied, it would be worth while noting that in our report to the lead committee.

I thank Helen Eadie and Rhoda Grant for suggesting that.

Ian McKee: I do not want to go to the wall on this convener, but the committee's job is to check that the instruments are technically in order. We could comment on every instrument that came in front of us and say how we have been lobbied about this, that and the other. Where do we stop?

The instrument is perfectly in order. If we are being lobbied, you can bet your bottom dollar that the members of the lead committee are being lobbied, and it is up to them to deal with it. In my

time as a member of the committee I could have mentioned a few hundred instruments on which I have been lobbied. Where does one stop with drawing the lead committee's attention to instruments on which one has been lobbied—as a member of the Parliament, not as a member of the committee? Do we go to the lead committee on every instrument on which we have been lobbied? Do we mention it ourselves? That is a function of the lead committee.

The Deputy Convener: If members will indulge me for a second, I have a suggestion. We could note that we have been lobbied. I also think that, if we have been lobbied in our capacity as members of the Subordinate Legislation Committee, it might be in order for the committee clerks to write to those who have lobbied us to point out that the committee does not deal with policy, only with enabling powers in secondary legislation. We could also make it clear in our report to the lead committee that we are making no judgment on the instrument; we are merely noting that we were lobbied on it. Dr McKee, however, is clearly saying that, if that becomes routine, it might defeat the purpose of the committee.

Helen Eadie: I agree with that and am happy to pass the NUS brief to the clerks. I am sure that Dr McKee's memory is better than mine, but I have been a member of the Subordinate Legislation Committee for four years and can count on the fingers of one hand the number of times that I have been lobbied about the policy content of any instrument that is coming to the committee. It is highly unusual for us to get a lobbying document from any organisation. The Subordinate Legislation Committee is not notorious for being one of the stars of the Parliament, but there we are.

The Deputy Convener: I do not think that we can read anything into the fact that we have been lobbied by this particular group. The fact that it has lobbied us does not make its case any more or less important; it has just incorrectly lobbied the wrong institution within the Parliament. If we can gently remind it that we do not deal with policy and refer it to the lead committee for any further representations that it might want to make, that might do a service.

Helen Eadie: Fine. That would be helpful.

Ian McKee: My concern is that, if we create a precedent, future subordinate legislation committees might well have lobbying on a much greater scale, which would be totally inappropriate for a committee that deals with technicalities rather than policy.

Rhoda Grant: We need to make it clear that we are not taking a position on the material, as it is not our job to scrutinise the policy; we are just

pointing the lobbyists in the direction in which they should go. It is important that we encourage people to engage with the Parliament. If they do not receive any response, that could be off-putting. The committee has clearly not examined any of the issues and should make it clear to the subject committee that we are not giving this representation any emphasis above any other representations that it might get. We are basically signposting somebody in the right direction.

The Deputy Convener: I wonder whether this is a one-off or whether there is a growing need for a protocol whereby we can, as nicely as possible, dead-bat the issue if it comes to the committee. We could tell people that we look at the powers underpinning the policy but not at the policy, and routinely refer them to the lead committees. That would create a precedent for informing our constituents, rather than dissuading them from contacting the Parliament.

Ian McKee: I have not the slightest objection to us or our clerks, when they receive a submission or when we mention one to them, saying that there is a lead committee that will deal with the issue. However, I would be concerned if, as part of our official proceedings, we passed on lobbying efforts and created a precedent whereby everyone lobbied the Subordinate Legislation Committee in the knowledge that the committee would bring their petition or their arguments before the lead committee. They should be encouraged to bring those things before the lead committee themselves.

The Deputy Convener: Dr McKee has raised concerns. The committee tends, when possible, to proceed on a consensual basis. I gently ask Dr McKee and Helen Eadie how strongly they feel about our notifying the lead committee that we have been lobbied. This could be about angels on the head of a pin or whatever the expression is—we could be splitting hairs that do not need to be split.

Helen Eadie: I would not get too excited about it, but I think that it is a matter of information for the public record that we have received this material. It is highly unusual for us to be lobbied in this way. All that is required is a note saying that the committee has had representations.

Rhoda Grant makes the extremely important point that people do not want to think that writing to individual members is a waste of time. They want to get at least an acknowledgement and to know that the committee has paid heed and dealt with the matter appropriately.

The Deputy Convener: I offer a suggestion, which I hope will enable us to move on. I suspect that the *Official Report* of this meeting will have all over it the fact that concerns have been raised by

a lobby group. That would not normally be the mainstay of a committee meeting. It is suggested that the committee clerks could informally notify the clerks of the lead committee of that, so that that information will not be on any official representations made by this committee.

Helen Eadie: We could do the same with our political colleagues.

The Deputy Convener: Would that be an acceptable compromise?

Helen Eadie: Absolutely.

Ian McKee: I accept that.

The Deputy Convener: Perhaps, in the future, that will be a way of not going off on a tangent towards policy content, whether inadvertently or whatever. That may be a way forward.

Ian McKee: In the interest of working together.

Instruments not laid before the Parliament

Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement) Order 2011 (SSI 2011/4)

Children's Hearings (Scotland) Act 2011 (Commencement No 1) Order 2011 (SSI 2011/8)

Interpretation and Legislative Reform (Scotland) Act 2010 (Commencement No 2 and Transitional Provision) Order 2011 (SSI 2011/17)

14:29

The Deputy Convener: No points have been raised on SSI 2011/4, SSI 2011/8 or SSI 2011/17. It should be noted that SSI 2011/4 omitted to make provision for the publication of instruments made under the Interpretation and Legislative Reform (Scotland) Act 2010 before 6 April 2011, which has been corrected by SSI 2011/17. We ought to welcome the swift rectification of the matter. Is the committee content with the instruments?

Members *indicated agreement.*

Ian McKee: I have not been lobbied on the instruments.

The Deputy Convener: Yes, we note any lobbying—no, I indulge.

Scottish Parliamentary Pensions Act 2009

14:30

The Deputy Convener: The motion on the Scottish Parliamentary Pensions Act 2009 modifies the parliamentary pensions scheme by changing the scheme rules, which are set out in schedule 1 to the Scottish Parliamentary Pensions Act 2009, and by modifying the transitional arrangements that have been made for the transfer of the scheme from the transitional order under the Scotland Act 1998 to the 2009 act.

The committee is considering the motion under rule 8.11A. Under that rule, we are obliged to determine whether the attention of the Parliament should be drawn to any issue that would constitute a reporting ground for an instrument and to report to the Parliament accordingly. Our advisers spotted that the original motion contained a mistake that might cause confusion, which has resulted in a revised motion being lodged. Our advisers have not raised any concerns about the revised motion. Is the committee content with the revised motion?

Members *indicated agreement.*

The Deputy Convener: As previously agreed, we move into private session for the remaining agenda items.

14:31

Meeting continued in private until 14:48.

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