



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 March 2011

Session 3

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **7<sup>th</sup> 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

### **THE FOLLOWING ALSO ATTENDED:**

Judith Morrison (Office of the Solicitor to the Scottish Parliament)

### **CLERK TO THE COMMITTEE**

Irene Fleming

### **LOCATION**

Committee Room 6

## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 8 March 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 throngs of the public who have gathered, as always, for a Subordinate Legislation Committee meeting, and I welcome members to the seventh meeting in 2011. Apologies have been received from Jamie Stone. I ask members to turn off any mobile phones, BlackBerrys or other devices that they have on them.

It is proposed that the committee discusses items 4 to 7 in private. Do members agree?

**Members** *indicated agreement.*

## Instruments subject to Annulment

### Officers of Court's Professional Association (Scotland) Regulations 2011 (SSI 2011/90)

14:15

**The Deputy Convener:** Do we agree to report the regulations, under the general reporting ground, for failure to follow proper drafting practice, in that regulation 11 limits the annual membership fee that the Society of Messengers-at-Arms and Sheriff Officers may charge for 2011 by reference to an external document, but does not state where the document may be obtained or inspected?

Do we also agree to accept the Scottish Government's view that that is unlikely to have any practical effect on the operation of the regulations?

**Members** *indicated agreement.*

### Plastic Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2011 (SSI 2011/100)

**The Deputy Convener:** Do we agree to report that we note that, due to the late implementation of the measures contained in the regulations and the use of ambulatory references to European Union law in earlier implementing legislation, there was a temporary incompatibility with EU law that has now been resolved?

Do we also agree to report that that illustrates the risks that are inherent in the use of ambulatory references, and that we consider it necessary for the Scottish Government to act expeditiously to implement relief from the effects of ambulatory references to EU law in domestic legislation fully and on time, particularly so as to remove criminal liability where it is incompatible with EU law?

**Members** *indicated agreement.*

**The Deputy Convener:** Do we otherwise agree to be content, for our interests, with the reasons that have been given for the 21-day rule not having been complied with?

**Members** *indicated agreement.*

### National Health Service Superannuation Scheme (Scotland) Regulations 2011 (SSI 2011/117)

**The Deputy Convener:** We have a lengthy briefing on the regulations, so I refer members to the summary of recommendations and ask that we agree to report the points that are set out there.

*Members indicated agreement.*

**The Deputy Convener:** Can we note that the Scottish Government has in its response undertaken to remedy those points by laying an amending instrument to come into force at the same time as the regulations, and can we welcome such a speedy amendment?

*Members indicated agreement.*

### **Provision of Water and Sewerage Services (Reasonable Cost) (Scotland) Regulations 2011 (SSI 2011/119)**

**The Deputy Convener:** Do we agree to report that we consider that regulation 2 is made by what appears to be an unusual or unexpected use of the powers that are conferred by the parent statutes: the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980? The regulation does not directly provide, under the enabling powers, for the determination of a question as to what is a reasonable cost for the purposes of section 6 of the 1980 act and section 1 of the 1968 act respectively. Regulation 2 appears to provide for a determination of the physical limit of the supply or system without reference to the actual costs of that in any individual case and whether that is "reasonable".

*Members indicated agreement.*

### **Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions Order 2011 (SSI 2011/121)**

**The Deputy Convener:** Do we agree to report the order on the basis that the meaning of article 21(b) could be clearer in regard to the obligations on service providers, in so far as that article, in providing for the continuation in force of regulations 19 to 24 of the Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 (SSI 2002/114), refers also to the continuation of such other provisions of the 2002 regulations as are necessary for the purposes of regulations 19 to 24? Can we note that the matter is not considered likely to affect the validity of the order?

*Members indicated agreement.*

**The Deputy Convener:** Do we agree to report that we are otherwise content with the order?

*Members indicated agreement.*

### **Licensing (Food Hygiene Requirements) (Scotland) Order 2011 (SSI 2011/128)**

**The Deputy Convener:** Again, we have a lengthy briefing on the order. Concerns are set out in the summary of recommendations in relation to

whether or not some of the articles in the order are intra vires. Do we agree to report in those terms, and to welcome the Scottish ministers' further consideration of those matters and their subsequent intention to revoke the order and to remake it in early course?

*Members indicated agreement.*

### **Sale of Tobacco (Display of Warning Statements) (Scotland) Regulations 2011 (SSI 2011/132)**

**The Deputy Convener:** Do we agree to report the failure to cite all relevant enabling powers that are used, as explained in the Government's response, as a failure to follow proper drafting practice?

*Members indicated agreement.*

### **Parole Board (Scotland) Amendment Rules 2011 (SSI 2011/133)**

**The Deputy Convener:** Do we agree to report, under the general reporting ground, that the rules contain a minor drafting error in not clearly specifying in the operative text which provision of the 2001 rules is being amended by rule 3(b)?

*Members indicated agreement.*

**The Deputy Convener:** Can we accept the Scottish Government's view that that is unlikely to have any practical effect on the operation of the rules?

*Members indicated agreement.*

### **Town and Country Planning (General Permitted Development) (Non-Domestic Microgeneration) (Scotland) Amendment Order 2011 (SSI 2011/136)**

**The Deputy Convener:** Do we agree to report, under the general reporting ground, that it would have been better drafting practice to have added a definition of "solar PV" in "Interpretation of Part 1B" at the end of the order, as the term is already defined for the purposes of part 1A of the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223)? That is not considered to affect the operation of the order, but can we welcome the Government's commitment to clarify that at the next opportunity?

*Members indicated agreement.*

### **Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011 (SSI 2011/137)**

**The Deputy Convener:** Do we agree to report that the meaning and effect of regulation 4 could

be clearer, in that the transmission condition is only to be satisfied—and consequently conduct excepted from the offence of possession of extreme pornography—where the service provider does none of the things that are listed in regulation 4(2), as opposed to where one of the prohibited actions is complied with but not another?

*Members indicated agreement.*

**The Deputy Convener:** Can we welcome the fact that the Scottish Government has already addressed that point by laying the Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170), which are before the committee today?

*Members indicated agreement.*

**The Deputy Convener:** There has been fast action on that one.

### **Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139)**

**The Deputy Convener:** Do we agree to report, under the general reporting ground, that in respect that regulation 49(1) revokes with exceptions the whole of part II and schedules 1 to 6A of the Environmental Impact Assessment (Scotland) Regulations 1999 (SSI 1999/1), and as it appears that many individual provisions of later instruments have amended those revoked provisions, it would have been more helpful to users of the legislation to have listed in a table of revocations any such amending provisions that are also revoked, or the extent to which they are revoked? That would also have provided greater clarity as to which provisions remain in force.

*Members indicated agreement.*

**The Deputy Convener:** Can we note that that approach was taken in a recent consolidation in the National Health Service (Superannuation Scheme) (Scotland) Regulations 2011 (SSI 2011/117), which are before us today? That makes it clear to readers of the instrument which amending provisions are revoked to clear them from the statute book, or the extent of such revocations.

*Members indicated agreement.*

### **Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011 (SSI 2011/140)**

**The Deputy Convener:** Can the committee agree to draw to the attention of the lead committee the fact that the Scottish ministers have elected to make the regulations subject to negative procedure when we consider that affirmative procedure would have been more

appropriate, given that the regulations effect a substantive change in the law and require to modify primary legislation to do so?

*Members indicated agreement.*

### **Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)**

**The Deputy Convener:** Helen Eadie has indicated that she would like to comment on the regulations. There are three or four points that we have to agree to, so perhaps we can run through them and find out whether we can agree to them as a committee. If there is a specific point of difference, we can come back to that. Would that be a helpful approach?

**Helen Eadie (Dunfermline East) (Lab):** Yes. Thank you, convener. I am grateful to you for the few words that we had in the informal session prior to the meeting. I am particularly concerned about the regulations, from a number of perspectives.

I have met representatives of the Carrington Dean Group and I am happy to share that information and put it on the public record. Having discussed the matter with the Deputy Convener and our legal advisers, I agree that the matter is a policy issue and that, therefore, it should be referred to the Justice Committee, which could explore some of the more complex issues that have been raised with me.

I highlight for the record that European Union competition law experts from Maclay, Murray and Spens have raised some issues with the regulations. The policy change may well raise significant issues in that regard. I therefore wish to refer the regulations formally to the Justice Committee. The regulations merit closer examination.

I take it that our legal advisers are content that the regulations should be dealt with under negative procedure as opposed to affirmative procedure, given that that is what is suggested in the recommendations. I would like that to be clarified.

**The Deputy Convener:** Can we split your points into two issues? We will come on to your second point shortly.

You mentioned, rightly, that this is a policy matter. First, it is important for the sake of transparency that you have put the matter on the record, because you wished to do so and we made you aware in the pre-meeting that the issue that has been raised is a policy matter.

It would not be appropriate for the committee to refer the regulations to the Justice Committee. We can pass on the information that we have received to the Justice Committee, but to refer the

regulations to it would assume that our role includes policy intent scrutiny, which it does not. Otherwise, we would find ourselves lobbied by every single group in relation to SSIs that come to the committee.

**Helen Eadie:** As an MSP, I can write to colleagues on the Justice Committee to flag up my case prior to its meeting. That would perhaps be the appropriate step for me to take.

**The Deputy Convener:** Yes. It is important that you made those comments so that the committee's work is transparent.

You want to raise a second issue on the SSI.

**Helen Eadie:** Yes. I want clarification that our advisers are content that the regulations should be subject to negative rather than affirmative procedure.

**Judith Morrison (Office of the Solicitor to the Scottish Parliament):** Yes, that is correct.

**The Deputy Convener:** Those comments are now on the record and they will be there for all to see when the *Official Report* is published.

We must now agree certain recommendations on the regulations. Are we agreed that we wish to report, under the general reporting ground, that regulation 37(4) contains a minor drafting error in that it erroneously refers to form 3 instead of form 4, but that we accept that that is unlikely to affect the operation of the regulations?

**Members indicated agreement.**

**The Deputy Convener:** Can we also welcome the Scottish Government's undertaking to correct that error at the first legislative opportunity?

**Members indicated agreement.**

14:30

**The Deputy Convener:** Can we also agree to report that the form or meaning of regulation 39(2) could be clearer, in that on the face of it the duty contained therein applies only to continuing money advisers, when the Government's intention is that it will apply also to debtors who do not have a continuing money adviser and that that is not apparent from the wording of regulation 39(2)?

Members will see included in the papers correspondence from Maclay, Murray and Spens on behalf of the Carrington Dean Group, setting out concerns about the regulations. The matters raised in the letter appear to relate to the substance and policy of the regulations. Can we agree, as I think we already have done, to forward the letter to the Justice Committee for its consideration, as it is the lead committee?

**Members indicated agreement.**

## **Radioactive Substances Exemption (Scotland) Order 2011 (SSI 2011/147)**

## **Police Grant (Carry-forward Percentages) (Scotland) Order 2011 (SSI 2011/148)**

## **Licensing (Minor Variations) (Scotland) Regulations 2011 (SSI 2011/151)**

## **Fruit Juices and Fruit Nectars (Scotland) Amendment Regulations 2011 (SSI 2011/153)**

## **Conservation (Natural Habitats, &c) Amendment (Scotland) Regulations 2011 (SSI 2011/155)**

## **Healthcare Improvement Scotland (Transfer of Property) Order 2011 (SSI 2011/156)**

## **Removing from Heritable Property (Form of Charge) (Scotland) Regulations 2011 (SSI 2011/158)**

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## **Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (SSI 2011/162)**

## **Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (SSI 2011/163)**

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## **Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions (No 2) Order 2011 (SSI 2011/169)**

## **Extreme Pornography (Electronic Commerce Directive) (Scotland) Amendment Regulations 2011 (SSI 2011/170)**

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



**The Deputy Convener:** On SSI 2011/155, can we agree that, as this is at least the 15<sup>th</sup> time that the principal regulations—the Conservation (Natural Habitats, &c) Regulations 1994 (SI 1994/2716)—have been amended as regards Scotland, we recommend in our annual report that they be consolidated?

**Members** *indicated agreement.*

**The Deputy Convener:** I suspect that the grins from members indicate that this is not the first time—I doubt whether it will be the last—that we have used the word consolidation in relation to this committee and regulations.

## **Instruments not laid before the Parliament**

**Protection of Vulnerable Groups (Scotland) Act 2007 (Commencement No 5, Savings, Transitional and Consequential Provisions) and the Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 7, Savings and Transitional Provisions) Order 2011 (SSI 2011/157)**

14:31

**The Deputy Convener:** Can we agree that we are content with the order but note that it is a matter of regret that such a short period of time for public notice of the commencement of this significant regulatory scheme has been given and that that appears to have arisen out of a failure properly to manage the delivery of the contract for necessary information technology services?

**Members** *indicated agreement.*

**Housing (Scotland) Act 2010 (Commencement No 2, Transitional, Transitory and Saving Provisions) Order 2011 (SSI 2011/96)**

**Alcohol etc (Scotland) Act 2010 (Commencement) Order 2011 (SSI 2011/149)**

**Act of Sederunt (Rules of the Court of Session Amendment No 2) (Fees of Shorthand Writers) 2011 (SSI 2011/165)**

**Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Protection of Vulnerable Groups (Scotland) Act 2007) 2011 (SSI 2011/167)**

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

**The Deputy Convener:** On SSI 2011/167, can we note that there are only four days between the instrument being made and coming into force? It is assumed that that is the case due to the late commencement of SSI 2011/157.

14:33

*Meeting continued in private until 14:40.*



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