



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 September 2011

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CONTENTS

	Col.
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE	25
Construction Contracts (Scotland) Exclusion Order 2011 [Draft]	25
Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 [Draft]	25
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	26
Plastic Kitchenware (Conditions on Imports from China) (Scotland) Regulations 2011 (SSI 2011/282)...	26
Pollution Prevention and Control (Scotland) Amendment Regulations 2011 (SSI 2011/285)	26
Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2011 (SSI 2011/304)	26
INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE	27
Local Democracy, Economic Development and Construction Act 2009 (Commencement No 1) (Scotland) Order 2011 (SSI 2011/269)	27
Local Electoral Administration (Scotland) Act 2011 (Commencement) Order 2011 (SSI 2011/277)	27
Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 1) Order 2011 (SSI 2011/279)	29
Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 1) Amendment Order 2011 (SSI 2011/287)	29
Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (Scotland) Order 2011 (SSI 2011/291)	30
International Criminal Court (Libya) Order 2011 (SI 2011/1696)	30
Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011	31
Damages (Scotland) Act 2011 (Commencement, Transitional Provisions and Savings) Order 2011 (SSI 2011/268)	32
Private Rented Housing (Scotland) Act 2011 (Commencement No 1 and Saving Provision) Order 2011 (SSI 2011/270)	32
Public Services Reform (Scotland) Act 2010 (Commencement No 5) Order 2011 (SSI 2011/278)	32
Act of Sederunt Rules of Court of Session Amendment No 4) (Miscellaneous) 2011 (SSI 2011/288)	32
Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 2) 2011 (SSI 2011/289)	32
Act of Adjournment (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2011 (SSI 2011/290)	32
Act of Sederunt (Rules of the Court of Session Amendment No 5) (Causes in the Inner House) 2011 (SSI 2011/303)	32
Act of Sederunt (Regulation of Advocates) 2011 (SSI 2011/312)	32

SUBORDINATE LEGISLATION COMMITTEE

3rd Meeting 2011, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

COMMITTEE MEMBERS

*Chic Brodie (South Scotland) (SNP)

*Kezia Dugdale (Lothian) (Lab)

*Mike MacKenzie (Highlands and Islands) (SNP)

John Scott (Ayr) (Con)

*Drew Smith (Glasgow) (Lab)

*attended

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 September 2011

[The Convener *opened the meeting at 14:34*]

Instruments subject to Affirmative Procedure

Construction Contracts (Scotland) Exclusion Order 2011 [Draft]

The Convener (Nigel Don): I welcome members to the third meeting of the Subordinate Legislation Committee in session 4. We have apologies from John Scott. I ask members to turn off their mobile phones and I will start by complying myself.

As members will note from the legal brief, there has been a failure to follow proper drafting practice, because words have been omitted in error from the headnote and the order contains an unnecessary extent provision. Given the failure to follow proper drafting practice, are members agreed to draw the order to the attention of the Parliament on the general reporting ground?

Members indicated agreement.

Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 [Draft]

The Convener: The legal brief notes that there have been failures to follow proper drafting practice. The following specific points are drawn to the committee's attention: words have been omitted in error from the headnote; the regulations contain an unnecessary extent provision; a word has been omitted from regulation 2, although it does not appear to affect the meaning or effect of the regulations; and a defined term has been given a different meaning in the regulations to that given in the explanatory note. Mindful of those failures to follow proper drafting practice, do members agree to draw the regulations to the Parliament's attention on the general reporting ground?

Members indicated agreement.

Instruments subject to Negative Procedure

Plastic Kitchenware (Conditions on Imports from China) (Scotland) Regulations 2011 (SSI 2011/282)

14:36

The Convener: As members will note from the legal brief, the regulations were not laid at least 28 days before they came into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The committee is therefore invited to draw the regulations to the Parliament's attention on the relevant reporting ground, which is rule 10.3.1(j) of the standing orders. Are we happy to do that in the first instance?

Members indicated agreement.

The Convener: At the same time, members might wish to note the explanation that has been provided by the Food Standards Agency for failing to lay the regulations 28 days before they came into force. The explanation is that, in order to give effect to a European Commission regulation from the date that it applied and to do so concurrently with equivalent legislation in the rest of the United Kingdom, it was necessary to bring the regulations into force on 1 July 2011. Mindful of that explanation, the committee might wish to reflect that it is satisfied in this instance with the reasons provided by the Government for failing to comply with section 28(2) of the 2010 act. Are members happy with that explanation?

Members indicated agreement.

Pollution Prevention and Control (Scotland) Amendment Regulations 2011 (SSI 2011/285)

Local Government (Allowances and Expenses) (Scotland) Amendment Regulations 2011 (SSI 2011/304)

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Local Democracy, Economic Development and Construction Act 2009 (Commencement No 1) (Scotland) Order 2011 (SSI 2011/269)

14:38

The Convener: It is recommended that the order be drawn to the attention of the Parliament on the general reporting ground. The basis for that recommendation is that there has been a failure to follow proper drafting practice. While the repeal provision in section 138(2) of the 2009 act has been brought into force, the corresponding provision in part 5 of schedule 7 to the 2009 act has not been brought into force. Given the failure to follow proper drafting practice, do members agree to draw the order to the Parliament's attention on the general reporting ground?

Members indicated agreement.

Local Electoral Administration (Scotland) Act 2011 (Commencement) Order 2011 (SSI 2011/277)

The Convener: As members will have noted from the legal brief, the order does not follow the convention that the provisions that it brings into force should be brought into force at least 10 days after the laying of the order. The main reason for the convention is that a sufficient minimum time should be allowed between the publication of a commencement order and when the provisions that are being brought into force have legal effect, so that those who will be affected by the order have adequate time to become aware of it and to comply with it. With that in mind, does the committee agree to draw the instrument to the Parliament's attention on the general reporting ground?

Members indicated agreement.

The Convener: In doing so, the committee might well wish to consider whether it is satisfied with the reasons provided for failing to follow normal legislative practice in that regard. The Government explained that convention was overlooked as it wished to commence the Local Electoral Administration (Scotland) Act 2011 before the parliamentary recess so that it could begin the recruitment procedure for the convener of the Electoral Management Board for Scotland and initiate discussions with the Electoral Commission about funding for the functions being conferred. Furthermore, the Government explained that those principally affected by the

earlier commencement were made aware of the provisions in advance and of the intention to commence them on 29 June. Although that does not explain why the arrangements could not have been co-ordinated to make the commencement order at least 10 days prior to the coming into force date of the instrument, does the committee agree to accept the Government's explanation in this instance?

Chic Brodie (South Scotland) (SNP): No. Maybe it is me, but I cannot believe—or maybe I can—that the Government, or whoever is advising the Government, does not understand, particularly in a situation like this where you are appointing a very senior individual, that the process has to be pristine clean. I am not suggesting that it was not, but it has to be seen to be so. A delay like this might just open up the question why the process was started before the order was laid, to ensure that the recruitment process was pristine clean.

The Convener: Thank you. We have already heard some other explanations for not being able to comply with the 10-day rule, and I think that we will meet some more later in the agenda. However, the complete absence of any explanation in this case as to why the 10-day rule was not met seems unsatisfactory. *[Interruption.]* I am just being advised—and I may as well put this on the record—that that does not affect the validity of the order. That is fair enough. In practice, in this case it probably does not affect the individuals concerned, who knew what was going to happen. I think that we can trust the Government on that. I certainly think that we might point out to the Government that in the complete absence of any explanation as to why this happened, we cannot be impressed. The order is equally valid, so it looks as though no damage was done, but Chic Brodie has made the point that, particularly when you are recruiting people, you want a pristine clean system.

Chic Brodie: Particularly when you are recruiting at a senior level, it has to be absolutely crystal clear that the process has been followed and that there is no scope for any misinterpretation. I am sure that there was nothing wrong, other than that the procedure was not followed. The message should be, "Be very, very careful in these situations."

The Convener: Okay. Are you happy that we write to the Government expressing those observations? I think that those observations probably should go in the report on the order to the relevant committee, although the point is really more for the Government than for the committee. Are we happy with that?

Members indicated agreement.

**Wildlife and Natural Environment
(Scotland) Act 2011 (Commencement No
1) Order 2011 (SSI 2011/279)**

The Convener: The legal brief notes that there appears to be an error in article 2(1)(l), in that the Finance Act 1924 and the Game Act 1970 were not repealed and the Destructive Imported Animals Act 1932 was repealed, on the appointed day of 29 June 2011. However, the defect has been corrected by an amending commencement order, the Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 1) Amendment Order 2011 (SSI 2011/287), which was also brought into force on that appointed day. Is the committee content to draw the order to the Parliament's attention on reporting ground (i), in that the drafting of article 2(1)(l) appears to be defective and at the same time note that the error does seem to have been corrected?

Members indicated agreement.

**Wildlife and Natural Environment
(Scotland) Act 2011 (Commencement No
1) Amendment Order 2011 (SSI 2011/287)**

The Convener: The order was laid to correct the Wildlife and Natural Environment (Scotland) Act 2011 (Commencement No 1) Order 2011 (SSI 2011/279). It was not laid before coming into force, as required by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, and as such it has been drawn to the committee's attention. Given the breach of section 30(2), does the committee agree to draw the order to the Parliament's attention on reporting ground (j)?

Members indicated agreement.

14:45

The Convener: In doing so, the committee may wish to note the Government's explanation that it was necessary to breach section 30(2) in order to ensure that the errors in SSI 2011/279 were corrected. In drawing the instrument to the Parliament's attention, the committee may wish to note its satisfaction with the explanation that the Government provided. I suggest that we confirm that the rule provides a very good basis because it allows things to be corrected. Whether they are spotted by the Government—as I believe they were in this case—or by our legal advisers, that is one of the reasons why the rule is a good thing and is to be commended. Are members happy to proceed on that basis?

Members indicated agreement.

**Local Democracy, Economic Development
and Construction Act 2009
(Commencement No 2) (Scotland) Order
2011 (SSI 2011/291)**

The Convener: Members should note the following failures to follow proper drafting practice with regard to the order. While the repeal provisions in sections 139(1) and 143(2) of the 2009 act have been brought into force, the corresponding provisions in part 5 of schedule 7 to the 2009 act have not been brought into force, and the wording of the commencement provision fails accurately to reflect the wording of the enabling power in section 149(2) of the 2009 act.

Given those failures to follow proper drafting practice, does the committee agree to draw the order to the attention of the Parliament on the general reporting ground?

Members indicated agreement.

**International Criminal Court (Libya) Order
2011 (SI 2011/1696)**

The Convener: As members will note from the legal brief, the instrument was not laid before the Scottish Parliament before it came into force, as required by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. Given the breach of section 30(2), does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j)?

Members indicated agreement.

The Convener: In drawing the instrument to the attention of the Parliament, the committee may wish to note the Government's explanation for the breach. The explanation sets out that, due to the urgent nature of the order in Westminster, consideration of whether it should be laid before the Scottish Parliament took place only after it had been laid with both United Kingdom Houses of Parliament. Furthermore, the Scottish Government had no involvement in the earlier aspects of the process. Given that explanation, does the committee agree to accept the Government's explanation in this instance?

Members indicated agreement.

The Convener: Does the committee also agree that I as convener should write to the Scottish Government to establish what steps are being taken to ensure that UK departments comply with the requirements of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

Chic Brodie: Has that been strongly underlined?

The Convener: We as a committee have an opportunity strongly to underline that.

Chic Brodie: The UK Government should, particularly in circumstances such as these, ensure that the order is laid before the Scottish Parliament and we should agree with the other processes before we are expected to enable it.

The Convener: Is the committee happy to underline that we are asking the Scottish Government to ensure that the UK Government understands that, when such issues affect Scotland, we would like to be told?

Members indicated agreement.

Consultation on the Draft Student Fees (Specification) (Scotland) Order 2011

The Convener: The proposed order is laid under the super-affirmative procedure, which requires that the draft be consulted on in advance of the finalised affirmative order being laid. The legal brief has drawn the consultation draft to members' attention and the committee may wish to report on it in the following terms.

First, we note that the Scottish Government has undertaken to reconsider the drafting of article 5(3)(a) to avoid retrospective effect, or perhaps one should say the appearance of retrospective effect, which is what it actually means.

Secondly, the committee has been unable to use the period for consultation to consider the proposals for fees applicable to "remainder of UK" students, because the draft Education (Fees) (Scotland) Regulations have not been produced. The committee will expect the proposed regulations to be laid at the same time as the finalised draft order is laid. The Scottish Government has confirmed in its response to our advisers that that is the intention.

Thirdly, article 1 contains a drafting error that the Scottish Government has confirmed should be corrected when the finalised draft order is laid.

Are members content with that?

Chic Brodie: When does the Government expect to lay the Education (Fees) (Scotland) Regulations? In view of today's comments and yesterday's actions, are we in danger of any conflict?

The Convener: The official advice is that it will be later in the year. That is apparently what we have been told.

Chic Brodie: For clarity, a university—Edinburgh university, say—cannot apply the fees that it has decided to apply until November.

The Convener: I do not think that I want to answer that question, Chic. The answer is that we

will see the revised draft and the relevant regulations at the same time. That is what we are being told that we will get later in the year.

Chic Brodie: Thanks for that. Forgive me, convener. In the event that a university—let us say Edinburgh university—sends out letters regarding the fees that have been paid for this year, it would be in contravention of the law. Is that correct?

The Convener: It is well above my pay grade to answer that, but I am wondering whether our legal advisers might be able to comment. They might not want to comment.

The answer is that we can check the dates—and push on the dates—but I do not think that we can answer Chic Brodie's question.

Chic Brodie: That is okay. I am raising the question whether what the university is doing is within its legal ambit.

The Convener: That is probably best addressed to the universities' legal advisers and possibly the Government.

Damages (Scotland) Act 2011 (Commencement, Transitional Provisions and Savings) Order 2011 (SSI 2011/268)

Private Rented Housing (Scotland) Act 2011 (Commencement No 1 and Saving Provision) Order 2011 (SSI 2011/270)

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Act of Sederunt (Regulation of Advocates) 2011 (SSI 2011/312)

The committee agreed that no points arose on the instruments.

The Convener: That brings us to the end of the agenda. Our next meeting will be on Tuesday 13 September. I thank members for their attendance.

Meeting closed at 14:54.

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