



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 September 2011

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SUBORDINATE LEGISLATION COMMITTEE

6th 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 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 27 September 2011

[The Convener opened the meeting at 14:32]

Instruments subject to Affirmative Procedure

Scottish Local Government Elections Order 2011 [Draft]

The Convener (Nigel Don): Good afternoon, members, and welcome to the sixth meeting of the Subordinate Legislation Committee in the fourth parliamentary session. As usual, I ask everyone to ensure that they have switched off their mobile phones.

The first item on the agenda is consideration of instruments subject to affirmative procedure. The legal brief notes that there appears to be a doubt as to whether the offence provision in rule 27(8) in schedule 1 is *intra vires*, given the strong presumption against the creation of offences by subordinate legislation, rebuttable only by express provision or clear inference, neither of which appear to the committee to have been satisfied in this case. Given the doubts whether the offence provision is *intra vires*, does the committee agree to draw the draft order to the Parliament's attention on reporting ground (e)?

Members indicated agreement.

The Convener: In light of a previous discussion that we had, do members have anything to add or are we simply happy to report as suggested?

Chic Brodie (South Scotland) (SNP): Maybe it is just a lawyer thing, but I get very concerned when I read the sort of comment that appears in the third paragraph of page 5 of the legal brief. It says:

"However in our view the Committee would be entitled to consider that, in this instance, the proper drafting practice has not been followed."

Is there any mechanism for ensuring that drafting practice is followed next time?

The Convener: Thank you for that question. It is not the immediate question that I had asked, but we might well pick up the point later.

Members will note from the aforementioned legal brief that two further points arise on the draft order. First, in article 5(3)(a), the reference to paragraph (1) of regulation 2 of the

Representation of the People (Post-Local Government Elections Supply and Inspection of Documents) (Scotland) Regulations 2007 (SSI 2007/264) should be to paragraph (2). Secondly, the commencement provision in article 1(1) does not follow proper drafting practice. It is suggested that proper practice would have been to have made provision that the order had no effect for the purposes of any election to be held on or before 2 May 2012, instead of making an exception from the provision for the order's commencement date.

Reflecting on those two issues, does the committee also agree to draw the draft order to the attention of the Parliament on the general reporting ground? In so doing, does the committee wish to welcome the Government's commitment that the error in article 5(3)(a) should be appropriately corrected and also to recommend that that should be done as soon as possible?

Members indicated agreement.

The Convener: Returning to Chic Brodie's question about how something can be improved, those matters are reported. We bring them to the Government's attention and subject committees can also do that. The hope is that with statistics and the annual report to help us, the Government will see it as its duty to improve what it drafts.

Chic Brodie: When it gets the orders laid seems to be a major issue, particularly when we are talking about elections.

The Convener: You will note that the Government argues that we get to the same result by two different routes, but the point is that there is a proper way of doing it. Our advisers constantly suggest to us that we should argue for the proper way, because there are right ways of doing things and if we did it the right way we would not have those issues.

Chic Brodie: Thank you.

The Convener: Are members content?

Members indicated agreement.

Instruments subject to Negative Procedure

Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324)

14:36

The Convener: It is suggested in the legal brief that the regulations be drawn to the Parliament's attention on reporting ground (h) in respect of the erroneous reference to "operator" in regulation 6, where it inserts new regulation 10(3) into the Marketing of Horticultural Produce (Scotland) Regulations 2009 (SSI 2009/225) in the context of a right of review, it being considered that the form or meaning of the provision concerned could be clearer. Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (h)?

Members indicated agreement.

The Convener: In so doing, the committee may wish to welcome the Scottish Government's intention to amend the regulations at the earliest opportunity. I suspect that we want to welcome that.

Members indicated agreement.

Planning etc (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment Order 2011 (SSI 2011/336)

The Convener: As members will note from the legal brief, the order was not laid before the Scottish Parliament at least 28 days before it came into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. Given the breach of section 28(2), does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j)?

Members indicated agreement.

The Convener: We may note that, in its response to questions on the breach, the Scottish Government states that the need for the amendment order came to its attention only recently, after a query raised by a planning authority on 2 September. Further investigation established that three local plans were likely to be adopted in the near future and that one of those was expected to be adopted in the week starting 19 September.

Against that background, the Government was required to bring the order into force on 17

September. From 3 September to the making of the order on 14 September, it appears that there was an informal consultation process with some planning authorities that are affected by the order.

It appears that the breach of the 28-day rule arose from a simple oversight, rather than from a failure to plan the process so that the order would comply with the rule, and that the technical amendment was appropriate until 2 September or shortly after.

Although we all know that it is not entirely satisfactory that such an oversight has led to a breach of the 28-day rule, it appears that urgent steps were taken to consult on, draft and complete the order once the need had been identified. The committee might therefore, in this instance, wish to intimate its satisfaction with the Scottish Government's reasons for the breach. Are we agreed?

Chic Brodie: It stinks. I find this difficult. The Government's position is that, after further investigation, it discovered that three local plans were likely to be adopted in the near future and that one of those was to be adopted in the week starting 19 September, so it rushed through the legislation.

James Dornan (Glasgow Cathcart) (SNP): And?

Chic Brodie: And I have difficulty with the fact that we comply and say, "Well, that's okay then." We should go back to the Government and ask why the 28-day rule is not being applied, particularly in circumstances that are somewhat questionable.

The Convener: Once we have reported or not reported issues, we do not have to express an opinion about whether the situation is satisfactory, so we need not divide.

I take Chic Brodie's point. I do not entirely know the detail of the provision. I take it from the advice that the order makes a technical amendment that covers an issue that was not previously thought to be relevant—our legal adviser is nodding furiously to show that that is the case. In that situation, I am inclined to say, "Well done for spotting it and getting it right in time." However, we have noted Chic Brodie's thoughts.

Poultrymeat (Scotland) Regulations 2011 (SSI 2011/318)

Criminal Legal Assistance (Fees) (Scotland) Regulations 2011 (SSI 2011/333)

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Pigs (Records, Identification and Movement) (Scotland) Order 2011 (SSI 2011/327)

14:41

The Convener: The legal brief notes that whether article 3(2) of the order is intra vires in so far as it relates to notices is in doubt. The article provides that notices may be issued otherwise than in writing in some circumstances, whereas section 83(1) of the Animal Health Act 1981 requires all notices under any order that is made under that act to be in writing.

The Scottish Government accepts that article 3(2) of the order is ultra vires in so far as it relates to notices and has undertaken to make an amending instrument as quickly as possible. Given the doubt about whether article 3(2) is intra vires, does the committee agree to draw the order to the Parliament's attention on reporting ground (e)?

Members indicated agreement.

The Convener: Given the seriousness of that reporting ground and the Scottish Government's commitment to make an amending instrument as quickly as possible, does the committee agree that its legal advisers should seek an update from the Scottish Government in a fortnight's time on the timetable for the amendment, so that the committee may monitor the implementation of the commitment?

Members indicated agreement.

West Lothian (Electoral Arrangements) Councillor Numbers Order 2011 (SSI 2011/332)

Local Democracy, Economic Development and Construction Act 2009 (Commencement No 3) (Scotland) Order 2011 (SSI 2011/337)

The Convener: The legal advisers have raised no points on the orders.

The committee may wish to welcome the prompt laying of Scottish statutory instrument 2011/337, as it remedies the omission of part 5 of schedule 7 to the Local Democracy, Economic Development and Construction Act 2009 from the two previous commencement orders in relation to that act, which the committee considered on 6 September. Does the committee agree to welcome the prompt laying of that order?

Members indicated agreement.

The Convener: That completes our business. Our next meeting will be on Tuesday 4 October.

Meeting closed at 14:43.

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