



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 20 September 2011



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**SUBORDINATE LEGISLATION COMMITTEE**

**5<sup>th</sup> 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

**THE FOLLOWING ALSO PARTICIPATED:**

Marco Biagi (Edinburgh Central) (SNP) (Committee Substitute)

Neil Ross (Legal Adviser)

**CLERK TO THE COMMITTEE**

Irene Fleming

**LOCATION**

Committee Room 6



## Scottish Parliament

### Subordinate Legislation Committee

*Tuesday 20 September 2011*

[The Convener *opened the meeting at 14:30*]

### Interests

**The Convener (Nigel Don):** I welcome members to the fifth meeting of the Subordinate Legislation Committee in session 4 and ask them to turn off their mobile phones. We have received apologies from James Dornan. In his place we have substitute Marco Biagi. I ask Marco whether he has any relevant interests to declare.

**Marco Biagi (Edinburgh Central) (SNP):** No, convener; but I draw members' attention to my declaration of interests on the Parliament's website.

**The Convener:** Thank you, and welcome.

## Instrument subject to Affirmative Procedure

### Storage of Carbon Dioxide (Inspections) (Scotland) Regulations 2011 [Draft]

14:30

**The Convener:** We turn to item 1 on our agenda. Members will note from the legal brief that there has been a failure to follow proper drafting practice, as the title of the regulations does not indicate that it amends the Storage of Carbon Dioxide (Licensing etc) (Scotland) Regulations 2011 (SSI 2011/24), which are the principal regulations. It implies instead that the regulations make standalone provision for inspections. Given that failure to follow proper drafting practice, does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground?

**Members indicated agreement.**

**The Convener:** Members should also note from the legal brief that the regulations appear to be defective. Regulation 18(1)(c) of the principal regulations, which is inserted by the draft regulations, creates an offence that may be committed either knowingly or recklessly. However, the offence is committed by making a statement that the maker of the statement knows to be false or misleading in a material particular, and it appears to be impossible recklessly to make a statement that one knows to be false or misleading in a material particular, thereby defeating the apparent intention that recklessly making such a statement should be penalised. With that apparent defect in mind, does the committee agree to draw the regulations to the attention of the Parliament on reporting ground (i)?

**Chic Brodie (South Scotland) (SNP):** I draw members' attention to paragraph 3 on page 4 of the legal brief, which says:

"The Scottish Government was accordingly asked to explain ... *how* a person might fall within the ... situation"

that the convener has just described. The paragraph continues:

"Its response asserts that it is possible for this to occur, but does not provide any further specification."

A rather spurious example is then given of what might be a similar case, but there is nothing related to a verbal commitment.

Also concerning is the last paragraph on page 4, which begins by saying that

"the Scottish Government comments that like provisions are to be found in other instruments".

What on earth is going on with the drafting? Do we need a Roget's thesaurus, or what?

**The Convener:** That is an interesting point. Do other members have any thoughts? Our legal advice is clear: the drafting is defective. I do not know whether one can construe a situation in which one can recklessly make such a statement that one knows to be untrue. Perhaps one might be reckless as to the consequences, even if one knew that the statement was untrue but believed that it might not matter. I do not know, but it sounds as if we are getting into areas of legal philosophy.

**John Scott (Ayr) (Con):** Or legal conjecture. It should not be up to us to imagine a situation wherein these regulations might be applicable. The regulations should be self-evident, so it seems that they have not been properly drafted.

**The Convener:** Is the committee content to draw the defective drafting of the regulations to the attention of the lead committee?

**Chic Brodie:** Could we also ask in what circumstances such a situation might arise? It does not make sense.

**The Convener:** On the question whether we can discuss the matter with the Scottish Government or whether that is up to the subject committee, the advice that I have received is that we can go back to the Government while the matter is being referred to the subject committee and give that committee whatever response we receive, for its information.

I also welcome members' support for the suggestion that when a criminal offence is created it should be clear what the offence is. The criminal law needs to be very clear to all. If this is not clear to us, it really must constitute a drafting defect.

**John Scott:** Given that the regulations are subject to affirmative procedure, they must be subject to the most rigorous scrutiny. The regulations are self-evidently defective and therefore must be rectified.

**The Convener:** Indeed. The points have been adequately made and we will report in those terms.

## Instruments subject to Negative Procedure

### Extraction Solvents in Food Amendment (Scotland) Regulations 2011 (SSI 2011/306)

14:35

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

**Members indicated agreement.**

**The Convener:** As for the explanation for the breach of section 28(2), the committee may wish to consider whether the breach could have been avoided had there been better planning of the regulations, especially if we take into account the fact that directive 2010/59/EU, which the regulations implement, was published in the *Official Journal of the European Union* at the end of August 2010 and that the period of May to June 2011 was chosen for a Scottish consultation on the draft regulation. With those points in mind, does the committee also agree to draw to the lead committee's attention the Government's explanation for the breach of the 28-day rule? Do members have any other thoughts or do we want to let the matter rest for a while?

**Mike MacKenzie (Highlands and Islands) (SNP):** This seems to be a recurring theme, convener. It should come as no surprise that the Parliament goes into recess. Notwithstanding that fact, due provision must be made to stay within the rules. We should reinforce the point because this is not the first time that this problem has arisen.

**John Scott:** I agree with Mike MacKenzie. I should say, though, that he is not picking up something that has just happened in the first weeks of this new parliamentary session; this lack of planning has been a problem for years and is certainly a real problem for the subject committees that have to deal with it. There are times when a committee needs to assert itself and say—in the politest and most proper way, of course—that matters should be better handled in future, and this might well be one of those times.

Although we see all such breaches, the problem, like pollution, is diffused when the various instruments go to the different committees, which will get only one or two once in a while. We get to see the bigger picture and realise that, for a number of instruments, it would have been better

had there been better planning. In any event, that planning has not been carried out. I am not quite sure what the procedure is—the clerks will be able to advise us in that respect—but we should make the point quite strongly.

**The Convener:** If it wishes, the committee is in a position to agree that we do not regard the explanation as acceptable and to impress on the Government that, as we have said before, the rule is there for a very good reason and should be observed. It is as simple as that. The good news is that the summer recess is getting further away and that this particular explanation will disappear, but I get the impression that there is a laxness out there that we might have to fight.

**Chic Brodie:** Notwithstanding recesses, we are talking about the implementation of the law. If the bits do not fit together, we have a position that may not be serious but is challenging.

Help me with the process. Forgive me if I should know this, but I do not. Does the Scottish Government have any tracking mechanism for European directives—and we know there are hundreds of them—that might affect it?

**Neil Ross (Legal Adviser):** There will be.

**Chic Brodie:** For example, the directive that the regulations implement was published in August 2010, although it did not go to all the member states then. Was there a chart saying that it would affect Scotland and did the Government track what happened to it?

**Neil Ross:** I think that, in the reply that the Government provided to the Presiding Officer, it commented on unawareness of the directive's expected date. However, in principle, directives are tracked.

**The Convener:** I must say that some part of a conversation that I had in the previous session—forgive me, but I forget where—pointed out that the Scottish Government does not always get direct access to such information, so it depends on somebody in the British Government thinking to point such matters out.

**Chic Brodie:** Should we not ask for that information? As I say, there are hundreds of directives, but might we suggest to the London Government that there should be some process for directives that would affect us?

**The Convener:** I suggest a way forward: could we ask the Government and the Food Standards Agency, which is responsible for the relevant directive in this case, what the mechanism for advising them of such matters is so that, if they feel that it is defective, they have the opportunity to report that to us?

**Chic Brodie:** Thank you, that would be helpful.

**The Convener:** Do we agree that the Government's explanation is not acceptable under the circumstances, that we will report accordingly and that we will ensure that the Government understands that?

**Members indicated agreement.**

### **Inshore Fishing (Prohibition of Fishing for Cockles) (Solway Firth) (Scotland) Order 2011 (SSI 2011/319)**

**The Convener:** Members will note from the legal brief that 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 order to the Parliament's attention on reporting ground (j)?

**Members indicated agreement.**

**The Convener:** Once again, the committee is happy—well, perhaps not happy, but content—to do so.

In its response to questions on the breach, the Scottish Government conceded that the order should have been laid timeously and that it should have taken steps to reassess the position. It apologised for failing to comply with the laying requirements and stated that it would ensure that future projects were managed more efficiently. Is the committee minded to accept that explanation on this occasion and in contrast to the previous instrument, given that we have an apology?

**John Scott:** I am more minded to accept it, given that the Government at least provided an explanation and an apology, in stark contrast to the previous instrument, on which it essentially held up its hands and said that it was guilty. It has at least made an effort to explain the situation.

**The Convener:** Is everyone so minded?

**Members indicated agreement.**

**The Convener:** The legal brief also highlights the point that, although the accompanying documents indicate that the order is to be a temporary measure, nothing in the order itself achieves that policy objective. Does the committee agree to draw that point to the attention of the lead committee?

**Members indicated agreement.**

**Curators ad Litem and Reporting Officers  
(Panels) and the Panels of Persons to  
Safeguard the Interests of Children  
(Scotland) Amendment Regulations 2011  
(SSI 2011/320)**

**Road Traffic (Permitted Parking Area and  
Special Parking Area (City of Edinburgh)  
Designation Amendment Order 2011 (SSI  
2011/323)**

**Bananas (Enforcement of Quality  
Standards) (Scotland) Regulations 2011  
(SSI 2011/325)**

**Bee Diseases and Pests Control  
(Scotland) Amendment Order 2011 (SSI  
2011/326)**

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

**Instrument not subject to  
Parliamentary Procedure**

**Property Factors (Scotland) Act 2011  
(Commencement No 1) Order 2011 (SSI  
2011/328)**

14:45

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

**London Olympic Games and  
Paralympic Games (Amendment)  
Bill**

14:45

**The Convener:** Item 4 is the London Olympic Games and Paralympic Games (Amendment) Bill, which is United Kingdom Parliament legislation. The committee is invited to consider for a second time the powers to make subordinate legislation that the bill confers on the Scottish ministers. Further to last week's consideration, members will note that the committee has been supplied with a draft report. Members are invited to confirm the committee's recommendations on the legislative consent memorandum.

First, does the committee accept in principle the amendment that clause 2(6) makes? Clause 2(6) provides that the first regulations that apply to Scotland under sections 19, 25 and 37 of the London Olympic Games and Paralympic Games Act 2006 shall be subject to the affirmative procedure and that subsequent regulations shall be subject to the negative procedure. Is the committee happy with that principle?

**Members indicated agreement.**

**The Convener:** Does the committee agree that it expects all substantive provisions for the advertising and street-trading regulations that apply to Scotland to be contained in the first regulations under the affirmative procedure, so that they can be subject to appropriate scrutiny? Will the committee confirm that it accepts that subsequent regulations under the negative procedure might be made if a games venue or the scheduled time for an event needed to be changed at short notice after the first regulations had been made?

**Members indicated agreement.**

**The Convener:** If the committee is content with the draft report, it will be submitted to the lead committee—the Health and Sport Committee—for its attention, to inform its scrutiny of the LCM. Are members happy with the report?

**Members indicated agreement.**

**The Convener:** That completes the committee's business. Our next meeting will be held on Tuesday 27 September. I thank members for their attendance.

*Meeting closed at 14:47.*



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