



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 October 2011

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SUBORDINATE LEGISLATION COMMITTEE

8th 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:

Brian Adam (Minister for Parliamentary Business and Chief Whip)

Al Gibson (Scottish Government)

Fraser Gough (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 25 October 2011

[The Convener opened the meeting at 14:32]

Subordinate Legislation

Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 [Draft]

The Convener (Nigel Don): I welcome members to the eighth meeting in session 4 of the Subordinate Legislation Committee. I ask all those present to switch off their mobile phones if they have not already done so. We have received apologies from John Scott.

Agenda item 1 is the first of two items concerned with the consideration of the Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 [Draft]. The committee is considering the instrument today from a policy perspective. We considered it at our previous meeting from the usual technical non-policy perspective, and we did not have any concerns. Our job today is different, in that we are considering the policy aspect in our lead committee capacity; that is why the Minister for Parliamentary Business and Chief Whip and his officials are before us.

The first item is an opportunity for members to question the minister and his officials on the instrument prior to debating the motion recommending its approval under item 2. I welcome Brian Adam, Minister for Parliamentary Business and Chief Whip in the Scottish Government; Fraser Gough, from the Scottish Government legal directorate; and Al Gibson, policy adviser with the constitution and governance team in the Scottish Government. I thank you for coming, gentlemen.

Would the minister like to make an opening statement?

The Minister for Parliamentary Business and Chief Whip (Brian Adam): Yes, I would. I thank you for your kind remarks. The instrument on which I am giving evidence is in itself relatively straightforward. However, I consider it appropriate to offer the committee a few introductory remarks to place matters in context.

The draft order is promoted under powers that are contained in the Interpretation and Legislative Reform (Scotland) Act 2010. The basis for the 2010 act was to replace three transitional orders that were enacted back in 1999 by Westminster to underpin legislative matters at the Scottish Parliament. One of the reforms that the act delivered was a reduction in the number of parliamentary procedures for the scrutiny of subordinate legislation, for which I am sure all members are grateful, especially those of you who served in the previous session of Parliament.

The act defines three distinct scrutiny procedures: the affirmative procedure, in which a Scottish statutory instrument is laid in draft and is only made subject to parliamentary approval; the negative procedure, in which an SSI is made before it is laid and the instrument is subject to annulment by the Parliament for a 40-day period after laying; and no procedure other than laying.

Schedule 3 to the 2010 act modified the scrutiny procedures in existing acts to one of those three procedures. However, certain statutory frameworks gave rise to the need to make further consequential amendments to complete the modification exercise. Although towards the end of session 3 the Government laid a consequential order under the 2010 act, it became clear that further time was required to proof the integrity of further necessary consequential provision. In the knowledge that the order-making powers that are concerned would not be exercised during the summer, a decision was taken to postpone the making of that provision until after the summer recess. The remainder of the necessary consequential provision is contained in the draft order that is before the committee.

The Government worked closely with relevant stakeholders—the Lord President's office and Transport Scotland—during the drafting of the order, and both parties are content. The draft order makes amendments in three areas. The first area relates to the legislation-making functions pertaining to court-related matters that are exercised by the Lord President, the Lord Justice General and the First Minister. For example, those powers relate to the setting of court fees, the disposal of court records and the removal of a sheriff. The second area relates to order-making functions that are exercisable by transport ministers in relation to significant transport infrastructure projects. Thirdly, the order simply updates a narrow and out-of-date statutory cross-reference in the European Communities Act 1972.

In summary, the effect of the consequential amendments is to ensure that the statutory frameworks that are concerned reflect the coming into force of the 2010 act. Members should note that the draft order does not affect courts or

transport policy. The changes affect only the parliamentary scrutiny to which such orders will be subject.

The Convener: Thank you, minister. Members have questions, the first of which is from James Dornan.

James Dornan (Glasgow Cathcart) (SNP): Why did the Scottish Government determine not to lay the order in the previous session of Parliament, at the same time as the other orders that implement the new ILRA framework? Given that the consultation on the draft order began last September, why was it not possible to lay it so that it came into force prior to the commencement of the new regime on 6 April 2011?

Brian Adam: That is a fair question. In the particular areas that are covered by the order, we needed a bit more time. We are glad that we took that time because, following further consultation with stakeholders, changes that would not have been available to us back in April came to light, particularly in relation to the Lord President's office. We were aware that nothing was going to happen between then and now that would cause any legal problems, and nothing has happened. It would have been ideal to have tied up everything at the initial stage, but the slight delay gave us improved opportunities to introduce what we hope are all the necessary corrections. If further corrections are required, we can return to the issue. However, we think that the draft order should be the end of it.

Chic Brodie (South Scotland) (SNP): Good afternoon, minister and colleagues. The minister said that nothing significant has happened since 6 April 2011. I understand that we reduced the number of procedures from eight to three. Has any instrument of the kind that the order covers been made since 6 April 2011? You commented on courts and the 1972 act, to which I will refer. Has any instrument under section 40 of the Sheriff Courts (Scotland) Act 1907 or to which paragraph 2C of schedule 2 to the 1972 act applies been made since 6 April 2011?

Brian Adam: To the best of my knowledge, the answer is no.

Chic Brodie: Given that answer, what would have happened if such an instrument had been made between 6 April 2011 and the coming into force of the order?

Brian Adam: That question is hypothetical. Nothing happened, and the judgment was made that nothing was likely to happen.

These things do not happen overnight. The process of drawing up statutory instruments is fairly complex, as the committee has undoubtedly realised. Knowing that nothing was in the pipeline

gave the Government confidence that there were no potential pitfalls that would have to be dealt with urgently.

I cannot answer your hypothetical question about what would have happened if something had come up. Nothing came up and nothing was forecast to come up. An instrument is not drawn up in a week, a fortnight or a month—it takes quite some time.

Chic Brodie: I will ask another hypothetical question. The order will apply retrospectively to clean up the process that applies to the acts to which we have referred and to other acts. What might happen if the process did not cover the full requirements of any new acts in the future?

Brian Adam: The 2010 act allows for further such amendments. If we discover weaknesses, we will be more than happy to return to the matter. If the committee identifies and cares to write to me about any potential weaknesses, we will consider them appropriately.

Mike MacKenzie (Highlands and Islands) (SNP): I think that we all welcome and are grateful for the simplification that the 2010 act has introduced. In evidence to the previous Subordinate Legislation Committee on 1 March 2011, your predecessor as the Minister for Parliamentary Business intimated that a future order might among other things amend the Pensions Appeal Tribunals Act 1943. Why does the order that we are discussing not contain amendments to that act?

Brian Adam: That question is perfectly legitimate and Mr Gough will answer it.

Fraser Gough (Scottish Government): The 1943 act was on the list of provisions that we identified as potentially needing to be remedied. However, when we looked at it more closely, we established that schedule 3 to the 2010 act, which glosses out all the old procedures, applied perfectly adequately to the 1943 act, so we did not need to deal with that separately.

The Convener: That is a great relief to our advisers, who were concerned about that.

Drew Smith (Glasgow) (Lab): You said that the delay had allowed you to make improvements. Are you confident that the order now captures all the enactments that it is necessary to modify to give full effect to part 2 of the 2010 act? You mentioned what would happen if other issues arose. Will you undertake to have a further review process to ensure that there are no outstanding enactments for which such provision needs to be made?

14:45

Brian Adam: We are confident that we have covered all the eventualities, but life is such that we cannot offer guarantees. If deficiencies are identified, either on the Government side or through the committee, we will return to the issue, but I am fairly sure that we will not be doing it next week, next month or even next year. Given that we had a little more time and that we went out for a further consultation, we are pretty confident that we have covered all the bases. If we have not, we will revisit the issue. There is no plan to have it under constant review; we will react to events rather than proactively review the situation.

I hope that that fully answers the question—unless either of my colleagues wishes to comment.

Al Gibson (Scottish Government): Just briefly. As the minister said, the previous consultation exercise identified everything that folk thought was out in the ether, and we have taken steps in the order to address those issues. As the minister said, we will not look proactively for material on the back of the previous work that we have undertaken, but if anything crops up or further issues arise, we will be open to looking at them. Any future statutes will be drafted in line with the 2010 act.

The Convener: I call Kezia Dugdale.

Kezia Dugdale (Lothian) (Lab): The minister has put on record on three occasions that he is happy to revisit the issue if problems arise, so he has dealt with my question. I will leave it at that, convener.

The Convener: That is fair enough.

There being no further questions from members, I thank you, minister, for answering our questions and invite you to move the motion, on which we will have a debate—in theory.

Motion moved,

That the Subordinate Legislation Committee recommends that the Interpretation and Legislative Reform (Scotland) Act 2010 (Consequential, Savings and Transitional Provisions) Order 2011 [draft] be approved.—
[Brian Adam.]

The Convener: Are we happy simply to agree to the motion?

Members indicated agreement.

The Convener: I thank the minister and his officials for their time.

Instrument subject to Affirmative Procedure

Aquatic Animal Health (Miscellaneous Modifications) (Scotland) Regulations 2011 [Draft]

14:48

The committee agreed that no points arose on the instrument.

The Convener: This is a good point at which to note and welcome the swift withdrawal and re-laying of the instrument following the identification of errors in the instrument as originally laid. I thank all those concerned with that.

Instruments subject to Negative Procedure

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2011 (SSI 2011/356)

14:49

The Convener: The amendment rules amend the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331) to correct defects identified in the rules by the committee at its meeting on 4 October 2011. In particular, the amendment rules will substitute a new rule 60 so that prison governors may exercise discretion in relation to requests to prevent communication from a prisoner to another person.

Given the seriousness of the concerns about the original rules, the Scottish Government has committed to bring the amendment rules into force at the same time as the principal rules come into force on 1 November 2011. As officials acknowledged before the committee on 4 October, that necessitates breaching the 28-day rule. The legal brief therefore notes that the amendment rules have not been laid at least 28 days before they come into force as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. On that basis, does the committee agree to draw the amendment rules to the Parliament's attention on reporting ground (j)?

Members *indicated agreement.*

The Convener: In so doing, does the committee wish to welcome the prompt action taken by the Scottish Government to lay the amendment rules to correct defects in the Prisons and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331) that were identified by the committee at its meeting on 4 October 2011, so that the amendment rules will come into force at the same time as the rules?

Members *indicated agreement.*

Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/349)

The Convener: The legal brief notes that there has been a failure to follow the proper drafting practice in regulation 39(b), where gender-neutral drafting should have been used instead of referring to "he". With that in mind, does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

Planning etc (Scotland) Act 2006 (Saving and Transitional Provisions) Amendment Order 2011 (SSI 2011/348)

Home Energy Assistance Scheme (Scotland) Amendment (No 2) Regulations 2011 (SSI 2011/350)

The committee agreed that no points arose on the instruments.

Instrument not subject to Parliamentary Procedure

International Criminal Court (Darfur) Order 2009 (SI 2009/699)

14:51

The Convener: As members will undoubtedly have noted, the legal brief suggests that there appears to have been an unjustifiable delay in laying the order before the Parliament. In this instance, the delay is considerable. The order was made on 18 March 2009 but not laid in the Parliament until 29 September 2011, which is some two and a half years later, due to an oversight by the Foreign and Commonwealth Office. On that basis, does the committee agree to draw the order to the Parliament's attention on reporting ground (d)?

Members indicated agreement.

The Convener: Does the committee also agree to draw the Parliament's attention to the letter to the Presiding Officer in which the Scottish Government has explained that the Foreign and Commonwealth Office accepts that the order ought to have been laid earlier, apologises for the delay and confirms that it will ensure that this situation does not recur?

Chic Brodie: I understand that that is helpful. I know that the Foreign and Commonwealth Office has said that it will not allow it to happen again, but it has already happened—I am not sure whether we had a similar letter following the events regarding a similar order for Libya. What security can the Foreign and Commonwealth Office give us? What strictures can we apply in communications with it in the sense of one, shame on them and two, shame on us?

The Convener: I am looking for a bit of advice to sort out the facts. I think that the second event, if this does not sound improbable, happened before the first event. So, yes, it has happened twice, but both events preceded the statement that it would not happen again. I entirely take Chic Brodie's point.

I have before me a copy of a letter from Bruce Crawford to me that I think members will have seen, but I will quote the last paragraph:

"On the matter of the International Criminal Court (Libya) Order 2011 (SI 2011/1696), I have regular discussions on a range of intergovernmental matters with David Mundell MP, the Parliamentary Under Secretary of State for Scotland, and will raise the issue of effective communications between the Scottish and UK Governments on legislative matters."

The letter is dated 5 October. I think that the issue has been elevated to the highest ministerial level to which we can sensibly take it. We just have to trust that the powers that be are beginning to get the message.

Chic Brodie: I understand that, convener, but if the circumstances had been such that the three Sudanese nationals had entered this country, goodness knows what the gentlemen concerned—I assume that they are all gentlemen—might have done while they were here. We would have been in a somewhat invidious position because of the delay, in that we could not have taken any particular action in regard to the three Sudanese nationals for whom warrants had been issued. They could have claimed diplomatic immunity, state security or what have you.

The Convener: If my reading of the papers is correct, I think that that is well understood and that those who were responsible are very grateful that that did not happen.

Chic Brodie: Fine. Thank you, convener, but I do not think that a slap on the wrist is sufficient in these circumstances, given all the events that have occurred recently.

The Convener: Your points are on the record and I am sure that they will be well understood by those who choose to read them.

I take it that the question that I asked some time back is agreed.

Members indicated agreement.

The Convener: Thank you very much. Our next meeting will be on Tuesday, 1 November.

Meeting closed at 14:56.

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