



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 November 2011

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SUBORDINATE LEGISLATION COMMITTEE

10th 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:

Judith Morrison (Legal Adviser)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 5

Scottish Parliament

Subordinate Legislation Committee

Tuesday 8 November 2011

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

Instruments subject to Negative Procedure

National Health Service Superannuation Scheme etc (Miscellaneous Amendments) (Scotland) Regulations 2011 (SSI 2011/364)

The Convener (Nigel Don): I welcome members to the 10th meeting in session 4 of the Subordinate Legislation Committee and, as usual, ask members to turn off any mobile phones.

The legal brief notes that the instrument contains drafting errors at regulations 17(b), 41(e) and 104(n). The nature of the errors is not, however, considered to be likely to affect the operation of the instrument. Does the committee therefore agree to draw the instrument to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

The Convener: In its response to the committee, the Scottish Government indicated that it intends to rectify the errors at the next available opportunity. Does the committee agree to welcome that?

Members *indicated agreement.*

Chic Brodie (South Scotland) (SNP): I am beginning to be boring on this, but it beggars belief that the instrument omits the word “service” from “national health service”.

The Convener: That was succinctly put. Thank you.

Highlands and Islands Air Services (Scotland) Act 1980 Amendment Regulations 2011 (SSI 2011/367)

Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions) (Scotland) Order 2011 (SSI 2011/368)

Ancient Monuments and Archaeological Areas (Compensation) (Scotland) Regulations 2011 (SSI 2011/373)

Planning (Listed Buildings) (Prescribed Form of Notices) (Scotland) Regulations 2011 (SSI 2011/374)

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Planning etc (Scotland) Act 2006 (Listed Buildings) (Saving Provisions) Order 2011 (SSI 2011/381)

Town and Country Planning (Enforcement of Control) (No 2) (Scotland) Amendment Regulations 2011 (SSI 2011/383)

The committee agreed that no points arose on the instruments.

The Convener: In relation to the Highlands and Islands Air Services (Scotland) Act 1980 Amendment Regulations 2011 (SSI 2011/367), the committee may wish to note that there has been a considerable delay between the coming into force of European Community regulation 1008/2008 and the making of the amendment to the 1980 act. That delay is a question of policy that the committee may recommend for consideration by the lead committee. Would the committee like to do so?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Pigs (Records, Identification and Movement) (Scotland) Amendment Order 2011 (SSI 2011/351)

14:34

The Convener: The legal brief notes that there has been a failure to follow proper drafting practice, as section 83(2) of the Animal Health Act 1981 has not been cited as an enabling power in the preamble. However, that does not appear to affect the validity or operation of the order, as the words

“and all other powers enabling them to do so”

may be construed as including a reference to that section.

The legal brief notes a further failure to follow proper drafting practice in that article 3 of the Pigs (Records, Identification and Movement) (Scotland) Order 2011 (SSI 2011/327), as substituted by article 2 of the amendment order, provides that notices must be in writing when provision to that effect is already made in section 83(1) of the 1981 act. Accordingly, article 3, as substituted, is superfluous in so far as it refers to notices.

With those two matters in mind, does the committee agree to draw the order to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 9, Transitional and Savings Provisions) Order 2011 (SSI 2011/354)

The Convener: The legal brief records that section 109(3) of the Criminal Justice and Licensing (Scotland) Act 2010 is commenced

“in respect of offences committed on or after 1st November 2011”.

Section 109(3) creates a new offence of unauthorised disclosure of information about certain offences. It could have been made clearer whether the reference to “offences” for the purposes of commencement related to the offence that section 109(3) creates or to the offences that are the subject of the information to which the new offence relates.

Reflecting on that evident lack of clarity, does the committee agree to draw the order to the Parliament’s attention on reporting ground (h)?

Members *indicated agreement.*

Chic Brodie: The relevant part of the legal briefing actually says:

“Section 109(3) is commenced ‘in respect of offences committed on or after 1st November 2011’”.

Can I just check that it should say “committed”, not “committee”?

The Convener: Forgive me. [*Interruption.*] I am assured that the typo does not appear in the order, so we are fine.

Chic Brodie: Is it “committee” or “committed”?

The Convener: It is “committed”.

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 9, Transitional and Savings Provisions) Amendment Order 2011 (SSI 2011/366)

Historic Environment (Amendment) (Scotland) Act 2011 (Commencement No 2) Order 2011 (SSI 2011/372)

Planning etc (Scotland) Act 2006 (Commencement No 12) Order 2011 (SSI 2011/382)

The committee agreed that no points arose on the instruments.

Correspondence (Commencement Orders and Transitional Provisions)

14:38

The Convener: The purpose of item 3 is for the committee to consider its approach to the scrutiny of commencement orders where complex transitional provisions are attached. Members will note that consideration of the issue was prompted by the concern that the inner house of the Court of Session expressed about the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009 (SSI 2009/267), which made transitional provision in relation to the commencement of the Adoption and Children (Scotland) Act 2007. It expressed specific concern about the scrutiny of such instruments.

The committee is invited to consider correspondence from the Scottish Government and to assess whether the Government's commitment to provide Executive notes for commencement orders that it considers to contain complex transitional or savings provisions, and to endeavour to allow the full 40 days between the making date of commencement orders and the appointed day in order to maximise scrutiny time, is an adequate response. It is suggested that the committee write to the Government with an assessment of the adequacy of those measures.

Reference is being made to the letter from Paul Cackette that we considered last week, which made three points, two of which I have just mentioned. The third was about separating transitional provisions from commencement orders. The Government suggested that that might give it a problem, because one instrument might be agreed to and the other not. The first two suggestions seem to be sensible responses to what we asked. Do members have any thoughts on that?

James Dornan (Glasgow Cathcart) (SNP): As I was not here last week, it is probably not appropriate for me to comment.

Mike MacKenzie (Highlands and Islands) (SNP): A technical concern arises where there is no scrutiny by the lead committee, which we might have expected to pick up the problem. The convener mentioned an example. Although it is essentially a timing problem, there is concern about it. I am not convinced that the Government response picks up on the procedural problem that arises when there is no scrutiny by the lead committee. That is my feeling, but I stand to be corrected.

The Convener: Thank you for that. Do other members have thoughts?

John Scott (Ayr) (Con): Forgive me for not being at the pre-meeting briefing. How do our legal advisers view the fact that the Government's response does not provide a commitment to separate out transitional provisions from commencement orders in complex cases? Perhaps that was discussed earlier, but I would be grateful for guidance on it, if possible. Is the position that the Government has adopted reasonable in the view of those who have legal minds?

The Convener: I will put that to our legal advisers in a moment. First, are there any other questions in that vein that members would like addressed? As there are not, I ask Judith Morrison whether she would care to give a view.

Judith Morrison (Legal Adviser): Under existing acts, ministers have a choice—which the Parliament has given them—whether to adopt one or other process, so it would not be wrong in legal terms for ministers to adopt one or other of the two options. The Parliament, as scrutineer of whether the Government is exercising the powers that it has been given—properly, in the Parliament's view—can, of course, comment on that. It is not so much a legal issue, as a matter for the Parliament to consider whether it is appropriate in any particular case, and it is open to the Parliament to comment on that.

The Subordinate Legislation Committee will have the opportunity, in considering new bills and new powers, to consider how the Government should be given powers and whether it should be given a choice of procedure or not. That is something that the committee can comment on in the course of considering new powers.

Chic Brodie: I think that I made this point last week. We are talking about transitional provisions of substance, and we also talked last week about complexity. Who defines the substance or the complexity of transitional provisions? I know that the Parliament can give a minister or cabinet secretary authority or what have you, but if a commencement order falls into that grey area, who makes the decision?

Judith Morrison: Because ministers have a simple choice, which is not based on a test of complexity, they make the choice and the Parliament scrutinises it and comments on it. There is no legal test of complexity and I do not think that it would be a good idea to write one into future acts because, as I think you are saying, it is difficult to quantify it as a legal concept.

Chic Brodie: As we discussed, there is a spectrum of provisions. A minister could decide that all transitional provisions are non-complex or

that he does not want to make a decision. There has to be some means of deciding that provisions need to be looked at. Or am I digging too far?

The Convener: I think that the answer, as we are hearing it, is that Government ministers decide how to proceed within the powers that they have available to them. Where they have a choice, they exercise it. Where they have no choice, they must go through a particular procedure.

Chic Brodie: I understand and accept that, convener, but, *reductio ad absurdum*, we could get into a situation where we ask why we should discuss this at all. Why not just give the minister authority over all the provisions so that the decision is made by the minister?

The Convener: It is ultimately up to the Parliament to decide what it does. There are two sorts of legislation: there is the sort that we already have to deal with and there is the sort that will come in the future. Regarding the sort that will come in the future, we clearly now have an opportunity to ask ourselves the question about the powers that ministers are being given—it would be within our remit to do that and in the light of this, maybe we should. Where ministers are exercising existing powers, it is our job simply to ask them whether they have done it the right way.

In the letter in front of us, the Government says that it will consider whether it might separate commencement orders from transitional provisions but, reading between the lines, I think that it is saying that it does not want to do that very often, because it does not want a situation in which one instrument might be agreed to and the other might not—that would leave it in an untenable position.

I suggest that we go back to the Government and say that although that makes logical sense, we are concerned about complex provisions. They do occasionally happen, they have happened and they did bite us. We could ask the Government to consider how often those situations arise, whether it recognises them when they do arise and, if they do come along again, how the Government proposes to deal with them. That is a question that we might legitimately ask, because the implication of it is that if the Government does come along with extraordinarily complex orders, we might ask some difficult questions.

Chic Brodie: Okay. Thank you.

The Convener: That is perhaps the way forward. Does that meet with general approval?

Members *indicated agreement.*

The Convener: Are members comfortable that I write to the Government in those terms, welcoming the first two commitments, which are essentially what we asked for; recognising that the third suggestion does have a problem—that it has

given us, collectively, a problem; and asking it for a bit more detail about how it will think about the matter?

Members *indicated agreement.*

The Convener: Okay. Thank you.

Welfare Reform Bill

The Convener: I am grateful for that. Our next meeting is on Tuesday 15 November.

Meeting closed at 14:48.

14:46

The Convener: This item invites the committee to consider those provisions in the Welfare Reform Bill that confer powers on the Scottish ministers to make subordinate legislation.

During the last session of the Parliament the Subordinate Legislation Committee considered a legislative consent memorandum in relation to the Welfare Reform Bill and agreed a report. It reported that the relevant clauses, clause 33 and clause 89, appeared to be acceptable in principle, but noted that the bill had not properly adopted the standard terminology for “the negative procedure” and “the affirmative procedure” set out in sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

The LCM under consideration today is different and so is the bill in that, amongst other things, the issue with terminology has been rectified. Clauses 33 and 89, however, remain otherwise the same and there are no new provisions of relevance to the committee. It is therefore for the committee to report to the lead committee whether, like the previous Subordinate Legislation Committee, it is content with the powers conferred on the Scottish ministers in principle, as to scope and as to the parliamentary procedure provided. The committee is invited to agree its report today. Given that clauses 33 and 89 reflect the change in terminology but are otherwise unchanged, the report that the committee is invited to agree is a repeat of the report agreed by the previous Subordinate Legislation Committee, with the concerns about terminology removed. If members have no comments on that, are they simply content?

Members *indicated agreement.*

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