The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 29 November 2011

Session 4

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SUBORDINATE LEGISLATION COMMITTEE
13th 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:

Patrick Down (Scottish Government)
Gery McLaughlin (Scottish Government)
Heather Wortley (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 29 November 2011

[The Convener *opened the meeting at 14:31*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 13th meeting in session 4 of the Subordinate Legislation Committee. I remind everyone to turn off their mobile phones, please.

Item 1 is a decision on taking business in private. It is proposed that the committee considers items 5 and 7 in private. Item 5 is to consider the committee's approach to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, and item 7 is to consider the evidence that we will have heard at item 6. Do members agree to take those items in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

Crofting Commission (Elections) (Scotland) Regulations 2011 [Draft]

14:32

The committee agreed that no points arose on the instrument.

Instruments subject to Negative Procedure

National Health Service (Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2011 (SSI 2011/392)

Police (Retention and Disposal of Motor Vehicles) (Scotland) Amendment Regulations 2011 (SSI 2011/395)

Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2011 (SSI 2011/403)

Administrative Justice and Tribunals Council (Listed Tribunals) (Scotland) Amendment Order 2011 (SSI 2011/405)

14:32

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Lands Valuation Appeal Court) 2011 (SSI 2011/400)

Licensing and Regulation of Taxis (Appeals in Respect of Taxi Fares) (Scotland) Amendment Order 2011 (SSI 2011/401)

Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Taxation of Accounts and Fees of Solicitors) 2011 (SSI 2011/402)

Act of Sederunt (Sanction for the Employment of Counsel in the Sheriff Court) 2011 (SSI 2011/404)

14:34

The committee agreed that no points arose on the instruments.

14:34

Meeting continued in private.

14:50

Meeting continued in public.

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: After Stage 2

The Convener: I welcome Gery McLaughlin, the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill team leader; Patrick Down, policy adviser for the bill team; and Heather Wortley, from the Scottish Government's legal directorate. Thank you for coming and for waiting around—it is greatly appreciated. You will know what we are here to discuss, so we will go straight to questions, which will be led by John Scott.

John Scott (Ayr) (Con): Given the unusual nature of this introduction of subordinate legislation at stage 2, for which there seems to be little or no precedent—certainly in Scottish Parliament legislation—will you outline the Scottish Government's reasons for making provisions in the bill to enable the Scottish ministers to modify sections 1 and 4 by order?

Patrick Down (Scottish Government): If the convener agrees, it might be easiest if I answer the question in relation to the order-making powers in sections 4A and 6A, because the reasons are largely the same.

The Convener: That is perfectly reasonable. If there is a general answer that refers to both powers, by all means do so.

Patrick Down: The powers were introduced in response to recommendations in the Justice Committee's stage 2 report on the bill. The committee invited us to consider adding age and gender to the list of characteristics that are covered by the section 1 offence. In our response, we noted the committee's support for the inclusion of categories beyond sectarian hatred and religious and racial hatred in relation to the section 1 offence and the invitation to consider the inclusion of age and gender.

We also noted that, in the previous session of Parliament, the Equal Opportunities Committee and the Justice Committee considered age and gender in relation to the Offences (Aggravation by Prejudice) (Scotland) Bill and, after hearing evidence from Barnardo's, Help the Aged and Scottish Women's Aid, among others, came to the conclusion that it was not appropriate to include age and gender in the list of characteristics in that bill in relation to which an offence could be aggravated. There are significant issues on which we need to consult further. We felt that, rather than add age and gender to the bill now, we would take an order-making power to enable us to take time to consult on whether those characteristics should be added.

As members know, there is another order-making power, in section 6A, which enables us to add new grounds of hatred. The Justice Committee recognised that there are different views on whether to widen the section 5 offence to cover other categories of hatred and acknowledged that the issue requires more consideration. The Justice Committee therefore invited the Government to consult on widening the section 5 offence at an appropriate time, should the bill be passed. In response, we noted the concerns about the lack of consultation on the implications of widening section 5 to cover other categories of hatred, which is why we did not support Patrick Harvie's stage 2 amendments that would have done so. We lodged an amendment to allow for the extension of the offence to cover additional categories of hatred at a later date, to enable the issues to be considered following full consultation.

John Scott: So the matter was essentially dealt with in this way in response to the concerns of the Justice Committee and others.

Patrick Down: Yes.

John Scott: Thank you.

The Convener: I will pursue that a little. Does the Government accept that it is really quite a wide power and that the justification is more narrowly drawn than the power that is being taken?

Patrick Down: The power to modify section 1 is about modifying the circumstances in which an offence relating to offensive behaviour at a regulated football match can be committed. It is not that wide, in that it can be used only to add new kinds of behaviour that, when they occur at a regulated football match and are likely to incite public disorder, could constitute a criminal offence. The power does not enable us, for instance, to lay an order that would extend the offence beyond football.

There is an argument that section 1(2)(e) covers offensive behaviour at football matches generally, so what we would be looking to do with any order-making power is to bring additional clarity. It may be that behaviour that expresses hatred on the basis of gender or age would already be considered offensive behaviour to a reasonable person, but laying an order would perhaps bring additional clarity that it was definitely covered by the offence. The power is perhaps not as wide as it first appears to be.

John Scott: Is it not unusual to take powers with such tariffs at such a late stage? I do not think

that you have necessarily answered that. Why was the need for the power not foreseen, given the level of discussion and debate that there has been around the bill?

Patrick Down: I am afraid that I cannot comment on whether order-making powers of this kind have been added to bills at stage 2 in the past. I simply do not know. The power was added at this stage very much in response to recommendations that the Justice Committee made in its stage 2 report.

John Scott: Our view is that it is unusual, and that is why we are a bit concerned about it. Anyway, thank you for your answer in the meantime.

Drew Smith (Glasgow) (Lab): One concern that was raised at the Justice Committee was about how behaviour will be defined or what it might be taken to mean. The minister has ruled out the possibility of a proscribed list of songs. Can you confirm that the provisions in relation to subordinate legislation will rule out a list of proscribed songs being produced in future?

Patrick Down: For the reasons that we outlined during the stage 1 debate, it is unlikely that ministers would want to provide a list of proscribed songs. I will ask Heather Wortley to comment from a legal perspective on whether the power is drawn in such a way as to prevent that from being done.

Heather Wortley (Scottish Government): I am afraid that I have never considered the question of a proscribed list being put into a Scottish statutory instrument. That might be something that we can consider and come back to you on.

The Convener: That would be helpful, especially if it is a question that you have not considered before.

James Dornan (Glasgow Cathcart) (SNP): Drew Smith touched on my question briefly. Section 4A gives the Scottish ministers the power to change one of the bill's core provisions by way of subordinate legislation. Among other things, it gives ministers the power to redefine what constitutes an offence under section 1. What factors did the Scottish Government take into account when it determined that that would be an appropriate use of order-making powers?

Patrick Down: The factors are largely those that we set out in the delegated powers memorandum, which were: striking the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly in the light of experience and without the need for fresh primary legislation; making proper use of valuable parliamentary time; and responding to the recommendations in the Justice Committee's report on the possible extension of the offences at sections 1 and 5, which we felt that it was not appropriate to do immediately by amending the bill at stage 2 because of the complex issues that were raised about extending the offences in that way.

James Dornan: Okay.

15:00

Chic Brodie (South Scotland) (SNP): When the Justice Committee was scrutinising the bill, it considered matters concerning the European convention on human rights and invited the Scottish Government to reflect on concerns raised. The catch-all test for offensive behaviour is set out in section 1(2)(e), which, as you will know better than I do, refers to

"other behaviour that a reasonable person would be likely to consider offensive".

It was felt that that might be too expansive and that it might raise concerns in respect of adherence to freedom of speech and other rules or guidance under the European convention on human rights. What consideration was given to whether the power at section 4A, which enables changes to be made to the offences in section 1, raises ECHR compliance issues, particularly in relation to freedom of speech?

Patrick Down: Any bill that is introduced into the Scottish Parliament has to be compliant with the European convention on human rights. The Presiding Officer had signed off the bill as being compliant and we are satisfied that it is compliant. Any order that we made would also have to be compliant with the European convention on human rights.

Chic Brodie: The question was about section 1(2)(e), which talks about

"other behaviour that a reasonable person would be likely to consider offensive".

Is that too wide and too expansive, given what the Government was trying to do—having the powers while still meeting the requirements of the ECHR?

Patrick Down: We are of the view that section 1(2)(e) is compliant with the European convention on human rights. The order-making power does not change that.

Chic Brodie: I am surprised.

Kezia Dugdale (Lothian) (Lab): I think that part of my question was answered at the beginning, but perhaps I can pursue it a bit further.

The bill creates two new criminal offences and gives the ministers the power to amend the terms of those offences. It alarms me that that could be done by secondary or subordinate legislation.

Does it not alarm you? You said earlier that you did not find it unusual. I understand that Patrick Down is a policy officer and that Heather Wortley is a lawyer. Is it unusual?

Patrick Down: If it would be helpful, I will give some examples of secondary legislation that can be used to vary criminal offences.

Section 43(8) of the Sexual Offences (Scotland) Act 2009 provides ministers with an order-making power to amend section 43 of the act by adding, deleting or amending a condition that, if satisfied, would constitute a position of trust. A person in a position of trust could commit the offence of sexual abuse of trust, which has a maximum penalty of five years imprisonment.

Another example is that section 141 of the Criminal Justice Act 1988 confers a power on the secretary of state to prescribe by order weapons that are offensive weapons and which it is an offence to manufacture, sell and so on. That power was transferred to the Scottish ministers on devolution and was used to make the Criminal Justice Act 1988 (Offensive Weapons) (Scotland) Order 2005, which added two new categories of weapon—the stealth knife and the straight, side-handled or friction-lock truncheon—to the list of weapons that are specified as offensive weapons under that section.

Other examples include a power at section 2 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005; one at section 8 of the Emergency Workers (Scotland) Act 2005, which enables ministers to amend by order the list of emergency workers whom it is an offence to assault, obstruct or hinder in various situations; and one at section 123(6) of the Licensing (Scotland) Act 2005, which allows ministers by order to include or exclude premises from the definition of excluded premises at section 123(2) of that act, which has the effect that the sale of alcohol in those premises would constitute a criminal offence.

Kezia Dugdale: Are you now arguing that it is common to use the power in that way?

Patrick Down: I do not know whether it is common, but it is certainly not entirely novel, as those five examples show.

Kezia Dugdale: It is not novel.

Mike MacKenzie (Highlands and Islands) (SNP): The exercise of the power under section 4A is subject to the affirmative procedure. Are you concerned that that might not allow an adequate opportunity for full consultation? Given the significance of the provisions that could be amended by section 4A, have you given any consideration to the use of the super-affirmative procedure, to allow for fuller scrutiny and consultation?

Patrick Down: Use of the super-affirmative procedure would place a requirement on the Government to consult before laying an order. The minister has made it clear that, as a matter of policy, the Government would consult before making any significant changes, for example, to section 1, to add new protected categories, or to section 5, to add new categories of person against whom it would be an offence to make threats that incited or stirred up hatred.

However, it is possible, at least hypothetically, that the order-making power could be used to make very minor technical changes, for example to the drafting of the definitions in section 4. One example that springs to mind is that, if at some future time there was a Council of Europe convention on equalities issues that required us to amend the language that we use to describe the equality groups that are listed in section 4, that might require us to make consequential amendments to section 4 that would have no real impact on how the offence worked in practice. We think that it would be disproportionate to require a full consultation before those technical drafting changes could be made. We take the view that, in practice, we would consult before we made any significant changes to either of the offences in the bill, but there are hypothetical circumstances in which we might want to make very minor technical drafting changes that would not require consultation.

Mike MacKenzie: Thank you very much. I am pleased that you have put on record a commitment to consult in the event that significant extensions to the power are proposed.

The Convener: Several members want to follow up on that. I will start with Kezia Dugdale.

Kezia Dugdale: In your answers to my question and to Mike MacKenzie's, you used the word "significant". To me, that is a highly subjective term. Do you have a definition of what you mean by it? For example, you talked about adding types of weapon to the offensive weapons legislation. It strikes me that that would be fairly insignificant and that adding to that legislation items that were clearly dangerous would not cause a great deal of alarm to the wider public. What does "significant" mean in the eyes of the law?

Patrick Down: The examples that the Justice Committee gave of the addition to section 1 of age and gender and additions to section 5 covering, for example, sexuality or disability are changes that would have a real impact on what would be criminal, as opposed to drafting changes that might have no practical impact. If we changed the definition of sexual orientation, it would not change

the fact that homophobic chanting at football was a criminal offence. If, on the other hand, we added threats that were intended to incite hatred on grounds of sexual orientation to section 5 of the bill—I suppose that it would be an act by the time that we laid the order—I think that that would change what was criminal and would therefore be significant.

Kezia Dugdale: That is helpful, but if we are talking about what would be criminal, surely that requires greater scrutiny than the subordinate legislation process entails.

Patrick Down: Such an order would, of course, be an affirmative order, so it would have to go to a vote of the full Parliament; it could not simply be sneaked through.

Kezia Dugdale: But it would not have to be debated.

Patrick Down: I am happy to be corrected on this, but my understanding is that affirmative orders are, or certainly can be, debated in the Parliament.

Drew Smith: Given that we are talking about the potential to change the nature of a criminal offence by order, what would be the timescale in the event that that was the course of action that the minister decided that he or she wanted to take? How long would it take for the order to come into effect, so that someone could commit a criminal offence under the new law? How easy would it be to communicate to those who attend football grounds in Scotland that something that was not illegal the previous week was illegal that week?

Patrick Down: If we take the example of the football offence, there is an argument that, because of the general criminalisation of behaviour

"offensive to a reasonable person",

the change to what would be criminal would not be significant. I foresee, however, that any consultation would follow the usual Scottish Government approach, involving a 12-week consultation period before any order was made. That order would then have to sit in the Parliament for, I think, 28 days before being voted on. It is 40 days, I am sorry. If such an order were brought forward, we would make efforts to communicate the fact that the behaviour that we were amending the act to cover was in our view criminal. There would be a commencement date in the order, so the point at which it would come into effect would be clear to anyone reading it.

John Scott: Just for clarification, if all are agreed that age and gender measures should be introduced now, is it correct that they cannot be included in the bill because you need more time to consult on that? Is that why those measures will have to be brought in by subordinate legislation?

Patrick Down: Yes.

Gery McLaughlin (Scottish Government): Sorry, I might have misunderstood what you said about everyone being agreed on age and gender. The position is that the committee took evidence from some people who were very much in favour of including such measures, as were some committee members, but not all. As Patrick Down said, a contrary conclusion was reached during the debates on the Offences (Aggravation by Prejudice) (Scotland) Bill.

The Government's view is that, because the issues are complex, such provisions would require consultation and could not be added to the bill at this stage. We have provided for the order-making power because it will give us the opportunity to consult and, as we have heard, the minister is committed to consulting before laying any order—we and the Justice Committee consider that to be essential. Certainly, the Justice Committee was strongly of the view that consultation was required in the case of the threatening communications offence. The committee would probably have taken that into account for the first offence as well, once it had seen our response on that, although it was not clear from the committee's report whether that was their view.

John Scott: Does that not imply that the whole thing is even now being rushed? If this should be in the bill, even after consultation—

Gery McLaughlin: No, I would disagree—

John Scott: Well, presumably you are proposing to introduce the new offence into the bill through subordinate legislation, which will have the same effect.

Gery McLaughlin: I disagree with the contention that this is being rushed. The bill's provisions, as they stand, address the issues relating to offensive behaviour at football, which the Government has identified as essential to address, as set out in the policy memorandum for the bill. Other groups gave evidence to the committee and came forward with other issues. They thought that the first offence, relating to football, could have been more clearly expressed and that the measures relating to the second offence could have been significantly widened. Those were not the initial targets of the bill, however, and the Government's view is that they are not essential in addressing the bill's policy objectives.

The Government said that it would be responsive to amendments, however, and in a spirit of openness and co-operation with the recommendations of the Justice Committee, said

that it would take powers to react to those recommendations at a later stage, following appropriate consultation. It would be rushed if we were to include them now, but it might be entirely appropriate to introduce them later, following consultation, depending on the results of the consultation. The regulatory power—the order-making power—allows the Government to do that, subject to the agreement of the Parliament under the affirmative procedure.

John Scott: I did not really take in what you said about affirmative and super-affirmative procedures on this issue. In reality, what would be the difference between the two? Given the tariff attached to these offences—which I believe is five years—why did you prefer the affirmative procedure to the super-affirmative procedure?

15:15

Gery McLaughlin: I refer you to Patrick Down's comment about the minister's commitment to consult on the issues before introducing an order, which would be debated by and subject to a vote in the Parliament before any changes were made in the law. That is equivalent to the super-affirmative procedure, minus a requirement in the bill that a consultation be undertaken. As Patrick has pointed out, that would permit more minor technical changes to be made in response, for example, to Council of Europe conventions, without having a full consultation, which might well be disproportionate for more minor issues. With regard to the age and gender issue that we have been discussing in relation to the first offence and the move to widen the provisions of the second offence for other equalities groups, the procedure is very similar to the super-affirmative procedure but without the specific requirement set out in legislation.

The Convener: Are you saying that the difference between the super-affirmative and affirmative procedures is the need to consult and that what subsequently happens in the Parliament is the same?

Gery McLaughlin: I am not an expert on the matter, but I think that there are different views on what super-affirmative procedure is. I am looking at Heather Wortley when I say this, but I do not think that it is a precise term. The idea is that it goes beyond the affirmative procedure, which, as you will be aware, requires that the Government introduces an order, that there is a consultation period of 40 working days—or perhaps it is just 40 days—after it is laid and that there is a debate in and a vote by the Parliament before it is passed into law. Obviously, the vote will have to be positive. Super-affirmative procedure goes beyond that in some way, usually with a specific requirement to consult in the bill. It might have other features but, as I said, I am not an expert on it.

The Convener: So the affirmative procedure means something specific in legislation, whereas super-affirmative does not necessarily mean anything specific, but goes beyond affirmative procedure and will be tailored to circumstances at the time.

Gery McLaughlin: To the best of my knowledge, the affirmative and negative procedures are similar to Westminster tradition, while the super-affirmative procedure is more specific to the Scottish Parliament. It is a more novel idea in that respect.

Chic Brodie: Are we saying that there is a procedure that is just an idea and has not been agreed across the board to ensure that we all have the same understanding of it?

The Convener: Perhaps I can answer that for you. Negative and affirmative instruments are laid—

Chic Brodie: I understand that.

The Convener: However, super-affirmative procedure is an idea. It goes beyond affirmative, but at this stage has not been prescribed in either statute or standing orders.

I suspect that one or two of the committee's remaining questions have already been answered but I think that Mike MacKenzie has a particular query.

Mike MacKenzie: What is the Scottish Government's reasoning behind making provision in the bill to enable the Scottish ministers to modify sections 5(5)(b) and 6 in a way similar to that for section 4A?

Patrick Down: We have taken the power to modify section 5(5)(b) in order to be able to add new grounds of hatred to the offence. At the moment, it would be an offence to make a threat intended to incite religious hatred. The power would enable us to include, for example, threats intended to incite hatred on grounds of disability, sexual orientation or gender as constituting the offence of threatening communications.

The power to amend section 6 is, to a degree, consequential on that in that it enables us to add definitions of any term that we introduce in section 5(5)(b). We have also taken a power to add provision equivalent to the section added at stage 2 to protect freedom of expression. I do not know how familiar you are with the bill's contents, but it contains a provision essentially intended to ensure, for the avoidance of doubt, that the provision on threats intended to incite religious hatred does not interfere with legitimate criticism or discussion of religious matters. Likewise, we

thought that if we took the power to extend the offence we might need to make similar provision protecting, for example, the right to discuss or criticise matters relating to people's sexual practices.

Mike MacKenzie: And are the reasons for not putting that in the bill similar to those that we have been discussing?

Patrick Down: Yes. Indeed, the Justice Committee was firmer on this matter and very much of the view that changes should not be introduced until there had been further consultation. The only way to do that was to take this order-making power to enable changes to be made later, following consultation.

James Dornan: As far as varying and defining the bill's hatred elements are concerned, what factors did the Government take into account when determining whether this was an appropriate use of order-making powers?

Patrick Down: I apologise for repeating myself—

James Dornan: I guess that you will be at this stage.

Patrick Down: The policy memorandum sets out the various factors, including the need to strike the right balance between recognising the issue's importance and providing the flexibility to respond to changing circumstances quickly and without the need for fresh primary legislation; the need to make proper use of valuable parliamentary time; and the need to respond to concerns raised during the Justice Committee's consideration of the offence about whether there was a case for extending the provisions to other categories of hatred.

Chic Brodie: Coming back to the process—and leaving the super-affirmative procedure to one side for a moment—I note that orders under section 6A will, as you have pointed out, be subject to affirmative procedure. Given the significance of those orders, are you content that there will be sufficient scrutiny of the kind of significant changes to the bill that you have just mentioned?

Patrick Down: Yes, not least because of the minister's commitment to having a full public consultation ahead of any such changes being made.

The Convener: On behalf of the committee I thank the witnesses for coming along and answering our questions. I remind Ms Wortley of our hope that she might be able to answer our question about songs.

Heather Wortley: We will provide a response in writing.

The Convener: If you could let us have that as soon as is reasonably possible, that would be helpful.

15:23

Meeting continued in private until 15:42.

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