Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
      (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
      (ii) [deleted]
      (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

**Clerk to the Committee**
Euan Donald

**Assistant Clerk**
Elizabeth White

**Support Manager**
Daren Pratt
Delegated Powers and Law Reform Committee

31st Report, 2014 (Session 4)

Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 6 May 2014, the Committee agreed to draw the attention of the Parliament to the following instrument—

   National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2014 (SSI 2014/100).

2. The Committee’s recommendations in relation to the above instrument are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
4. This Order delegates certain health functions of the Scottish Ministers to the Common Services Agency (CSA), and provides that the CSA is to perform certain other health functions determined by the Scottish Ministers. The provisions amend the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008.

5. The purpose is to allow the CSA to carry out a broader range of activities, and to participate in research and development projects and innovative arrangements, to enhance the service provided by the body.

6. The Order comes into force on 19 May 2014.

7. In considering the instrument, the Committee asked the Scottish Government as to certain matters. The correspondence is reproduced at the Annex.

8. The Committee enquired whether the meaning of article 2(e) of the Order could be clearer. Article 2(e) amends article 2 of the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008, to add the exercise of “the power of the Scottish Ministers under section 47 of the Act” to the functions of the CSA. (“The Act” refers to the National Health Service (Scotland) Act 1978).

9. Article 2(e) is made in exercise of a power in section 10(3) of the 1978 Act. Section 10(3) provides that the Scottish Ministers may by order delegate to the CSA such of their functions relating to the health service as they consider appropriate.

10. Section 47 of the 1978 Act has 2 subsections. Subsection (1) provides that it is the duty of the Scottish Ministers to make available such facilities, in any premises provided by them under the 1978 Act, as appear reasonably required for undergraduate and post-graduate clinical teaching and research, and for the education and training of persons providing or intending to provide services under the Act. Subsection (2) provides that the Ministers may conduct, or assist by grants or otherwise any person to conduct, research into any matters relating to the causation, prevention, diagnosis or treatment of illness, or into such other matters relating to the health service as Ministers' think fit.

11. The Committee sought clarification whether it is intended by article 2(e) of the Order to delegate both of those functions described in section 47, as subsection (1) describes a duty, and subsection (2) describes various powers.

12. The Committee considers that article 2(e) could be clearer in implementing the Scottish Government’s intention that the provision delegates to the CSA both:
(1) The powers set out in section 47(2), and

(2) The power to do what is required to implement the duty conferred in section 47(1), but not the duty itself. It is noted that the duty has been transferred from the Ministers to Health Boards (to exercise it on Ministers’ behalf) by the Functions of Health Boards (Scotland) Order 1991. It is therefore intended that the CSA will have the power to provide the facilities as set out in section 47(1), but the Health Boards’ duty in terms of the 1991 Order remains in effect.

13. The Committee therefore draws the Order to the attention of the Parliament on the reporting ground (h). The meaning of article 2(e) of the Order, which inserts article 2(la) into the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008 could be clearer.

14. This is in respect that the provision specifies, as a further function of the Common Services Agency (CSA), the exercise of “the power” of the Scottish Ministers under section 47 of the National Health Service (Scotland) Act 1978. This could be clearer, so far as it is intended to confer on the CSA both—

- the power of the Ministers to act in accordance with the duty specified in section 47(1), but not to confer the duty itself (which is exercised by each Health Board on behalf of the Ministers in accordance with the Functions of Health Boards (Scotland) Order 1991); and

- the powers of the Ministers specified in section 47(2).
NO POINTS RAISED

15. At its meeting on 6 May 2014, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

Education and Culture

Additional Support for Learning (Sources of Information) (Scotland) Amendment Order 2014 (SSI 2014/103);


Justice


Rural Affairs, Climate Change and Environment

Marketing of Vegetable Plant Material Amendment (Scotland) Regulations 2014 (SSI 2014/111).
ANNEX

National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2014 (SSI 2014/100)

On 16 April 2014, the Scottish Government was asked:

(1) Article 2(e) amends article 2 of the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008, to add the exercise of “the power of the Scottish Ministers under section 47 of the Act” to the functions of the Common Services Agency (“CSA”). Some provisions in article 2 of the 2008 Order specifically refer to functions which are set out in whole sections of the National Health Service (Scotland) Act 1978, while others specifically refer to particular subsections of sections.

Subsection (1) of section 47 provides that it is the duty of the Scottish Ministers to make available such facilities, in any premises provided by them under the 1978 Act, as appear reasonably required for undergraduate and post-graduate clinical teaching and research, and for the education and training of persons providing or intending to provide services under the Act. Subsection (2) provides that the Ministers may conduct, or assist by grants or otherwise any person to conduct, research into any matters relating to the causation, prevention, diagnosis or treatment of illness, or into such other matters relating to the health service as Ministers’ think fit.

Please explain therefore whether it is intended that article 2(e) should confer on the CSA the entire functions which have been conferred on the Ministers by section 47; or whether it is intended to confer the powers and functions which are described in subsection (2) only. Could the provision be clearer, given that only subsection (2) makes provision for powers (with more than one element to them), while subsection (1) provides for a duty- and the section in general confers functions?

(2) Section 10(4) of the 1978 Act has been variously amended. It appears to provide that it is a pre-condition of the making of the Order that there is consultation with the Health Boards, NHS trusts, and any other interests which appear to the Ministers to be concerned with the proposals. The requirement for consultation with NHS trusts appears to have been added by paragraph 44 of schedule 4 to the Health Act 1999, with effect from October 1999. Paragraph 2 of the preamble to the Order narrates there has been consultation with Health Boards, Special Health Boards, and other interests concerned.

Please clarify therefore—
(a) whether there has been consultation with NHS trusts prior to the making of the order, and if not, why that is appropriate; and
(b) why it is considered that the terms of paragraph 2 of the preamble are appropriate.
The Scottish Government responded as follows:

1. It is intended that article 2(e) confers on the Common Services Agency the entirety of the powers conferred on the Scottish Ministers by section 47. Section 47(1) places a duty on the Scottish Ministers to make available such facilities, in any premises provided by them under the 1978 Act, as appear reasonably required for undergraduate and post-graduate clinical teaching and research, and for the education and training of persons providing or intending to provide services under the 1978 Act. The conferral of this duty, by necessary implication, also confers a power on the Scottish Ministers to act in accordance with the duty (see Craies on Legislation 9th edition 12.2.8 at p. 508). This power, together with the powers conferred by section 47(2), are intended to be conferred on the Common Services Agency. In the view of the Scottish Government it is clear that this is the meaning of article 2(e).

2. National Health Service Trusts have been dissolved in Scotland by virtue of The National Health Service Trusts (Dissolution) (Scotland) Order 2004 (SSI 2004/107). Accordingly, notwithstanding that section 10 contains a reference to the consultation of NHS trusts, there are no extant bodies with which such consultation could have been undertaken. Accordingly the Scottish Government considers that the terms of the preamble are appropriate as the preamble clearly describes the extent of the consultation that has been undertaken.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.