



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 8 March 2016

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DELEGATED POWERS AND LAW REFORM COMMITTEE

10th Meeting 2016, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Lesley Brennan (North East Scotland) (Lab)

*John Scott (Ayr) (Con)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

James Shaw (Legal Adviser)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 8 March 2016

[The Convener opened the meeting at 10:47]

Instruments subject to Negative Procedure

Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2016 (SSI 2016/126)

The Convener (Nigel Don): I welcome members to the 10th meeting in 2016 of the Delegated Powers and Law Reform Committee. As always, I ask members to turn off mobile phones, please.

The order contains a drafting error. Article 3(2) substitutes class 6H of part 1A of schedule 1 to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992. The word “if” has been omitted from the provision at the beginning of paragraph (2)(d) of that class. The committee may wish to note that the Scottish Government intends to correct the error at the next available opportunity.

Does the committee agree to draw the instrument to the Parliament’s attention under the general reporting ground, in the respect that it includes a minor drafting error?

Members indicated agreement.

Non-Domestic Rates (Renewable Energy Generation Relief) (Scotland) Amendment Regulations 2016 (SSI 2016/121)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members indicated agreement.

Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2016 (SSI 2016/124)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members indicated agreement.

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Miscellaneous) 2016 (SSI 2016/102)

10:48

The Convener: The act of sederunt contains two errors.

New rule 33A.21(6) of the ordinary cause rules, as inserted by paragraph 3 of the instrument, makes reference to a “child welfare officer”. The correct term is “child welfare reporter”.

Paragraph 5 of the instrument makes a savings provision preserving the effect of the ordinary cause rules as they applied immediately before “21st March 2106”. The correct reference is of course to “21st March 2016”.

The committee may wish to note that the Lord President’s private office intends to correct both those errors at the next available opportunity.

Does the committee agree to draw the instrument to the Parliament’s attention under the general reporting ground, as it contains errors?

Members indicated agreement.

Air Weapons and Licensing (Scotland) Act 2015 (Commencement No 3 and Transitional Provisions) Order 2016 (SSI 2016/130)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members indicated agreement.

Air Weapons and Licensing (Scotland) Act 2015 (Commencement No 4, Transitional and Saving Provisions) Order 2016 (SSI 2016/132)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members indicated agreement.

Higher Education Governance (Scotland) Bill: After Stage 2

10:50

The Convener: Agenda item 3 is for the committee to consider the delegated powers provisions in the Higher Education Governance (Scotland) Bill as amended at stage 2.

There is one revised power in the bill, and four delegated powers have been removed from the bill, which the committee reported on at stage 1.

The committee may wish to welcome both the removal of the powers and the inclusion of further detail in the bill.

Does the committee agree to report that it is content with the delegated powers as amended at stage 2?

Members *indicated agreement.*

Private Housing (Tenancies) (Scotland) Bill: After Stage 2

10:50

The Convener: Agenda item 4 is for the committee to consider the delegated powers provisions in the Private Housing (Tenancies) (Scotland) Bill as amended at stage 2.

At stage 2, there was one new power and two revised powers. The revised power in section 30(2) allows the Scottish ministers to designate a rent pressure zone. The bill was amended at stage 2 so that the procedure to make regulations to designate a rent pressure zone is restricted to when the zone is first so designated, and any subject revocation or amendment of the zone is subject to the negative rather than the affirmative procedure.

The justification for the change, as provided by supplementary delegated powers memorandum, is that there may be a need to respond quickly to market conditions and that the affirmative procedure would be a barrier to “expeditious action”.

The committee may wish to have regard to the steps that are taken before a rent pressure zone can be designated by the Scottish ministers in regulations—including their being subject to affirmative procedure—and we may wish to consider that a similar level of scrutiny by the Parliament should be available when it is proposed that a rent pressure zone is amended or revoked.

The committee may consider that the affirmative procedure would provide adequate scrutiny and would also meet the Scottish Government’s needs. A model is found in section 68(4) of the Land and Buildings Transaction Tax (Scotland) Act 2013. That procedure would allow regulations to be made and, if necessary, have effect during periods of recess.

John Mason (Glasgow Shettleston) (SNP): I would agree with those points. It seems to me that there are some quite considerable steps to be taken before the initial designation can be made. Although a subsequent step might be minor, it could also be major. If it involves undoing the whole of a rent pressure zone, in my opinion that is a major step and should require the provisional affirmative procedure.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): The Government could take a number of approaches to the matter. One that occurs to me is that it could perhaps restrict the power under the negative procedure to orders that have effect only for a limited period—say, for the

sake of argument, for 60 days—which would give it time to use an affirmative procedure.

I am not saying what the Government should do, but I share the concern that my colleague John Mason has expressed that something as substantial as the original order might be dealt with under the negative procedure. I understand the issue about urgency, but I think there are other ways of dealing with the matter that the Government should consider.

John Scott (Ayr) (Con): I am supportive of what my colleagues Stewart Stevenson and John Mason have said. It is a very big step to amend or revoke a rent pressure zone. The procedure needs to be an enhanced procedure, rather than just the negative procedure. I would be content with and supportive of my colleagues' comments.

Lesley Brennan (North East Scotland) (Lab): I am supportive of the comments about changing the procedure from negative to affirmative, but I have a question as well.

Section 32(3) describes how the provisions regarding the zone will "cease to have effect" after five years. If the Government made an amendment under the negative procedure at a point near the end of the five years, would that extend the period?

I think that the affirmative procedure is a better procedure. It gives proper scrutiny.

The Convener: I am happy to ask that question. If the original order was for five years but an amendment was made part of the way through, would the amendment run for five years, or would it merely be an amendment of the original five-year period?

James Shaw (Legal Adviser): Looking at it cold—

Lesley Brennan: Sorry, I just thought of that question.

The Convener: It is a good question.

James Shaw: I think that the original five years would run, but I would need to look at the provisions properly. The issue has first come up now, so I would want to consider it, but I think that the five years would expire on the original regulations.

The Convener: Either way, it does not seem unreasonable to read the bill as an opportunity, in theory, to bring in an extremely strong procedure for one street and then to have an amendment that would cover the whole of a town. I am not arguing that the Government would do that, but it seems a strange way to set up the law. A zone could be expanded to the whole of a town, rather than just taken away from one street. It looks as

though the amending procedure is rather underweighted.

Does the committee agree that a change in procedure for regulations under section 30 that amend or revoke a rent pressure zone from the affirmative procedure to the negative procedure is unacceptable?

Members indicated agreement.

The Convener: Does the committee agree to recommend to the Scottish Government that the provisional affirmative procedure may be more appropriate, and to suggest that a model similar to the one in section 68(4) of the Land and Buildings Transaction Tax (Scotland) Act 2013 should be adopted?

Members indicated agreement.

John Mason: Do you want us, at this stage, to agree that if the Government does not propose an amendment we will put one forward, or is that a decision for us to make at another time?

The Convener: I think that that is an interesting discussion to have now. Thank you for raising the issue. How do we see this?

John Mason: My inclination, if the Government does not propose an amendment, is for us to put one forward.

The Convener: How do colleagues feel about that?

Stewart Stevenson: I agree with the principle of what John Mason is saying, but we should allow the convener to make that choice, in the light of what emerges. I trust the convener; I do not think that we should tie his hands by saying that he must lodge an amendment if the Government does not. He should look at what happens and take soundings from members of the committee in an appropriate way. We should empower the convener to put forward an amendment if, after we see what is brought forward by the Government, his soundings of committee members suggest that that is the right thing to do.

The Convener: Do any other members have a view? I am very happy to take those soundings now, because I think that there are various ways of tackling this situation.

Lesley Brennan: I support what John Mason said. If the Scottish Government does not bring forward such an amendment, we should put one forward on the affirmative procedure. We have a meeting on Thursday; will we know about the Government's amendments by then?

The Convener: Not necessarily—I am told—which is why I think that, given the general timescale, it might be wise for us to do something proactive. Maybe I should write to the Government

laying out our concerns. As always, I am sure that somebody will be watching the committee literally as we proceed.

If there is a general concern about the procedure, there must be some options as to how the Government could handle the matter. One would be for it to give itself a different kind of power if it is dealing with something minor. Secondly, it could give itself a different kind of power if it is merely to revoke something that already exists on a small scale—on the other hand, if revocation is as significant as setting up a zone in the first place, maybe even that is not logical.

I am in members' hands. I am quite prepared to write to the Government, pointing out that we think that there is an issue.

John Scott: I think that the logical first step would be to write to the Government. As you say, the Government will doubtless be watching these proceedings. The letter should intimate formally that we are unhappy with what it is proposing. I am certain that discussions can take place between our advisers and the Government in the meantime, and if the Government does not wish to bring forward an amendment, we should perhaps reserve the right to do so.

The Convener: We certainly have the right to do that—we do not need to reserve it.

If colleagues have nothing to add, I will pursue those thoughts in writing, and no doubt there will be discussions between legal advisers and the Government.

John Mason: Just for clarification, you are going to write to the Government and lay all of that out.

The Convener: I am going to write to the Government to lay out the general issues as we have raised them.

John Mason: Right. We will see what happens, but I endorse Stewart Stevenson's suggestion that we empower you to lodge an amendment if we are not satisfied with the response.

The Convener: Thank you. If there is any indication by Thursday that there is something that we need to discuss, I will ensure that we have something positive to talk about then. I will talk to the clerks.

Land Reform (Scotland) Bill: Before Stage 3

10:59

The Convener: Item 5 is consideration of correspondence from the Scottish Government on expected amendments to part 3 of the Land Reform (Scotland) Bill.

The expected delegated power will enable the Scottish ministers to make provision for a public register that will contain information about persons who have a controlling interest in land. It is proposed that regulations should be subject to an enhanced affirmative procedure the first time the power is used, but the implication of the letter to the convener of the Rural Affairs, Climate Change and Environment Committee is that the enhanced procedure might be used only that first time.

Again, we have not seen the Government's proposals yet, although the clerk is confirming that we will have seen them by Thursday. How do members want to proceed?

Stewart Stevenson: Until we have seen the Government's proposals and concluded that we are satisfied with them, we should perhaps just put on record that our preliminary view is that subsequent operation of the powers should be subject to the same procedure as the initial operation would be.

John Scott: I support Stewart Stevenson on that. We expect the Government to take very wide powers in the amendment that is yet to be revealed to us. We are content that the first exercise of the powers should be subject to the enhanced affirmative procedure, but from our understanding of what we are about to receive—so to speak—it seems reasonable that subsequent exercise of the powers should also be subject to the enhanced procedure.

John Mason: I still have a general concern that so much is being left to regulation and is not in the bill. I accept that there are time pressures, but someone decided to run with the timetable that we have. That is my starting point.

On the proposed amendment, I agree with my colleagues. I think that the intention is that when the powers are used for the first time something major will happen but after that it will probably be a question of minor tweaking. My preference is for the Government to set out in the bill that after the initial steps have been taken only minor changes will be made, but if that is not made clear in the bill I quite agree that there will need to be greater scrutiny.

The Convener: If I hear members correctly, I think that one option might be to have two amending powers, one of which would be used for things that were definably minor, given that it would be crazy to require enhanced scrutiny of such matters, with the recognition that changes that are not minor should be subject to some kind of enhanced scrutiny. It ought to be possible to have such a system.

Stewart Stevenson: If we have two processes, depending on whether a change is major or minor, we might conclude that there is a case for the Parliament being party to making the decision about whether a change is major or minor, rather than leaving that to ministers. We are talking about a major policy area.

Lesley Brennan: A number of concerns have been expressed about the lack of policy development on the bill, and I think that we want clarity about the development of regulations. It would be good to have clarity about whether changes will be major or minor at subsequent iterations.

John Scott: I echo what my colleagues said, and I will add a little to it. We also had concerns about this section of the bill, which relate to the European convention of human rights. At this very late stage, we are looking at the possibility of major policy being left to regulation. Given the Government's track record in this area, that may or may not be compatible with the ECHR.

It seems to me that one of the important things about the ECHR is the balance between the rights of the individual and those of the state. That being the case, the amendment that is brought forward must at least offer the maximum level of scrutiny to avoid any mistakes that would bring the Parliament into disrepute.

The Convener: I wonder how we should take this forward. The timetable is short. I wonder whether I should suggest to the committee that I write to the Government, pointing out the tenor of this discussion—thanking it, of course, for the letters to myself and Rob Gibson—and expressing concern that, whatever amendments or proposals it brings forward should be appropriate to whatever amendment they are trying to make to those regulations. If we assert that there should always be an extended enhanced procedure, there is a risk that, on some occasions, that approach would be totally over the top. Equally, to take the reverse view would be inappropriate on other occasions.

I suggest that I try to get the Government to establish whether it can get its mind around a way of doing something that is appropriate to the level of amendment at the time.

Lesley Brennan: Given the very tight timescales, I think that that is a good step forward.

John Mason: I endorse that. My preference is that the Government spells out, in the bill, that the first time would be major, and that other times might be different. However, if that is not the case, the scrutiny side needs to be changed.

The Convener: Of course, we have an opportunity to look at this again on Thursday, by which time we will have the Government's current proposals. Therefore, my letter needs to go off pretty promptly this afternoon, to make sure that the Government has something to work on. I propose copying the Rural Affairs, Climate Change and Environment Committee—or at least the convener of that committee—into the letter so that everybody is in the same place on this matter.

John Scott: The committee members do not necessarily need to see that letter. We are happy to delegate that power to you.

The Convener: Thank you. You will see a copy, but it may have been sent before you see it.

John Scott: Absolutely.

The Convener: If the committee is comfortable that it has made every decision that it needs to make, that completes item 5.

Scotland Bill

11:08

The Convener: Under item 6, the committee is invited to consider the powers that the Scotland Bill confers on ministers to make subordinate legislation. A briefing paper has been provided, setting out the relevant aspects of the bill and comments on their effect.

Does the committee agree to recommend to the Devolution (Further Powers) Committee that, in relation to clause 7(14) of the bill, the power conferred upon the Scottish ministers by virtue of section 155(2)(a) of the Political Parties, Elections and Referendums Act 2000 should be subject to the following procedure—that, in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, the order should be laid before Parliament and not subject to further procedure?

Members indicated agreement.

The Convener: Does the committee agree to recommend to the Devolution (Further Powers) Committee that, in relation to clause 38(10), the powers conferred upon the Scottish ministers to commence certain provisions of part 1 of the Equality Act 2010 should be subject to the procedure that normally applies to a commencement order, which is that, in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, the order should be laid before Parliament and not subject to further procedure?

Members indicated agreement.

The Convener: Does the committee agree to report to the Devolution (Further Powers) Committee that it is content with the remaining delegated powers that this bill confers on the Scottish ministers, and that it is content with the procedure to which those powers are subject?

Members indicated agreement.

The Convener: Thank you very much. That completes the agenda.

Meeting closed at 11:09.

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