



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 27 June 2017

Session 5



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DELEGATED POWERS AND LAW REFORM COMMITTEE
22nd Meeting 2017, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Alison Harris (Central Scotland) (Con)

*Monica Lennon (Central Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Annabelle Ewing (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law
Reform Committee

Tuesday 27 June 2017

[The Convener opened the meeting at 10:06]

Decision on Taking Business in
Private

The Convener (John Scott): Good morning and welcome to the 22nd meeting in 2017 of the Delegated Powers and Law Reform Committee.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 5, which is consideration of the committee's draft stage 1 report on the Forestry and Land Management (Scotland) Bill; item 6, which is consideration of the report on instruments considered by the committee during the fourth quarter of the parliamentary year 2016-17; and item 7, which is consideration of the committee's work programme?

Members *indicated agreement.*

Contract (Third Party Rights)
(Scotland) Bill: Stage 2

10:08

The Convener: Agenda item 2 is stage 2 proceedings on the Contract (Third Party Rights) (Scotland) Bill. I welcome to the meeting Annabelle Ewing, the Minister for Community Safety and Legal Affairs—good morning, minister—and from the Scottish Government, Catriona Marshall, solicitor, legal directorate; and Jill Clark, bill team leader, civil law reform unit.

For the purposes of stage 2, members should have copies of the bill, the marshalled list and the groupings of amendments.

Sections 1 to 8 agreed to.

Section 9—Arbitration

The Convener: Amendment 1, in the name of the minister, is grouped with amendment 2.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): I have set out previously that it would be a matter of concern if the bill's provisions were not readily understood. The committee is aware of the concerns that were raised by the Faculty of Advocates in respect of section 9, and my officials met a representative from the faculty to discuss those concerns and section 9 in general.

A number of the points that were raised in those discussions go beyond third-party rights into possible wider changes to the law of arbitration. Such changes were not part of the recommendations of the Scottish Law Commission that underpin the bill and, unlike those recommendations, have not been consulted on. I therefore do not consider the bill to be the right vehicle for addressing all the points that were raised by the Faculty of Advocates. However, to the extent that the points raised by the faculty expose a certain amount of confusion about what section 9(3) is intended to achieve, there is merit in amending it to clarify the intended relationship between section 1 and section 9.

The bill is intended to allow contracting parties to give third parties a right to resolve disputes by arbitration, even if the dispute arises from outside the contract—for example, personal injury claims that arise under the law of delict. The essentials necessary for the creation of such a procedural third-party right to arbitrate are the same as for any third-party right and are set out in section 1.

Section 1 is the legal basis for a third-party right to arbitrate, as it is for any other kind of third-party right. However, without further provision, a third

party would be unable to enforce that right because, under the Arbitration (Scotland) Act 2010, only a person who is a party to an arbitration agreement can go to arbitration. Section 9 is a technical fix to overcome that obstacle. It allows someone with a third-party right to arbitrate to be treated as a party to the relevant arbitration agreement.

Section 9 is what is often called a deeming provision. It provides for someone who is not a party to an arbitration agreement to be deemed to be a party. It is a common drafting device. Exactly the same approach to the issue of allowing third parties to arbitrate is taken in section 8 of the Contracts (Rights of Third Parties) Act 1999, which applies to England and Wales.

Amendment 1 is intended to make it explicit in section 9(3)(c) that the third-party right is to enforce the undertaking to arbitrate. That should remove any doubt that the third-party right referred to in that subsection must be a third-party right arising under section 1.

Amendment 2 is consequential on amendment 1.

I move amendment 1.

The Convener: As no colleague has a comment, is there anything that you want to say in winding up, minister?

Annabelle Ewing: No. I have explained our position. Thank you.

Amendment 1 agreed to.

Amendment 2 moved—[Annabelle Ewing]—and agreed to.

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4, 5 and 7.

Annabelle Ewing: We have had an opportunity to reflect on the view offered by Professor Vogenauer on section 10 and also the Law Society of Scotland's evidence to the Scottish Government that the provision is superfluous. We have concluded that section 10(1) is not needed.

Section 10(1) provides for the third party to renounce their right and confirms that the effect of such renunciation is extinction of the right. It is simply a statement of what is already a matter of general principle. However, section 10(2) remains in point, as it provides that where a third party raises a court action it is not to be taken as a renunciation of the right to submit the same dispute to arbitration.

Amendment 5 will leave out section 10, while amendment 3 will move what is presently section 10(2) to sit within the wider arbitration provisions under section 9.

Amendments 4 and 7 simply remove cross-references to section 10.

I move amendment 3.

The Convener: As no member has a comment to make, do you have anything to add in winding up, minister?

Annabelle Ewing: No. Thank you.

Amendment 3 agreed to.

Amendment 4 moved—[Annabelle Ewing]—and agreed to.

Section 9, as amended, agreed to.

Section 10—Renunciation of third-party right

Amendment 5 moved—[Annabelle Ewing]—and agreed to.

Section 11 agreed to.

Section 12—Abolition of common-law rule: *jus quaesitum tertio*

The Convener: Amendment 6, in the name of the minister, is in a group on its own.

10:15

Annabelle Ewing: In written evidence to the committee, Shepherd and Wedderburn raised the very valid issue of how the bill would impact on contingent or conditional third-party rights that have not yet crystallised at the point at which the bill's provisions are commenced. It was not the intention that the bill should impact adversely on those rights. The amendment to section 12(1) addresses that point.

In that regard, it is important to point out that, because section 13 allows contracting parties to choose to apply the bill's third-party rights rules to pre-commencement undertakings, a single undertaking could give rise to a common-law and a statutory third-party right. That is why amendment 6 adds new subsections (1A) and (1B) to section 12.

The purpose of new subsection (1A) is to ensure that if a pre-commencement contract gives rise to a statutory third-party right, any parallel common-law right becomes unenforceable. That is to avoid the confusion that could result from a third party simultaneously having a common-law and a statutory third-party right.

Linked to that, new subsection (1B) will prevent a third party from being able to assign a statutory third-party right to enforce an undertaking—which means that someone else can enforce it—and then be able to enforce it themselves through a revived common-law right.

I move amendment 6.

The Convener: Thank you for that clarification.

I see that members have no comments to make. I presume that you have nothing further to add, minister.

Annabelle Ewing: No.

Amendment 6 agreed to.

Section 12, as amended, agreed to.

Section 13—Application

Amendment 7 moved—[Annabelle Ewing]—and agreed to.

Section 13, as amended, agreed to.

Sections 14 and 15 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and her colleagues for coming to the meeting and delivering the stage 2 process.

Annabelle Ewing: Thank you.

10:17

Meeting suspended.

10:18

On resuming—

Instruments subject to Negative Procedure

Loch Carron Urgent Marine Conservation (No 2) Order 2017 (SSI 2017/205)

The Convener: Under agenda item 3, the first negative instrument for consideration is SSI 2017/205, which urgently revokes and replaces the Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158). It does so as a result of the Loch Carron marine protected area being redesignated as a nature conservation marine protected area by the Loch Carron Nature Conservation Marine Protected Area (No 2) Order 2017.

The order was made and laid before the Parliament on 14 June 2017, and it came into force on 15 June. It does not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.

Accordingly, does the committee agree to draw the order to the attention of Parliament under reporting ground (j), as there has been a failure to lay it in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

The Convener: Does the committee also agree to find the failure to comply with section 28(2) to be acceptable in the circumstances, as outlined in correspondence from the Scottish Government that is contained in our papers?

Members indicated agreement.

Building (Miscellaneous Amendments) (Scotland) Amendment Regulations 2017 (SSI 2017/214)

The Convener: The regulations amend the Building (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/188), which the committee considered at its meeting last week. The regulations were made and laid before the Parliament on 20 June 2017 and come into force on 30 June. They do not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

Accordingly, does the committee agree to draw the regulations to the attention of the Parliament

under reporting ground (j), as there has been a failure to lay them in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee also agree to find the failure to comply with section 28(2) to be acceptable in the circumstances, as outlined in correspondence from the Scottish Government that is contained in our papers?

Members *indicated agreement.*

Carers (Scotland) Act 2016 (Prescribed Days) Regulations 2017 (SSI 2017/207)

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 (Summary Application Rules 1999 Amendment) (Trafficking and Exploitation Orders) 2017 (SSI 2017/211)

10:21

The Convener: This act of sederunt amends the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 in consequence of the Human Trafficking and Exploitation (Scotland) Act 2015. Paragraphs 2(2)(b)(i) and 2(2)(b)(ii) insert references to a

“trafficking and exploitation prevention order”

and a

“trafficking and exploitation risk order”

respectively into rule 3.45.2 of the Summary Applications, Statutory Applications and Appeals etc Rules 1999. However, our legal advisers have identified that references to the equivalent interim orders—interim trafficking and exploitation prevention orders and interim trafficking and exploitation risk orders—have not been inserted.

The instrument was laid on 20 June 2017 and there was therefore no time available for formal questions and a response to be issued and received in time for the committee’s final meeting before the summer recess.

It is appropriate for the committee to consider the instrument before the recess because the error that has been identified relates in part to a provision that commences on 30 June 2017. Expediting the committee’s consideration of the instrument affords the committee an opportunity to comment on the drafting error before it comes into force rather than wait until its first meeting following recess, which will be on 5 September. As a result of the lack of time available, the committee liaised informally with the Lord President’s private office on the drafting error and it has agreed informally to correct the omissions.

Accordingly, does the committee agree to draw the instrument to the attention of the Parliament under the general reporting ground, as a result of the error identified at paragraphs 2(2)(b)(i) and 2(2)(b)(ii)?

Members *indicated agreement.*

The Convener: Does the committee also agree to welcome the fact that the Lord President’s private office has agreed informally to correct the omission in relation to interim trafficking and exploitation prevention orders at the next available opportunity, which it is anticipated will be within

the next few weeks, in light of the fact that such orders come into force on 30 June 2017?

Members *indicated agreement.*

The Convener: Finally, does the committee also agree to welcome the fact that the Lord President's private office has agreed informally to correct the omission in relation to interim trafficking and exploitation risk orders prior to such orders coming into force on 31 October 2017?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following three instruments.

**Mental Health (Scotland) Act 2015
(Commencement No 4 and Transitional
and Savings Provisions) Order 2017 (SSI
2017/197 (C 17))**

**Act of Sederunt (Rules of the Court of
Session 1994 Amendment) (Withdrawal of
Agents and Judicial Review) 2017 (SSI
2017/200)**

**Act of Sederunt (Rules of the Court of
Session 1994 and Sheriff Court Rules
Amendment) (Regulation (EU) 2015/848)
2017 (SSI 2017/202)**

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

10:26

Meeting continued in private until 10:47.

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