



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 1 September 2015

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DELEGATED POWERS AND LAW REFORM COMMITTEE

23rd Meeting 2015, Session 4

CONVENER

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

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Margaret McCulloch (Central Scotland) (Lab)

*John Scott (Ayr) (Con)

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

*attended

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 1 September 2015

[The Convener opened the meeting at 11:15]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning. I welcome members to the 23rd meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off mobile phones.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee takes items 11 and 12 in private. Item 11 is for the committee to consider its approach to the scrutiny of the Land Reform (Scotland) Bill at stage 1, and item 12 is consideration by the committee of the written evidence received on the Succession (Scotland) Bill.

Does the committee agree to take items 11 and 12 in private?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Scotland Act 1998 (Modification of Schedules 4 and 5) Order 2015 [Draft]

11:15

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

Members *indicated agreement.*

Scottish Parliament (Disqualification) Order 2015 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Wester Ross Marine Conservation Order 2015 (SSI 2015/302)

11:16

The Convener: The instrument was laid before the Parliament on 17 August 2015 and came into force on 18 August 2015. The requirement to leave a minimum of 28 days between laying and coming into force has therefore not been complied with. It was brought into force urgently, due to a breach of the voluntary management arrangement for the Wester Ross marine protected area.

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (j), as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee accept the Scottish Government's explanation for the breach of the 28-day rule?

Members *indicated agreement.*

Town and Country Planning (Hazardous Substances Inquiry Session Procedure) (Scotland) Amendment Rules 2015 (SSI 2015/250)

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

Members *indicated agreement.*

Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2015 (SSI 2015/260)

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

Members *indicated agreement.*

Court of Session etc Fees Order 2015 (SSI 2015/261)

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

Members *indicated agreement.*

High Court of Justiciary Fees Order 2015 (SSI 2015/262)

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

Members *indicated agreement.*

Justice of the Peace Court Fees (Scotland) Order 2015 (SSI 2015/263)

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

Members *indicated agreement.*

Sheriff Court Fees Order 2015 (SSI 2015/264)

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

Members *indicated agreement.*

Public Bodies (Joint Working) (Integration Joint Board Establishment) (Scotland) Amendment (No 2) Order 2015 (SSI 2015/266)

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

Members *indicated agreement.*

South Arran Marine Conservation Order 2014 (Urgent Continuation) Order 2015 (SSI 2015/303)

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

Members *indicated agreement.*

Queen Margaret University Edinburgh (Scotland) Amendment Order of Council 2015 (SSI 2015/305)

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 Adjournal (Criminal Procedure Rules 1996 Amendment) (No 4) (Sheriff Appeal Court) 2015 (SSI 2015/245)

11:18

The Convener: The instrument contains some minor drafting errors. First, in paragraph 2(9), the references in the substituted rule 19.11(1)(a) and (b) of the Criminal Procedure Rules 1996 to sections 179(9) and 187(9)(a) should be followed by the words “of the Act of 1995”.

Secondly, in paragraph 3, the reference to section 194ZF(2)(a) in the inserted rule 19E.4(1) should be followed by the words “of the Act of 1995”.

Thirdly, in paragraph 5(23)(b), the reference to paragraph 4 of form 38 should instead refer to paragraph 5.

Lastly, in form 19E.2, which is inserted by the schedule, the reference to rule 19E.2(4) should instead refer to rule 19E.2(5).

The Lord President’s private office has laid an instrument—SSI 2015/295—to correct the errors ahead of the instrument coming into force. That amending instrument will be considered later in the meeting.

Does the committee agree to draw this instrument to the attention of the Parliament on the general reporting ground, as it contains minor drafting errors?

Members *indicated agreement.*

Housing (Scotland) Act 2014 (Commencement No 3 and Transitional Provision) Order 2015 (SSI 2015/272)

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

Members *indicated agreement.*

Act of Adjournal (Criminal Procedure Rules 1996 and Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No 4) (Sheriff Appeal Court) 2015 Amendment) (Miscellaneous) 2015 (SSI 2015/295)

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

Members *indicated agreement.*

Act of Sederunt (Ordinary Cause Rules 1993 Amendment and Miscellaneous Amendments) 2015 (SSI 2015/296)

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

Members *indicated agreement.*

Health (Tobacco, Nicotine etc and Care) (Scotland) Bill: Stage 1

11:20

The Convener: The purpose of agenda item 5 is for the committee to consider the delegated powers provisions in the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill at stage 1.

The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the delegated powers in the bill in written correspondence. The committee will have the opportunity to consider the responses at a future meeting, before the draft report is then considered.

Section 3(1) confers a power on ministers to issue guidance on age verification policy. Section 3(1) inserts section 4B(5) into the Tobacco and Primary Medical Services (Scotland) Act 2010. Subsection (1)(b) of that new section 4B refers to the requirement for a person to operate an age verification policy in respect of premises at which the person carries on a tobacco or nicotine vapour product business—I may later refer later to a nicotine vapour product as an NVP. Subsection (3) enables an age older than 25 to be specified in a policy.

Subsection (5) of the new section lists various matters on which the Scottish ministers may publish guidance relating to age verification policies. It appears that matters other than those listed might be included in guidance. However, the list does not include guidance about what should be considered before a person decides to specify any age older than 25 in their policy.

Does the committee agree to ask the Scottish Government: to clarify whether it is intended that a person operating an age verification policy in relation to a tobacco or NVP business should have complete discretion to determine any age older than 25 that may be specified in their policy for the purposes of subsection (3) of section 4B; to clarify whether it is intended that the guidance that is issued by ministers under subsection (5) should or should not include guidance on how any such older age may be determined; and whether, therefore, the new section 4B could be clearer in providing for the intentions that underlie the provisions?

Members indicated agreement.

The Convener: Section 17(1) enables ministers by regulations to make provision prohibiting or restricting

“an activity, in the course of a business, which relates to”

an NVP advert or NVP brand sharing. The delegated powers memorandum acknowledges that that power is widely drawn. Further clarity on the scope of the power to regulate related activities might be beneficial.

Does the committee agree to ask the Scottish Government: why it considers that the wide power in section 17(1) to make provision prohibiting or restricting

“an activity, in the course of a business, which relates to”

an NVP advert or NVP brand sharing is appropriately drawn and could not be framed more transparently or narrowly in order to provide a description or list of activities related to NVP advertising or brand sharing that may be included within the regulations; what related activities it considers would be potentially within the scope of the power; and to provide examples of the activities that the Scottish Government intends could be covered by the regulations?

Members indicated agreement.

The Convener: Subsections (2)(b) and (c) of section 17 enable the regulations under subsection (1) that specify offences to provide for exceptions and defences to such offences. There is currently no description or list of exceptions or defences of offences that may be included in the regulations.

Does the committee agree to ask the Scottish Government: whether the power in sections 17(2)(b) and (c) could be drawn more transparently or precisely to include a description or list of exceptions or defences to offences that might be included in the regulations in accordance with the Scottish Government's intentions, albeit that an initial description or list might in future be modified by regulation; or, otherwise, to please explain why it has been considered appropriate to include the provisions in sections 17(2)(d) and (e) on enforcement but not to include further provision as to exceptions and defences?

Members indicated agreement.

The Convener: Section 18(1) will enable ministers to make regulations to prohibit or restrict, in the course of a business, the giving away of NVPs—and coupons for those products—for free, including retailing them for a nominal value. Section 19(1) will enable regulations to prohibit or restrict a person in the course of a business from entering into a sponsorship agreement where the purpose or effect of anything done as a result of it promotes a NVP.

Both section 18(2) and 19(2) contain a non-exhaustive list of the kind of provision that could be made in regulations, including enforcement, offences, defences and exceptions. There is currently no description or list of exceptions or

defences to offences that might be included in the regulations.

Therefore, as for the powers in section 17(2)(b) and (c), does the committee agree to ask the Scottish Government: whether sections 18(2) and 19(2) could be drawn more transparently or precisely to include a description or list of exceptions or defences to offences that may be included in the regulations in accordance with the Scottish Government's intentions, albeit that an initial description or list might in future be modified by regulation; or, otherwise, to please explain why it has been considered appropriate to include the provisions in sections 18(2)(e) and (f) and 19(2)(d) and (e) on enforcement but not to include further provision as to exceptions and defences?

Members indicated agreement.

The Convener: Section 20 will insert section 4D into the Smoking, Health and Social Care (Scotland) Act 2005. Section 4D(1) defines

"no-smoking area outside a hospital building"

as meaning an area

"lying immediately outside the hospital building, and ... bounded by a perimeter the specified distance from the building."

New section 4D(2)(a) will enable ministers to make regulations to prescribe the specified distance of the perimeter. The delegated powers memorandum explains that the perimeter distance to be specified under the power is a key aspect of the proposed policy.

Does the committee agree to ask the Scottish Government for further explanation as to why a proposed initial perimeter distance could not, following consultation on the bill, have been included in the proposed new section 4D of the 2005 act for consideration by Parliament and consultation with stakeholders during the stages of the bill's passage? It appears possible to provide that such an initially proposed distance be variable by means of regulations. Do we agree to ask why the Scottish Government has considered it more appropriate for the distance to be proposed in regulations at a later stage?

Members indicated agreement.

The Convener: The DPM states at paragraph 87 that, for consistency, it is intended that the same perimeter distance of a proposed no-smoking area is to apply to all NHS hospital buildings. However, the proposed new section 4D(1) and (2) of the 2005 act do not in terms provide that only one distance may be specified for the purposes of all health service hospital buildings. The ancillary powers in section 32(1) enable the regulations to make different provision for different purposes.

Does the committee agree to ask the Scottish Government whether the policy intention to prescribe a single perimeter distance could be made clearer in the provisions?

Members indicated agreement.

The Convener: Section 22(1) will confer powers on ministers to specify the actions that should be taken by the "responsible person"—the duty of candour procedure. A "responsible person" is one of the bodies—including health boards—as defined in section 25 that provide health, care or social work services. Further information about why secondary legislation is appropriate here and how it might be used may be beneficial.

Does the committee therefore agree to ask the Scottish Government to explain why it has been considered appropriate to set out all the details of the duty of candour procedure in regulations, under the framework of particular matters that might be included, as set out in section 22(2)(a) to (k), and to provide examples of how the power might be exercised to set out specific procedures and requirements on a "responsible person"? In particular, examples could be provided of the types of actions, steps and requirements that might be required of a "responsible person" under section 22(2)(d), (g) or (i).

Members indicated agreement.

The Convener: The wording of the ancillary powers in section 33(1) differs from, for example, the wording of section 97(1) of the Community Empowerment (Scotland) Bill, as passed. Yet different wording is used in section 25 of the Succession (Scotland) Bill, which the committee is also considering currently.

Does the committee agree to ask the Scottish Government to explain why the different wording used in section 33(1) is appropriate, and what the effect of the provision will be, compared with the formulations used in the Community Empowerment (Scotland) Bill and the Succession (Scotland) Bill? Does the committee agree that, for consistency, if the effect of ancillary powers in different bills is intended to be the same, the same wording ought to be used?

John Mason (Glasgow Shettleston) (SNP): I just wonder how important this is. People say things in different ways but they end up meaning the same thing. Is it really important that we all have exactly the same wording or the same type of wording in different bills? I throw that in just by way of comment.

John Scott (Ayr) (Con): If the words are different, presumably they have a different meaning in law thereafter and they are open to different interpretations. If the intentions are the

same, would it not make sense for the words to be consistent one with another?

The Convener: Shall we ask the question? It seems reasonable that there is a catch-all set of words that would be in any statute and changed only when something was not meant to be caught by the statute.

We shall ask the question.

Community Justice (Scotland) Bill: Stage 1

11:30

The Convener: The purpose of item 6 is for the committee to consider the delegated powers provisions in the Community Justice (Scotland) Bill at stage 1. The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the delegated powers. The committee will have the opportunity to consider the responses at a future meeting, before the draft report is then considered.

Section 3(4) of the bill provides for the Scottish ministers to confer additional functions on, or transfer another person's functions to, community justice Scotland. Section 3(5) provides that regulations that are made under section 3(4) may modify any enactment. The DPM does not appear to explain how those powers might be exercised.

In relation to the powers in sections 3(4)(c) and 3(5), does the committee agree to ask the Scottish Government: why, specifically, the power to make changes to the main functions of community justice Scotland as listed in section 3(1) is appropriate and how the Scottish Government might exercise the power to modify that subsection; and, secondly, which functions of community justice Scotland as described in section 3(1) and elsewhere in the bill are functions

"in relation to community justice"

that may be changed by regulations and whether it would be clearer if the provision set out which of the functions that are described in the bill could be changed and which could not?

Members *indicated agreement.*

Succession (Scotland) Bill: Stage 1

11:32

The Convener: The purpose of item 7 is for the committee to consider the delegated powers provisions in the Succession (Scotland) Bill at stage 1.

The committee is invited to agree the questions that it wishes to raise with the Scottish Government. We will have an opportunity to consider the responses at a future meeting, before the draft report is then considered.

The wording of the ancillary powers in section 25(1) differs from, for example, that in section 97(1) of the Community Empowerment (Scotland) Bill as passed and as just discussed. Does the committee therefore agree to ask the Scottish Government to explain why the different formulation that is used in section 25(1) is appropriate, and what the effect of the provision is in comparison with the formulation used in, for example, section 97(1) of the Community Empowerment (Scotland) Bill)?

Does the committee also agree that, for consistency, if the effect of ancillary powers in different bills is intended to be the same, the same wording ought to be used?

Members indicated agreement.

Interests of Members of the Scottish Parliament (Amendment) Bill: Stage 1

11:33

The Convener: We come to agenda item 8.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Convener, it would be appropriate for me to declare that, as the introducer of the bill that the committee is about to discuss, I will not take any part in the discussion.

The Convener: Thank you. I take it that you do that as the convener of the relevant committee—I am struggling to remember its full name.

Stewart Stevenson: The Standards, Procedures and Public Appointments Committee.

The Convener: Thank you. It is in that capacity that you have made that declaration.

Members are invited to consider the delegated powers contained in the Interests of Members of the Scottish Parliament (Amendment) Bill. If members are content with the recommendations in the paper, they will form the basis of a report to Parliament and the committee will not discuss the draft report before it is published.

Is the committee content with the delegated power in section 17?

Members indicated agreement.

The Convener: Does the committee agree to refer to the Standards, Procedures and Public Appointments Committee the following questions? First, do we agree to ask whether any changes to standing orders are contemplated in implementation of the bill, in light of the resolution-making power in section 17, to include specific provision for appropriate parliamentary scrutiny of any such resolution? An example of such provision can be found in standing orders in respect of motions seeking modification of the parliamentary pension scheme or grants scheme.

Secondly, does the committee agree to ask whether any changes to standing orders are contemplated in respect of a resolution of the Scottish Parliament to change the registrable interests set out in the schedule to the Interests of Members of the Scottish Parliament Act 2006 to include specific provision for appropriate parliamentary scrutiny of any such resolution?

Members indicated agreement.

British Sign Language (Scotland) Bill: After Stage 2

11:35

The Convener: This item is consideration of the delegated powers provisions in the British Sign Language (Scotland) Bill after stage 2. It is expected that the stage 3 debate will take place in early September so members should agree their conclusions today.

After stage 2, one power to make subordinate legislation has been removed and another has been amended. Does the committee agree to report that it is content with the delegated powers in the bill that have been amended or removed at stage 2?

Members *indicated agreement.*

Education (Scotland) Bill: Stage 1

11:35

The Convener: The purpose of item 10 is to consider the Scottish Government's response to the committee's report on the Education (Scotland) Bill at stage 1. The Government agreed with the committee's recommendations and will bring forward amendments to the bill to give them effect. I invite members to note that.

Members *indicated agreement.*

The Convener: At this point, we come to item 11 and I move the meeting into private.

11:36

Meeting continued in private until 12:10.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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