



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 19 January 2016

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DELEGATED POWERS AND LAW REFORM COMMITTEE
3rd Meeting 2016, Session 4

CONVENER

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

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*John Scott (Ayr) (Con)

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

James Kelly (Rutherglen) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 19 January 2016

[The Convener opened the meeting at 11:01]

Instruments subject to Negative Procedure

Public Contracts (Scotland) Regulations 2015 (SSI 2015/446)

The Convener (Nigel Don): I welcome members to the third meeting in 2016 of the Delegated Powers and Law Reform Committee, and I ask them to switch off mobile phones.

I welcome James Kelly as a substitute member for this morning's meeting.

James Kelly (Rutherglen) (Lab): Thank you, convener.

The Convener: The first instrument for consideration is the Public Contracts (Scotland) Regulations 2015 (SSI 2015/446). Its purpose is to revoke and replace the Public Contracts (Scotland) Regulations 2012 (SSI 2012/88) and to transpose into domestic law directive 2014/24/EU on public procurement.

The regulations could be clearer in the following respect. Regulation 2 defines the term "central government authority" as

"the authorities listed in Schedule 1 and, where any such authority is succeeded by another authority which is itself a contracting authority, their successors".

Regulation 2 also defines the term "contracting authority" as

"the state, a regional or local authority, body governed by public law or association formed by one or more such authorities or bodies".

Directive 2014/24/EU defines "central government authorities" as the contracting authorities that are listed in annex 1, but the definition of "central government authority" in regulation 2 refers not to "contracting authorities" but only to "authorities". The central government authorities that are listed in schedule 1 of the regulations are intended to be contracting authorities for the purposes of the regulations, but the definition of "central government authority" as set out in regulation 2(1) does not make that policy intention clear.

The regulations also contain a number of cross-referencing errors. Paragraphs (5), (6) and (7) of

regulation 4 refer to, respectively, paragraphs (5)(a), (5)(b) and (5)(c). The references should instead be to paragraphs (4)(a), (4)(b) and 4(c). Regulation 38(1) refers to paragraph (9)(a), but there is no paragraph (9) in regulation 38. Regulations 85(3)(a) and 85(3)(b) refer to, respectively, regulations 43(11) and 43(10). The references should instead be to regulations 43(14) and 43(13). Regulation 91(2) refers to paragraph (10)(b). The reference should instead be to regulation 92(1)(b).

Regulation 99(5) defines the term "the Utilities amendments" as the amendments made to the Utilities Contracts (Scotland) Regulations 2012 (SSI 2012/89)—which are defined as "the UCR"—by paragraph 9 of schedule 6. The reference to paragraph 9 should instead be to paragraph 8. Finally, the new paragraphs (10)(1)(b) and 10(2) of schedule 3 to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (SSI 2013/50) as substituted by paragraph 10 of schedule 6 to the regulations refer to regulation 80 when they should refer to regulation 79.

Do members have any comments?

John Scott (Ayr) (Con): Given the Government's apparent willingness—which I welcome, of course—to correct the cross-referencing errors, I think that, when it re-lays the instrument, it ought to take the opportunity to remove from regulation 2 the ambiguity that the convener explained. It seems reasonable that the difference between "authorities" and "contracting authorities" should be made clear.

For the life of me, I cannot see why the Government would not want to take the opportunity to remove the ambiguity that our legal advisers tell us exists. If they perceive it, I am certain that, in future, other legal advisers, solicitors and lawyers will also perceive it, so why would we not take the opportunity to make the legislation clear when we have it?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): When there is potential doubt about the instrument that is before us and there is an amending instrument coming, there appears to be no downside in making the position clearer, and I think that we should seek to have the Government make the necessary change.

The Convener: That is clearly the view of the committee.

Does the committee agree to draw the instrument to the attention of the Parliament under reporting ground (h), as the meaning of regulation 2(1) could be clearer, and the general reporting ground, given the cross-referencing errors?

Members indicated agreement.

The Convener: We would like the Government to deal with both.

Local Government Pension Scheme (Scotland) Amendment (No 2) Regulations 2015 (SSI 2015/448)

The Convener: Regulation 29(e) inserts a definition of

“the Transitional and Savings Regulations 2014”

in schedule 1 to the Local Government Pension Scheme (Scotland) Regulations 2014 (SSI 2014/164). However, the Scottish Government has confirmed that the policy intention was to insert a definition of “the Transitional Provisions and Savings Regulations 2014” in that schedule.

The committee may wish to note that the Scottish Government has undertaken to correct the error by a further amending instrument, which is to come into force on 2 February 2016.

Does the committee agree to draw the instrument to the Parliament's attention under the general reporting ground?

Members indicated agreement.

Public Bodies (Joint Working) (Integration Joint Board Establishment) (Scotland) Amendment Order 2016 (SSI 2016/2)

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

Members indicated agreement.

Health Boards (Membership and Procedure) (Scotland) Amendment Regulations 2016 (SSI 2016/3)

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

Members indicated agreement.

Community Right to Buy (Scotland) Amendment Regulations 2016 (SSI 2016/4)

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

Members indicated agreement.

Local Governance (Scotland) Act 2004 (Remuneration) Amendment Regulations 2016 (SSI 2016/6)

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

Members indicated agreement.

Scottish Local Government Elections Amendment Order 2016 (SSI 2016/7)

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

Members indicated agreement.

Representation of the People (Absent Voting at Local Government Elections) (Scotland) Amendment Regulations 2016 (SSI 2016/8)

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

Scottish Parliament Elections (Returning Officer Fees and Charges) Regulations 2016 (SSI 2016/10)

11:08

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

Members *indicated agreement.*

Transplantation (Authorisation of Removal of Organs etc) (Scotland) Bill: Stage 1

11:08

The Convener: The purpose of agenda item 3 is for the committee to consider the response from the member in charge of the Transplantation (Authorisation of Removal of Organs etc) (Scotland) Bill to its stage 1 report.

If members have no comments, is the committee content to note the response?

Members *indicated agreement.*

“The work of the Delegated Powers and Law Reform Committee in 2014-15”

11:08

The Convener: The purpose of agenda item 4 is for the committee to consider the Scottish Government’s response to our report on our work during 2014-15. The correspondence supplements the oral evidence session that the committee held with the Minister for Parliamentary Business on 15 December 2015.

Do members have any comments?

John Mason (Glasgow Shettleston) (SNP): The final paragraph on page 4 of the letter from the minister is headed “Bills containing ‘framework’ provisions”. In the second sentence, the minister says:

“There is however, a place for Bills that provide an outline within which policy can be fully developed with stakeholders then implemented by subordinate legislation.”

I have some reservations about that sentence, which could be taken to mean a few things. I would be more happy if it just meant that the vast bulk of the policy was in the bill and there was room for a little bit of movement in subordinate legislation, which I think is what we are aiming at. However, the way in which the sentence is written suggests that its meaning could be much wider than that, to the extent that there is little policy in the bill and far too much is left to subordinate legislation—and we have seen examples of that.

Therefore, I do not fully agree with the minister on that point. I do not know whether we should say that to him or just leave it until later.

John Scott: I back up what my colleague John Mason has said. I, too, am very concerned about the apparent trend of leaving policy development to subordinate legislation and to engagement with stakeholders. Parliament exists to create legislation—that is why we are the elected representatives of the people of Scotland—and I do not think that the trend has emerged is beneficial from the point of view of creating good legislation. I say that it is a trend, because in the past year we have had the Community Empowerment (Scotland) Bill, the Land Reform (Scotland) Bill, and the Burial and Cremation (Scotland) Bill, all of which have been short of policy, with the policy being left to be developed in subordinate legislation. I do not think that Parliament should be happy about that.

I again draw the matter to the Government’s attention. We have already raised it with the minister and, in other respects, I welcome his

response to the committee, but I think that we should write to him again to say that we are not content with the new trend that we have spotted. If that is to be the way in which legislation is developed in future, he should say so loudly, clearly and publicly, because it is certainly a departure from what has been the law-making process hitherto.

Stewart Stevenson: I think that there are a couple of points that we should put on the record. First, if such an approach is being taken, we should remind all who might be watching our proceedings that we would expect the changes in law in question to be made in affirmative instruments. We have made that point quite regularly, and it is as well that we remake it.

Equally, the fact that those affirmative instruments would be bringing forward new policy is an important point for the committees that are responsible for policy in the areas concerned. In writing to the minister, we might well want to seek an assurance that, when secondary legislation is the means by which new policy is brought forward, timetables will be arranged such that subject committees have adequate time to consider the policy issues. With other subordinate legislation, the policy committees are looking to see whether it properly implements policy that Parliament has already discussed and agreed. There is a difference of approach in the cases we are discussing, and it would be helpful to get the Government to recognise that that difference exists and to make appropriate commitments to Parliament that it will ensure that there is sufficient time for policy changes that are brought forward by secondary legislation to be adequately and properly considered.

The Convener: The issue is maybe not to do with the traditional conception of a super-affirmative process whereby there is more consultation; it is maybe about having a process whereby more time is given beforehand to ensure that policy is properly considered.

John Scott: I think that it would be not unreasonable for the committee to write to the minister to ask him to explain how he sees the new process whereby policy is developed through subordinate legislation evolving, because there are nuances, as Stewart Stevenson has accurately described. The issue should be one for Parliament's wider consideration.

John Mason: I think that what we are seeing happening is a product of the fact that we are getting towards the end of the session, and I think that we might have seen it happen regardless of the colour of the Government that was in place. Throughout the session, there have been many bills that have been extremely thoroughly examined before they were even drafted—they

were consulted on and all the rest of it—and all the policy has been laid out on the face of the bill. Therefore, I think that it is a timing issue.

I think that we all accept that it is necessary to speed things up towards the end of a session, but when we are dealing with a major piece of legislation—the Land Reform (Scotland) Bill, which is extremely wide reaching, is such an example—there must be adequate time for the consideration process.

The Convener: That discussion is on the record, and the Government will be listening. On the basis of that, I will see whether I can draft a letter that we might consider sending to the Government as a response to Joe FitzPatrick's response to us. Are members content with that?

Members indicated agreement.

The Convener: That completes agenda item 4 and we move into private.

11:15

Meeting continued in private until 11:27.

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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