



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 2 February 2016



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**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**5<sup>th</sup> 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:**

Robert Buchan (Scottish Government)

Greig Walker (Scottish Government)

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

The Sir Alexander Fleming Room (CR3)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 2 February 2016*

*[The Convener opened the meeting at 11:01]*

### Decision on Taking Business in Private

**The Convener (Nigel Don):** Good morning. I welcome members to the fifth meeting in 2016 of the Delegated Powers and Law Reform Committee. As always, I ask everyone to switch off their mobile phones.

Agenda item 1 is a decision on taking business in private. Do members agree to take in private item 9, which is consideration of the evidence that we will receive on the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill?

**Members** *indicated agreement.*

## Instruments subject to Affirmative Procedure

### Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [Draft]

11:01

**The Convener:** The regulations are made under the power in section 165 of the Local Government etc (Scotland) Act 1994, which enables the Scottish ministers to make provision with respect to the powers of “authorities” to borrow and lend money, and to establish and operate loan funds.

The term “authorities” is defined for the purpose of section 165 and includes the Strathclyde Passenger Transport Authority—the SPTA. However, the term “authorities” is defined for the purposes of the instrument as including not the SPTA but the regional transport partnership for the west of Scotland—designed as the Strathclyde partnership for transport—established under the Transport (Scotland) Act 2005.

There is no narration of how the functions of the SPTA have been transferred to the west of Scotland transport partnership. In the circumstances, narrating that transfer of functions would have been proper drafting practice.

Does the committee therefore agree to draw the instrument to the Parliament’s attention under the general reporting ground, as there has been a failure to follow proper drafting practice?

**Members** *indicated agreement.*

### Scotland’s Adoption Register Regulations 2016 [Draft]

**The Convener:** Regulation 5(6) provides that when, after information is provided under the regulation for inclusion in the adoption register, it is decided that the person in respect of whom the information was provided is no longer suitable to be an adoptive parent, “an adoption agency” must as soon as is reasonably practicable notify the Scottish ministers and inform them of the reason for the decision. Those requirements enable the adoption register to be brought up to date.

The Scottish Government’s intention is that the adoption agency that decides that the person is no longer suitable to be an adoptive parent—which might not be the same as the agency that approved suitability—must implement the requirements of regulation 5(6). The committee may consider that the provision could more clearly implement that intention.

Does the committee therefore agree to draw the regulations to the attention of the Parliament on the reporting ground (h), as the meaning of regulation 5(6) could be clearer?

**Members** *indicated agreement.*

### **Procurement (Scotland) Regulations 2016 [Draft]**

**The Convener:** Some provisions of the regulations are made by virtue of provision in the Procurement Reform (Scotland) Act 2014 that applies to “regulated procurements”. Others are made by virtue of provision in the 2014 act that applies to “regulated contracts”. Yet other provisions are made by virtue of provision in the 2014 act that applies to “regulated procurements” and “EU-regulated procurements”, and others are made by virtue of provision that applies to “regulated procurements” but not those which are “EU-regulated”.

In that way, regulations 4, 6 and 12, apply to differing types of contract or procurement. However, the provisions make no reference to a “regulated procurement” or “regulated contract”, apart from one reference in regulation 11(1).

**John Scott (Ayr) (Con):** Can I just correct you? It is regulations 4, and 6 to 12, rather than 4, 6 and 12.

**The Convener:** Thank you—you are absolutely right. It is one of those mornings.

The committee may consider that it would have been appropriate drafting practice in these circumstances to have specified in the relevant regulations, as well as in the explanatory note, which types of contract or procurement the regulations apply to. Alternatively, where it might be more suitable drafting, a regulation could have made reference back to the section of the act specifying which type of contract or procurement the provision applies to. That would have helped the reader to understand the extent of the provisions.

Does the committee agree to draw the regulations to the attention of the Parliament on the general reporting ground, as there has been a failure to follow proper drafting practice?

**Members** *indicated agreement.*

### **Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 [Draft]**

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

**Members** *indicated agreement.*

### **Budget (Scotland) Act 2015 Amendment Regulations 2016 [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

11:06

### **Local Government Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/32)**

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

**Members** *indicated agreement.*

### **Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/33)**

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

**Members** *indicated agreement.*

### **Nature Conservation (Scotland) Act 2004 (Authorised Operations) Order 2016 (SSI 2016/38)**

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

**Members** *indicated agreement.*

### **Pollution Prevention and Control (Scotland) Amendment Regulations 2016 (SSI 2016/39)**

**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

11:06

### **Local Government etc (Scotland) Act 1994 (Commencement No 9) Order 2016 (SSI 2016/31)**

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

**Members** *indicated agreement.*

### **Specified Diseases (Notification) Amendment (Scotland) Order 2016 (SSI 2016/41)**

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

**Members** *indicated agreement.*

### **Water Act 2014 (Commencement No 2) (Scotland) Order 2016 (SSI 2016/48)**

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

**Members** *indicated agreement.*

## Land and Buildings Transaction Tax (Amendment) (Scotland) Bill: Stage 1

11:07

**The Convener:** Item 5 is for the committee to consider the delegated powers in the Land and Buildings Transaction Tax (Amendment) (Scotland) Bill.

The timetable for considering the bill is short: it is being considered by the Finance Committee tomorrow. I have invited Scottish Government officials to give evidence. The committee will reflect on that evidence and, at item 9, will agree on the terms of a draft report.

I welcome Robert Buchan, who is the bill team leader, and Greig Walker, a solicitor in the Scottish Government legal directorate. Thank you for coming along, gentlemen, and for sitting through that preamble. We have only one real substantive question, which will be put by John Mason.

**John Mason (Glasgow Shettleston) (SNP):** The main issue that we want to raise is that of the £40,000 threshold and how it might be adjusted. I have a few points to make, if you will bear with me.

The proposed power in paragraph 14(2) of new schedule 2A allows the Scottish ministers to adjust the £40,000 threshold in paragraph 9(3) of that schedule. The £40,000 threshold is relevant when determining whether the additional tax will be triggered. The purchase of additional property with a market value below that figure will not trigger the additional charge, whereas the purchase of a property worth £40,000 or more may do so.

We would like an explanation of why it is considered appropriate for that power to be subject to the negative procedure. The committee notes that powers in the Land and Buildings Transaction Tax (Scotland) Act 2013 to adjust tax rates and bands for the ordinary land and buildings transaction tax charge are subject to the affirmative procedure when first exercised and thereafter to the provisional affirmative procedure.

The committee considers that the power in paragraph 14(2) is a similar power, in that it allows the Scottish ministers to adjust the threshold below which liability for the additional charge will not apply. We feel that that is not an administrative point—it is a change in the tax rates and bands. A comparator would be the power to change the level of the 3 per cent additional charge, which I understand is subject to the provisional affirmative procedure and not to the negative procedure.

Generally, the committee considers that a power to adjust thresholds for tax liability should more properly be subject either to the affirmative or the provisional affirmative procedure. Do you have any thoughts on that?

**Robert Buchan (Scottish Government):** I will defer to Greig Walker in a moment to talk about the different ways in which the threshold can be varied, but from a policy perspective the reason why it was felt necessary to have the power to vary the £40,000 threshold separately from the threshold to notification was that it is conceivable that the Scottish ministers may want the two to diverge in future. There may be good reasons in the future that we are not aware of now for increasing the threshold beyond £40,000 for the purposes of the supplement, and those reasons would not necessarily mean that the threshold for notification per se should be increased.

**John Mason:** Is that why there are two figures rather than one?

**Robert Buchan:** Yes.

**John Mason:** Okay, that makes sense.

**Robert Buchan:** From a policy perspective, that is about as far as it goes from me. Greig Walker may want to add something.

**Greig Walker (Scottish Government):** As Robert Buchan has said, we have said in the delegated powers memorandum that there is a synergy between the £40,000 figures that appear in different parts of the Land and Buildings Transaction Tax (Scotland) Act 2013. The current policy is for them to be aligned, and an alternative way of reflecting that in the bill would have been to say in new schedule 2A that the figure is the figure that is already in section 30. However, as Robert Buchan has mentioned, because we need to build in flexibility for the future, we have made the figures severable.

We view the new power in the new schedule 2A as similar to the power in section 30 of the 2013 act. That is a relevant precedent that is subject to negative procedure. Having the same procedure applicable means that two measures could be combined in a single instrument, rather than having two measures at different times and subject to different procedures to achieve a common policy intention.

The point about the tax rates and bands orders always being subject to a form of affirmative procedure is absolutely right. I would comment in terms of the section 30 power that if, having no regard to the bill, there was a proposal to vary the notification threshold below £40,000 or above, that would have significant legal consequences for the duties of taxpayers and their agents to send in



returns. It might not affect whether tax is payable, but it could have some impact.

The reason why affirmative procedure applied to the first rates of devolved tax was that there were no figures in the first LBTT bill. There was some time between that bill being passed in 2013 and its coming into effect in April 2015. Here, we have an expedited legislative procedure with commencement scheduled in the bill for 1 April. We have all the rates in the bill, so I do not think that there is a comparator for full affirmative procedure. For the reasons that we have set out, we feel that negative procedure strikes the right balance.

**John Mason:** I want to question that a little bit more, and my colleagues may want to come in as well.

I take the point that we may not be dealing with this measure in quite the same way as we dealt with the full LBTT legislation and that the interim step of full affirmative procedure is therefore not so necessary. However, I would still argue that the provisional affirmative procedure for future changes is necessary. It still seems to me that, if we are comparing the two £40,000 thresholds, changing the threshold in relation to the 3 per cent rate is like changing the 3 per cent rate, in that what somebody actually pays in tax changes, whereas the notification threshold is more administrative. I feel that the two are not quite the same.

Although it has already been pointed out that the two thresholds might not be varied together, or that they might be, my point is still that the two are slightly different things: one is administrative and one is the actual tax. We will hear from others on the committee, but my preference is that it should be the provisional affirmative procedure.

**The Convener:** I would like to intervene from the chair. I have heard everything that you say, Mr Walker, and I agree that, if something is in the bill, there is no need to treat it as if it were not. I do not think that we have any troubles with that.

The difficulty that I have with the idea that the £40,000 threshold for the 3 per cent rate could be varied using negative procedure—and with the idea that it could be compared in any way with whether people need to fill in a form—is quite simply that it could have significant effects on whether I pay tax. If that number was reduced, I could find myself in a position in which I have to pay 3 per cent on an entire transaction when I did not before. It is as simple as that, and 3 per cent on an entire transaction could be an awful lot of money.

There are policy implications that go beyond anything to do with whether a person needs to fill in a piece of paper. It feels to me—and, I think, to

my colleagues—as though this threshold is actually a tax band, because that is how it behaves. As you have already said, you would set bands by affirmative procedure—provisional or otherwise.

Mr Buchan has already set out eloquently that the Government feels that it needs to have the opportunity to have different thresholds for filling in the forms and for changing the tax rates. That is the reason—from your own mouth—why this particular power should be subject to the affirmative procedure, because it has a significant effect on individuals' tax liabilities.

11:15

**Greig Walker:** The bill team can certainly reflect on that point. We have obviously not followed the usual procedure, whereby we would have had the benefit of the committee's input before we are asked to respond. We will certainly take that issue away and reflect on it.

**The Convener:** Thank you very much. I think that that is probably all that we can ask you to do.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I think that I am persuaded by what my two colleagues have said. Although the officials are not here to make a decision on the matter, I think that they can now see that a majority of the committee would be in favour of making the power subject to the affirmative procedure.

**John Scott:** I, too, support what John Mason has eloquently put to the Government officials.

While I have caught the microphone, so to speak, I would like to ask a different question, if that is acceptable.

**The Convener:** Yes, it is. Please go ahead.

**John Scott:** In terms of whether the value of a property is £40,000, does whether it is tenanted affect its value? Have you considered that?

**Robert Buchan:** I am not sure whether the value of a property around £40,000 would be affected by whether it has tenants in it. I imagine that it probably would be, but that is not something that we have considered.

**John Scott:** Is it something that you might consider considering?

**The Convener:** I think that a property being tenanted would certainly change the value; the question is whether it takes someone over the threshold. If the rule of thumb were to be that a tenanted property would be worth half what it might otherwise be worth, which would probably do as a workable number—

**John Scott:** In some cases.

**The Convener:** —it might make a huge difference.

I make it clear that that is clearly a policy issue, which in principle we should not be going anywhere near, but I am conscious of the timetable, so we might as well raise what we can.

**Stewart Stevenson:** I think that the interesting point that John Scott raises is perhaps not so much whether the value at the point of the transaction is changed by whether there is a tenant in place—and, indeed, by the nature of the tenancy—but whether, if a tenancy subsequently ceases and that therefore changes the value, there is a mechanism that could be open to being used by some people in some circumstances to reduce the value of a property. They could have a tenant at the point of the transaction who would leave soon thereafter so that the property would assume its full market value. Does this therefore open a tax avoidance question? I am attempting not to answer that question but merely to suggest that it is a question that others may wish to consider getting an answer to.

**The Convener:** You might be forewarning members of the bill team of questions that the Finance Committee might put to them tomorrow morning, bearing in mind that two members of that committee are sitting here now.

**Greig Walker:** I have a technical comment. We will obviously take away all the points that have been made. The nature of LBTT is that there are various points at which there is a financial threshold, so the issue of valuation is not new or irrelevant as to whether someone hits the £145,000 threshold at which the tax starts being payable or the threshold beyond that at which they move into a different tax band. That is not a new question, but we will certainly have a think about it.

**The Convener:** Are there any other questions on the issues in front of us?

**John Scott:** This is a daft laddie question, but the value subject to vacant possession—or not—would be an easy way of describing the scenario. Will you reflect on that point?

**Greig Walker:** We will reflect on it.

**The Convener:** Thank you, John; thank you, gentlemen. That probably takes us as far as we need to go this morning. I briefly suspend the meeting to enable the witnesses to leave.

11:19

*Meeting suspended.*

11:20

*On resuming—*

## **Budget (Scotland) (No 5) Bill: Stage 1**

**The Convener:** Agenda item 6 is for the committee to consider the delegated powers provisions in the Budget (Scotland) (No 5) Bill. The bill confers one delegated power, which is set out in section 7 and makes provision for budget revision regulations. The power is subject to the affirmative procedure.

Does the committee agree to report that it is satisfied with the power in section 7 and that its exercise is subject to the affirmative procedure?

**Members indicated agreement.**

## Burial and Cremation (Scotland) Bill: Stage 1

11:21

**The Convener:** Agenda item 7 is for the committee to consider the Scottish Government's response to its stage 1 report on the Burial and Cremation (Scotland) Bill. Do members have any comments?

**Stewart Stevenson:** We should welcome the Government's response. In the bill as introduced, it was certainly not clear that the processes that the committee had to consider related to the way in which one might have imagined that funeral directors go about their business. Their business is most certainly not wholly conducted in a single premises. Often it is conducted in the premises of others, including the premises of the bereaved. We should properly welcome the response and pat ourselves and our legal advisers gently on the back for effecting this proposed set of changes.

**John Mason:** I agree. It will be much better to license the business rather than the premises.

A concern remains that the whole licensing regime is subject to provisions that are in regulations rather than on the face of the bill. One might have expected the bulk of the regime to be in the bill, with a bit of room for tweaking around the edges. Perhaps in the debate we can make that point, as well as offer congratulations on the changes that will be made.

**John Scott:** I agree with my colleagues—their responses are perhaps a little more predictable than mine. Without taking any particular side, I welcome the fact that the Government has proposed radical changes to the bill in many areas, which are not just welcome but essential. I congratulate our advisers on their scrutiny and on drawing to the Government's attention the many weak spots. I welcome the Government's intention to improve hugely on the bill as introduced.

**The Convener:** Is the committee content to note the response and to consider the powers as amended at stage 2?

**Members indicated agreement.**

## Carers (Scotland) Bill: After Stage 2

11:23

**The Convener:** Agenda item 8 is for the committee to consider the delegated powers and provisions in the Carers (Scotland) Bill as amended at stage 2. There are five new or substantially amended powers in the bill after stage 2.

Does the committee agree to report that it is content with the new or substantially amended delegated powers in the bill as amended at stage 2?

**Members indicated agreement.**

11:23

*Meeting continued in private until 11:36.*



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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