



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 6 September 2016

Session 5



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Pàrlamaid na h-Alba

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DELEGATED POWERS AND LAW REFORM COMMITTEE

3rd Meeting 2016, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Rachael Hamilton (South Scotland) (Con)

Elaine Smith (Central Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Monica Lennon (Central Scotland) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law
Reform Committee

Tuesday 6 September 2016

[The Convener opened the meeting at 10:30]

Interests

The Convener (John Scott): I welcome members to the third meeting of the Delegated Powers and Law Reform Committee in session 5. I invite members to turn off any mobile phones or, at least, to turn them to silent.

Elaine Smith is sadly unable to attend the meeting and has submitted her apologies. Monica Lennon is attending in her place. I welcome Monica and, in accordance with section 3 of the "Code of Conduct for Members of the Scottish Parliament", invite her to declare any relevant interests that she has.

Monica Lennon (Central Scotland) (Lab): Thank you, convener. I draw the committee's attention to my entry in the register of members' interests. You will note that I am an elected member of South Lanarkshire Council and a member of the Royal Town Planning Institute.

Decision on Taking Business in
Private

10:31

The Convener: Item 2 is a decision on taking business in private. It is proposed that the committee discuss item 6 in private. That will be an opportunity for the committee to discuss its working practices. Do members agree to consider item 6 in private?

Members *indicated agreement.*

Instruments subject to
Affirmative Procedure

Public Appointments and Public Bodies
etc (Scotland) Act 2003 (Treatment of
Crown Estate Scotland (Interim
Management) as Specified Authority)
Order 2016 [Draft]

10:31

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

Members *indicated agreement.*

Children and Young People (Scotland) Act
2014 (Part 4 and Part 5 Complaints)
Revocation Order 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

Named Persons (Training, Qualifications, Experience and Position) and the Child's Plan (Scotland) Revocation Order 2016 (SSI 2016/234)

10:32

The Convener: The order was laid before the Parliament on 24 August 2016 and came into force on 30 August. Therefore, 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.

As regards its interest in the Scottish Government's decision to proceed in that manner, the committee may wish to find the failure to comply with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 to be acceptable in the circumstances. The reasons for doing so are outlined by the Deputy First Minister in his letter to the Presiding Officer dated 24 August 2016 and relate to the halting of commencement of parts 4 and 5 of the Children and Young People (Scotland) Act 2014.

Does the committee agree to draw the order to the attention of the Parliament under reporting ground (j), as the instrument fails to comply with the requirements of section 28(2) of the 2010 act?

Members indicated agreement.

The Convener: Does the committee also agree to find the reasons for doing so to be acceptable in the circumstances?

Members indicated agreement.

Health and Care Professions Council (Miscellaneous Amendments) Rules Order of Council 2016 (SI 2016/693)

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 (Simple Procedure) 2016 (SSI 2016/200)

10:34

The Convener: The committee may wish to note at the outset that the Lord President's private office—LPPO—has undertaken to amend almost all of the errors in respect of which the legal brief invites the committee to report. A number of errors will be corrected in time for the commencement of the new simple procedure on 28 November 2016. However, the LPPO explains that some corrections will require further deliberation by the Scottish Civil Justice Council and, accordingly, may be resolved following implementation.

The committee may wish to welcome the LPPO's commitment to correct the errors and to encourage it to take all steps that are available to it to correct them in time for commencement of the new procedure on 28 November 2016. Do we agree to that?

Members indicated agreement.

The Convener: The committee may also wish to agree that, for an instrument of approximately 260 pages in length and one that deliberately adopts a drafting approach that is in many respects novel, the number of errors that the committee has identified in the new rules does not appear to be disproportionate. Are we agreed?

Members indicated agreement.

The Convener: Rule 10.11(1) provides that a person who has particular documents

"must tell the court that the person believes them to be confidential".

However, the provision is intended to require a person to tell the court that documents are confidential only if that person believes the documents to be confidential. The error means that the proper policy intention is not delivered. The LPPO has agreed that there is an error in that rule and proposes to change the word "that" to "if" at the next available opportunity.

Rule 11.7(3) provides that, when a special measures review application is received, the sheriff may do one of four things, but the policy intention, as confirmed by the LPPO, is that the sheriff should be able to do five things. Rule 11.7(3) omits a fifth option that enables the sheriff to vary an existing special measure. To the extent that the rule does not fully deliver the policy intention and the full suite of options that are to be available, the committee may consider that the

rule is defectively drafted. The LPPO has undertaken to amend it at the next available opportunity so as to include the fifth option of varying a special measure.

With respect to those errors, does the committee wish to draw the instrument to the Parliament's attention under reporting ground (i) as the drafting of the rules appears to be defective?

Members indicated agreement.

The Convener: The definition of the term

"a case where the expenses of a claim are capped"

that is set out in paragraph 3(1) is unclear as it defines such a case by reference to a provision where a sheriff has specifically directed that an order that caps expenses is to be disapplied with the effect that the expenses are not capped. The LPPO acknowledges that there is an error in the definition and has undertaken to amend it at the next available opportunity.

Rule 10.5(3) uses the wording:

"within 2 weeks of the end of either the 4 week period or the appeal being decided, whichever is later."

The meaning of

"the end of ... the appeal being decided"

could be clearer given that there are a number of options available to the Sheriff Appeal Court when it considers an appeal, as set out in rule 16.4. The LPPO has agreed to consider whether rule 10.5(3) can be drafted more clearly and, in particular, whether the rules can be explicit in setting out the stage in an appeal when the two-week period begins.

There is also a lack of clarity about the relationship between rules 11.3(3) and 12.3(4). Rule 11.3(3) provides that a sheriff

"must not continue a hearing to another day solely because a witness did not appear."

Rule 12.3(4) provides that a sheriff

"may continue the hearing to another day ... only if it is necessary to do so."

The rules do not make it clear which rule is to take precedence in circumstances where the reason why the sheriff considers it necessary to

"continue the hearing to another day"—

in the language of rule 12.3(4)—is to enable the court to hear from a witness who has not appeared. In particular, the rules do not make it clear whether rule 11.3(3) is intended to preclude the continuation of the hearing in those particular circumstances. The LPPO has undertaken to reflect upon whether the relationship between the two rules could be clarified.

Does the committee wish to draw the instrument to the Parliament's attention under reporting ground (h), as the meaning of the provisions could be clearer?

Members indicated agreement.

The Convener: The preamble to the instrument fails to cite paragraph 1A of schedule 2 to the European Communities Act 1972 as an enabling power under which the instrument is made. The committee may consider that that error constitutes a failure to follow proper drafting practice.

The preamble also fails to explain the basis for making the reference to "Service Regulation" in paragraph 3(1) of the rules an ambulatory reference. Proper drafting practice for creating an ambulatory reference is to narrate the intention to do so in the preamble to the instrument. The committee may consider that omitting to do so constitutes a failure to observe proper drafting practice, which falls to be reported under the general ground.

Paragraph 3(1) of the rules contains four definitions that do not appear in the body of the instrument. The definitions are:

"a decision absolving the responding party";

"a decision ordering the responding party to deliver something to the claimant";

"a decision ordering the responding party to do something for the claimant";

and "restart a case". The LPPO has undertaken to amend the definitions at the next available opportunity.

Further, paragraph 3(1) defines the term "child's property administration order" as an order under section 11(1) of the Children (Scotland) Act 1995. However, the correct reference should be to section 11(1)(d) of the 1995 act. The LPPO acknowledges that lack of specification and has agreed to amend the reference at the next available opportunity.

Also, rule 18.2(2)(c) refers to rule 6.10(2). The correct reference, as confirmed by the LPPO, should be to rule 6.11(2). Again, the LPPO confirms that it will amend the error at the next available opportunity.

There is also an error in section C2 of form 20E of the rules, which contains two otiose tick boxes—those referring to

"By a next-day postal service which records delivery"

and "Other". The LPPO has undertaken to remove those tick boxes at the next available opportunity.

Rule 19.7(16) refers to the

"Confirmation of Formal Service Notice".

The LPPO has confirmed that that should instead refer to the "Confirmation of Formal Service". The LPPO has undertaken to correct the error at the next available opportunity.

The heading to rule 10.9 indicates that a party may apply for a special order to recover documents "if" that party does not believe that a standard order to recover documents has been complied with. The LPPO has acknowledged that the heading to rule 10.9 does not accurately reflect the policy intention, which is that a party should be able to make an application for a special order for recovery of documents where a standard order has not been complied with, and not only when the party does not "believe" that the order has not been complied with. The LPPO has undertaken to amend the heading to rule 10.9 to better reflect the content of the rule at the next available opportunity.

10:45

Section B2 of form 9G omits to include a tick box for an "interested person", who is neither the claimant nor the respondent but who nevertheless is a person entitled to make an application using that form by virtue of the provision made in rule 20.6(2). Form 9G also instructs the person filling it out to refer to rule 9.10 before completing the form. Rule 9.10 is of no relevance to interested parties who may make applications using form 9G by virtue of rule 20.6. The introductory note to form 9G should also, therefore, instruct the person filling it out to refer to rule 20.6. The LPPO has acknowledged those omissions from form 9G and intends to correct them at the next available opportunity.

Therefore, with reference to the preceding errors, does the committee wish to draw the instrument to the Parliament's attention under the general reporting ground?

Members indicated agreement.

Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016 (SSI 2016/215)

The Convener: Appendix 1A, which is called "The Personal Injury Pre-Action Protocol" and which is contained in schedule 2, should properly have been numbered 1B. In consequence, the references to appendix 3 in paragraph 3(2) of the instrument, to appendix 1A in paragraph 3(3) and in the heading of schedule 2 are errors. SSI 2016/229 is also to be considered by the committee this week. Paragraph 5 of that instrument corrects the errors timeously.

Does the committee wish to draw the instrument to the attention of the Parliament on the general

reporting ground, as the instrument contains two drafting errors?

Members indicated agreement.

Succession (Scotland) Act 2016 (Commencement, Transitional and Saving Provisions) Regulations 2016 (SSI 2016/210 (C19))

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 (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No 2) (Miscellaneous) 2016 (SSI 2016/229)

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

Members indicated agreement.

Children and Young People (Scotland) Act 2014 (Commencement No 11) Partial Revocation Order 2016 (SSI 2016/233 (C20))

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

Members indicated agreement.

The Convener: Many thanks. That concludes that part of the agenda, so we will now move into private session.

10:48

Meeting continued in private until 10:50.

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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