



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 5 November 2013

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DELEGATED POWERS AND LAW REFORM COMMITTEE

28th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)

*Richard Baker (North East Scotland) (Lab)

*Mike MacKenzie (Highlands and Islands) (SNP)

*Margaret McCulloch (Central Scotland) (Lab)

*John Scott (Ayr) (Con)

*attended

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 5

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 5 November 2013

[The Convener opened the meeting at 11:34]

Instrument subject to Negative Procedure

Council Tax Reduction (Scotland) Amendment (No 4) Regulations 2013 (SSI 2013/287)

The Convener (Nigel Don): I welcome members to the 28th meeting in 2013 of the Delegated Powers and Law Reform Committee and ask them to turn off mobile phones.

Agenda item 1 is consideration of an instrument that is subject to negative procedure. Our legal advisers have suggested that the regulations raise the question whether they relate to matters that are reserved by section F1 of part II of schedule 5 to the Scotland Act 1998 and that, as such, the committee may wish to report them as raising a devolution issue.

The matter was also raised in connection with the principal regulations—that is, the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303) and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319)—and various other instruments that amend the principal regulations, all of which the committee has previously considered.

The Scottish Government's view is that the principal regulations do not relate to any of the reserved matters that are described in section F1 of part II of schedule 5 to the Scotland Act 1998. When the committee considered the principal regulations and the amending regulations, a majority of committee members preferred the Scottish Government's view.

It is, of course, for the committee to decide whether it wishes to report the regulations or whether, as with the Council Tax Reduction (Scotland) Regulations 2012 and the amending regulations that the committee has previously considered, it is content that no devolution issue has been raised.

Do members wish to comment?

John Scott (Ayr) (Con): I support the view of our legal advisers. I am concerned that the regulations may well be ultra vires, as they appear to relate to matters that are reserved by section F1

of part II of schedule 5 to the Scotland Act 1998. There is certainly a doubt about whether the regulations are intra vires, which is what we are seeking to report. As a council tax reduction could be considered to be a benefit, our legal advisers have consistently taken the view that the making of such a reduction may well be ultra vires. Therefore, I disagree with the Scottish Government's interpretation and would like the committee to report the regulations under reporting ground (f).

The Convener: Can I provide you with some wording? I suggest that the proposition is that the committee considers that the regulations may raise a devolution issue and should be drawn to the attention of the Parliament on that basis.

John Scott: That is the position that I support.

The Convener: Okay—I will take that as your position. Stewart Stevenson wishes to comment.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): It is perfectly proper for our legal advisers to put it to us that there is "sufficient doubt" about whether the regulations are intra vires. It is clear that were it to be decided by whomever that the regulations related to a reserved matter, a wide range of other activities in relation to reduction of taxation for special categories of people would be affected, and it is clear that that is not required or desired.

The real question is what the correct forum is for the doubt that our legal advisers have raised to be resolved. I am clear that a reduction of a tax is simply a reduction of a tax and not a benefit. It is not the delivery of value to people; it is a reduction in what we take away. Therefore, I seek to oppose the proposition that is before the committee, which came from Mr Scott.

Richard Baker (North East Scotland) (Lab): I support Mr Scott's proposition. Beyond the merits of the policy and the fact that, even if the regulations are ultra vires, they should be, from a policy perspective, intra vires, the fact is that the committee has received legal advice that is contrary to the advice that the Scottish Government has received. I respect the fact that the Scottish Government takes a different legal view on the matter but, as Stewart Stevenson said, the issue comes down to what the correct forum for debate is. I agree with Mr Scott that, given that doubt has been raised about whether the regulations are intra vires, they should be drawn to the Parliament's attention.

The Convener: Do any other members wish to comment?

This is the fifth time that we have been round this particular loop, so I think that we know what we are doing. I reiterate that the proposition is that

the committee considers that the regulations may raise a devolution issue and should be drawn to the attention of the Parliament on that basis. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
Scott, John (Ayr) (Con)

Against

Allard, Christian (North East Scotland) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

As before, the proposition is not agreed to.

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Miscellaneous) 2013 (SSI 2013/294)

11:40

The Convener: Paragraph 5(1)(b) substitutes rule 76.37(3) of the Rules of the Court of Session. The new rule provides:

“An application under section 396(4) of the Act of 2002 or article 55(2) of the Proceeds of Crime Act 2002 (supplementary) shall be by motion.”

The reference to

“article 55(2) of the Proceeds of Crime Act 2002”

should be a reference to article 55(2) of the Proceeds of Crime Act 2002 (External Investigations) Order 2013 (SI 2013/2605). Accordingly, paragraph 5(1)(b) of the act of sederunt refers to the wrong legislation.

Although such drafting is not considered defective as it is unlikely in practice to prevent or impede the operation of the act of sederunt, it amounts to a patent error. Does the committee agree to draw the act to the Parliament's attention under the general reporting ground as it incorrectly refers to an instrument of subordinate legislation about which it seeks to make provision?

Members indicated agreement.

The Convener: Does the committee agree to note that the Lord President's private office accepts that the reference to the legislation is incorrect and has undertaken to rectify the matter by amendment when the next act of sederunt amending the rules of the Court of Session is made?

Members indicated agreement.

John Scott: That is welcome.

The Convener: Indeed.

Finally, the committee may wish to note that the act of sederunt fails to meet commitments that were given to correct errors in SSIs 2013/162 and 2013/238. One of the errors in each of those instruments has been corrected, but not the other. Do members have any comments on that? I note that it is clearly an oversight. I think that the Lord President's private office recognises that and has every intention of expediting the correction.

**Act of Sederunt (Summary Applications,
Statutory Applications and Appeals etc
Rules Amendment) (Miscellaneous) 2013
(SSI 2013/293)**

The committee agreed that no points arose on the instrument.

**Procurement Reform (Scotland)
Bill: Stage 1**

11:42

The Convener: The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the delegated powers in the bill. It is suggested that the questions be raised in written correspondence. The responses that are received will help to inform a draft report on the bill, which the committee will consider at a later date.

Section 1(1) defines “contracting authority” for the purposes of the bill, section 1(2) confers on the Scottish ministers a power to modify the meaning of “contracting authority” and section 1(3) clarifies that that can be done either by amending the list of bodies or persons in the schedule or by amending section 1(1).

The policy intention underlying sections 1(2) and 1(3), as explained in the delegated powers memorandum, is

“to apply the measures in the Bill to a single set of bodies being only those covered by the EU Directive and corresponding Scottish Regulations and whose functions do not relate to reserved matters within the meaning of the Scotland Act 1998.”

Does the committee agree to ask the Scottish Government whether the policy intention could be clarified, given that certain bodies that are listed in the schedule to the bill have some functions that relate to reserved matters, which seems to be at odds with the statement in the delegated powers memorandum?

Members indicated agreement.

The Convener: Subparagraphs (i) and (ii) of section 1(1)(b) appear to have the effect of excluding certain contracting authorities that are subject to the procurement requirements in the Public Contracts (Scotland) Regulations 2012 (SSI 2012/88), but which have functions in reserved areas.

Does the committee agree to ask the Scottish Government why it is considered necessary or appropriate to take the power to amend the whole of section 1(1)(b), and in particular subparagraphs (i) and (ii), and in what ways the power might be exercised?

Members indicated agreement.

The Convener: Section 3 defines what is meant by “regulated contracts”, and in doing so it sets financial thresholds for public contracts and public works contracts. Section 3(3) provides that the Scottish ministers may, by order, amend the table in section 3(2) so as to substitute for the figures

that are specified there for the time being such other figures as they consider appropriate.

Does the committee agree to ask the Scottish Government to reflect on whether, as regards any amendments to the figures in the table in section 3(2), which are limited to reflecting adjustment due to changes in the value of money over time, the negative procedure might be a more suitable level of parliamentary scrutiny of the exercise of that power?

Members indicated agreement.

11:45

The Convener: Section 7(1) contains a general power for ministers to make provision by regulations about dynamic purchasing systems. The only justification given in the delegated powers memorandum for that general power to make provision about dynamic purchasing systems and to modify the application of the bill in that respect is that it is designed to ensure continued consistency with EU procurement law. Given the general scope of the proposed power to make any provision by regulation about such systems, does the committee agree to ask the Scottish Government for further explanation of why that general power is appropriate and of the underlying policy intentions for how the power would be exercised?

Members indicated agreement.

The Convener: Does the committee also agree to ask the Scottish Government to clarify how that power will ensure continued consistency with EU law; why the bill could not provide for how its provisions apply or initially apply to such systems; and, given the proposed scope of the power and that it could be used to modify the bill's provisions in their application to such systems, whether the affirmative procedure would be a more suitable level of parliamentary scrutiny for the exercise of the power?

Members indicated agreement.

The Convener: Section 10 permits the restriction of contract opportunities to supported businesses, but not for an EU-regulated procurement. An EU-regulated procurement is one to which the 2012 regulations fully apply.

The delegated powers memorandum explains that the power in section 10(4) is required

"to ensure consistency with European procurement law, the relevant EU Directive and corresponding regulations should they be amended in future."

However, the power enables any modification by order of the meaning of "supported business", as defined in section 10(3). Section 38(1) would appear to enable differing meanings to be

substituted for the purposes of each of sections 9(1)(a) and 10.

Does the committee therefore agree to ask the Scottish Government why it is appropriate to confer a power to enable any modification of the meaning of "supported business" for the purposes of sections 9(1)(a) and 10, apart from a modification that is consequential on the amendment of the corresponding definition in regulation 7 of the 2012 regulations, and how that power could be used otherwise?

Members indicated agreement.

The Convener: Contracting authorities that expect to have significant procurement expenditure in the next financial year must prepare a procurement strategy that sets out how they intend to carry out regulated procurements. Authorities must comply with their strategies so far as is reasonably practicable.

Section 11(5) sets out what the strategy must cover. Section 11(5)(d) provides a power by order to specify other matters, as well as those that are listed.

The delegated powers memorandum explains that the negative procedure has been considered to be a suitable level of scrutiny for the exercise of that power, as the provision is administrative in nature. However, where the Scottish ministers decide to specify by order additional matters to be addressed in the procurement strategy, section 13 provides that the contracting authority

"must ensure that its regulated procurements"

in a financial year

"are, so far as reasonably practicable, carried out in accordance with its strategy."

The significance of the effects on the contracting authority appears therefore to depend on what may be specified in an order to be addressed in the strategy.

Does the committee agree to ask the Scottish Government to explain what the policy intentions are on the types of additional matters that could be specified in an order to be addressed in the procurement strategy, and to explain why scrutiny of the exercise of that power by the negative procedure is more suitable than scrutiny by the affirmative procedure?

Members indicated agreement.

The Convener: Section 11(1) provides that

"A contracting authority which expects to have significant procurement expenditure in the next financial year must, before the start of that year—

(a) prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or

(b) review its procurement strategy for the current financial year and make such revisions to it as the authority considers appropriate.”

Section 11(4) provides that

“An authority has significant procurement expenditure in a year if the sum of the estimated values of the contracts to which its regulated procurements in that year relate”

is greater than £5 million. The power in section 11(6) provides that the ministers may by order substitute another sum for that amount.

In relation to section 11(6), does the committee agree to ask the Scottish Government to reflect on whether, as regards any amendment of the figure stated in section 11(4), which is limited to reflecting adjustment due to changes in the value of money over time, the negative procedure could be a more suitable level of parliamentary scrutiny of the exercise of that power?

Members indicated agreement.

The Convener: Section 16 provides that the ministers must issue guidance to contracting authorities on the preparation and publication of procurement strategies and annual procurement reports. Contracting authorities must have regard to any such guidance issued.

Does the committee therefore agree to ask the Scottish Government whether it is intended that that guidance will be published on issue, and if so, whether that could be provided for by amendment of section 16?

Members indicated agreement.

The Convener: Section 20(1) provides that certain community benefit requirements contained in the section apply where a contracting authority proposes to carry out a regulated procurement under the bill, in relation to which the estimated value of the contract is equal to or greater than £4 million.

Section 20(5) provides that the Scottish ministers may, by order, modify section 20(1), to substitute for the £4 million figure such other figure as they consider appropriate.

Does the committee agree to ask the Scottish Government, in relation to the power in section 20(5), to reflect on whether, as regards any amendment of the figure stated in section 20(1), which is limited to reflecting adjustment due to changes in the value of money over time, the negative procedure would be a more suitable level of parliamentary scrutiny of the exercise of the power?

Members indicated agreement.

The Convener: Section 21(1) provides that the ministers may issue guidance on the use of community benefit requirements. The guidance

may cover specific matters as set out in section 21(2). Contracting authorities must have regard to any guidance issued.

Does the committee agree to ask the Scottish Government, in relation to the power to issue guidance in section 21, whether it is intended that that guidance will be published on issue and, if so, whether that could be provided for by an amendment?

Members indicated agreement.

The Convener: Section 22(1) provides that the Scottish ministers may, by regulations, require a contracting authority to exclude an economic operator from a regulated procurement process—except for an EU-regulated procurement—if the operator or certain other persons have been convicted of an offence that is specified in the regulations.

The regulations may also specify evidence that is to be conclusive in determining whether a person has been convicted, and circumstances in which a contracting authority may award a contract to an operator despite being otherwise prohibited from doing so under the regulations.

The policy memorandum states that it is intended to use the power to draw down the list of exclusions from the 2012 regulations into the bill, thus ensuring consistency with those regulations. However, the scope of that power is drawn considerably wider, as the regulations may specify any offences in respect of which a contracting authority would be required to exclude an economic operator from a regulated procurement process or any circumstances in which a contracting authority may award a contract, despite being otherwise prohibited from doing so under the regulations.

Does the committee therefore agree to ask the Scottish Government to explain why the scope of that power could not be drawn more narrowly, for instance to reflect the exclusions listed in regulations 23(1) and 23(2) of the 2012 regulations in implementation of EU procurement law—even if subject to possible amendment by further regulation?

Does the committee also agree to ask the Scottish Government to explain why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the power and the scope to specify the substantial grounds on which economic operators may be required to be excluded from a regulated procurement process due to the commission of an offence?

Members indicated agreement.

John Scott: It does seem an extraordinarily wide power—presumably “any offence” could relate to a speeding offence. I am not sure whether a parking ticket is an offence, but it is an extraordinarily wide power that has been drawn up and therefore I support what has been agreed to by the committee.

The Convener: Section 23(1) provides that the Scottish ministers may, by regulations, make further provision about the selection by contracting authorities of economic operators to participate in a regulated procurement.

As with section 22, the power does not apply to EU-regulated procurements. Section 23(1) provides that regulations could include provision about the use of minimum standard requirements to assess the suitability of bidders, the circumstances in which an operator may or may not be excluded on the basis of criteria stated in the regulations, or the procedure to be followed in determining whether to exclude a bidder.

Section 23(3) lists various criteria that could be specified as possible grounds for the exclusion or non-exclusion of a bidder. The regulations may also prohibit contracting authorities from taking into account specified matters in such an assessment.

Does the committee agree to ask for an explanation of why it has been considered that the negative procedure is a more appropriate level of scrutiny of the exercise of the power than the affirmative procedure, given the width of the powers and the scope to specify the substantial grounds on which an economic operator may be selected or excluded from a regulated procurement process?

Members indicated agreement.

The Convener: Section 24 enables ministers to issue guidance about the selection of economic operators to take part in the process relating to a regulated procurement. Contracting authorities must have regard to such guidance.

Does the committee agree to ask the Scottish Government for an explanation of how those powers could be used, particularly with regard to how the recruitment and terms of engagement of persons involved in the subject matter of a procurement are to be taken into account in assessing the suitability of a bidder; why it is appropriate that the power is in the form of guidance, which is not laid in the Parliament or subject to procedure, rather than covered by regulations under section 23; and whether it is intended that the guidance will be published on issue and, if so, whether that could be provided for by an amendment?

Members indicated agreement.

Scottish Independence Referendum Bill: After Stage 2

11:56

The Convener: At long last we come to agenda item 4, which is consideration of the delegated powers provisions in the Scottish Independence Referendum Bill after stage 2. Members will have seen the briefing paper and noted that the Scottish Government has provided a supplementary delegated powers memorandum.

Stage 3 consideration of the bill is due to take place on Thursday 14 November and the deadline for lodging amendments is 4.30 pm on Friday 8 November. The committee may therefore wish to agree its conclusions today.

Does the committee agree to report that it is content with the removal of the power to make supplementary orders subject to the correction of the typographical error in paragraph 28A(3), where “paragraph 8A(3)” should read “paragraph 8A(8)”?

Members indicated agreement.

The Convener: Does the committee also agree to recommend that the Government lodges an appropriate amendment to correct that error?

Members indicated agreement.

The Convener: Does the committee agree to report that it is content with the revised powers to issue guidance conferred on the Electoral Commission by paragraph 13A of schedule 5, subject to drawing it to the Parliament’s attention that the commission is not required to consult appropriate persons before the issue of additional guidance or its revision?

Members indicated agreement.

The Convener: Does the committee agree to report that it is content in principle with the power to issue codes of practice set out in section 20A and that the codes are required to be laid before the Parliament but are not subject to any further parliamentary procedure?

Members indicated agreement.

The Convener: That concludes our business. Our next meeting is on Tuesday 12 November.

Meeting closed at 11:58.

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