



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 4 February 2014

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DELEGATED POWERS AND LAW REFORM COMMITTEE
5th Meeting 2014, Session 3

CONVENER

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

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)

*Mike MacKenzie (Highlands and Islands) (SNP)

*Margaret McCulloch (Central Scotland) (Lab)

*John Scott (Ayr) (Con)

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

*attended

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 5

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 4 February 2014

[The Convener *opened the meeting at 11:10*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the fifth meeting in 2014 of the Delegated Powers and Law Reform Committee. As ever, I ask everyone to turn off mobile phones.

Under item 1, it is proposed that the committee take in private item 9, which is consideration of the High Speed Rail (London – West Midlands) Bill, which is UK Parliament legislation, and the draft report that we have in front of us. Does the committee agree to do so?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2014 (SSI 2014/14)

Designation of Regional Colleges (Scotland) Order 2014 (SSI 2014/22)

11:10

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

**Act of Sederunt (Rules of the Court of
Session Amendment) (Fees of Solicitors)
2014 (SSI 2014/15)**

**Post-16 Education (Scotland) Act 2013
(Commencement No 3 and Transitory and
Savings Provisions) Order 2014 (SSI
2014/21)**

11:11

*The committee agreed that no points arose on
the instruments.*

Revenue Scotland and Tax Powers Bill: Stage 1

11:11

The Convener: Under item 4 the committee will consider the delegated powers in the Revenue Scotland and Tax Powers 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. It is suggested that those questions are raised in written correspondence. The responses that are received will help to inform a draft report on the bill. The committee will have the opportunity to consider the responses at a future meeting before the draft report is considered.

The committee may wish to note that, in keeping with standing orders requirements, the delegated powers memorandum covers only powers to make subordinate legislation. Therefore, the powers to issue guidance that are contained in the bill are not discussed in the delegated powers memorandum. The committee may wish to seek further explanation on those powers from the Scottish Government.

Section 8 of the bill sets out that ministers may give guidance to revenue Scotland about the exercise of its functions, to which the body must have regard. The guidance that is provided must be published as is considered appropriate by ministers, unless they consider that to do so would impact on the ability to carry out the functions effectively.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I understand that there may be circumstances in which the publication of guidance would inhibit revenue Scotland's ability to recover all due tax. However, as part of the Parliament's consideration of whether it is appropriate for ministers to have the decision-making power not to publish certain parts of the guidance, it would be appropriate for us to ask ministers to help us to understand under what circumstances they would exercise that discretion not to publish guidance to revenue Scotland.

The Convener: Indeed. Does the committee agree to ask the Government what the purposes of the power are and how it could be exercised, and why the section provides for the publication of the guidance but does not provide for a copy of it to be laid before the Parliament?

Members indicated agreement.

The Convener: Section 11(7)(a) allows the Scottish ministers to set the period that revenue Scotland's first corporate plan will cover. The corporate plan will set out revenue Scotland's

main objectives, the outcomes that would demonstrate achievement of those objectives and the activities that revenue Scotland expects to undertake. The delegated powers memorandum states that the power is required to specify a planning period, to which the corporate plan of revenue Scotland will relate, of less than three years, and that it is intended that the planning period of the second plan will start from 1 April 2018. However, the scope of the power allows any first planning period to be specified by order, whether it is less or more than three years. Does the committee agree to ask the Scottish Government why the power should not be drawn more narrowly to permit a first planning period of three years or less to be specified?

Members indicated agreement.

The Convener: Section 41 provides that

“The Tax Tribunals are to sit at such times and in such places as the President of the Tax Tribunals may determine.”

The committee may wish to note that a different approach is taken in the Tribunals (Scotland) Bill for the first-tier tribunal and upper tribunal for Scotland. Section 56 of the Tribunals (Scotland) Bill provides that the first-tier tribunal and the upper tribunal may be convened at any place in Scotland to hear or decide a case, or for any other purpose relating to its functions. That is subject to any provision made by the tribunal rules as to the question of where in Scotland the Scottish tribunals are to be convened.

Does the committee agree to ask the Scottish Government why the power in section 41 is proposed and why it is formulated differently from the power in section 56 of the Tribunals (Scotland) Bill to determine the venue and timing of hearings of the first-tier tribunal and the upper tribunal for Scotland?

Members indicated agreement.

11.15

The Convener: Section 45(1) confers a power on the Scottish ministers to confer “such additional powers” on the tax tribunals

“as are necessary or expedient for the proper exercise of their functions.”

Section 45(2)(b) provides that the regulations can include provision

“causing Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 ... to apply to the making of a relevant Act of Sederunt as it does to the making of tribunal rules”

under the bill. Part 1 of that act established the Scottish Civil Justice Council, and the Court of Session must consider any draft civil procedure rules submitted to it by that council.

Does the committee agree to ask the Scottish Government what the purpose of the provision is; why it is appropriate to include it in regulations under section 45(1), rather than to confer a power to make an act of sederunt in relation to the tax tribunals to which that part 1 could be applied; and what “relevant Act of Sederunt” refers to, as the section does not define that term?

Members indicated agreement.

The Convener: Section 54 provides that

“The President of the Tax Tribunals may issue guidance such about the administration of the tax tribunals as appears ... necessary or expedient”

to secure that

“the functions of the tribunals are exercised efficiently and effectively.”

Does the committee agree to ask the Scottish Government why there is no provision for the publication of the guidance—unlike, for instance, in section 52(4), on the publication of practice directions—nor for laying a copy before the Parliament on issue; and why, although it is specified in the section that the guidance has the purpose of securing that the functions of the tax tribunals are exercised efficiently and effectively, there is no provision that any specified persons are required to have regard to it?

Members indicated agreement.

The Convener: Section 69 provides for the duty of a person who is required to make a tax return for a devolved tax to

“keep any records that may be needed to enable the person to make a correct and complete return, and ... to preserve those records”.

Section 69(2) provides that

“The records must be preserved until the end of the later of the relevant day and the date on which ... an enquiry into the return is completed, or ... a designated officer no longer has power to enquire into the return.”

Section 69(3) states that the “relevant day” is

“the fifth anniversary of the day on which the return is made or,”

a notice of the amendment of the return is given, or

“any earlier day that may be specified in writing by revenue Scotland.”

The duty under section 69 to preserve records may be satisfied by preserving them in any form and by any means.

Section 70(b) provides that the duty may also be satisfied by preserving the information that is contained in the records in any form and by any means. Section 70(b) states that that is subject to any conditions or exceptions that may be specified in writing by revenue Scotland, which enables

revenue Scotland to specify the form or means by which information that is contained in tax records may require to be kept.

In relation to both sections 69(3) and 70(b), does the committee agree to ask the Scottish Government why those powers are appropriate in principle and why they should be exercisable by revenue Scotland rather than by the Scottish ministers; why the powers should be exercisable by informal written specification, which is not subject to parliamentary procedure, rather than through a form of subordinate legislation; and why there is no provision for appropriate publication of the written specifications?

Members indicated agreement.

The Convener: Unjust enrichment may occur where a repayment of tax is made to a taxpayer, but the taxpayer has not ultimately borne the cost of the tax. Section 100 provides that unjust enrichment would be a defence against a claim for repayment of tax. Section 102 enables regulations to be made under which certain reimbursement arrangements may count for the purposes of section 100, and so do not allow revenue Scotland to defend a repayment claim on the ground of unjust enrichment. The regulations may provide for the conditions the reimbursement arrangements must comply with and for other arrangements to be disregarded for the purposes of section 100. Section 103 provides that the regulations may make provision for penalties for a breach of regulations under section 102.

Does the committee agree to ask the Scottish Government why the power in section 103(2) enables any amount of penalty, including daily penalties, to be imposed by regulation; why, therefore, the power could not be drawn more narrowly to provide for suitable maximum penalties; and, given the width of the power in that respect, whether the affirmative procedure would provide a more suitable level of scrutiny of the regulations than the negative procedure? It is noted by way of comparison that, for example, the powers to change fixed amounts of penalty in section 170(1) are subject to the affirmative procedure.

Stewart Stevenson: In some parts of what is before us, an amount is to be specified in primary legislation while, in other parts, the matter will be left to secondary legislation. It might be more satisfactory to have a consistent approach in which an amount is specified in primary legislation, albeit with the power to modify that through secondary legislation, or in which all amounts are excluded from primary legislation and are specified in secondary legislation instead. I hope that putting that general observation into the *Official Report* will be sufficient to carry it forward.

The Convener: I hope so, too, and I think that our questions, if members are happy for us to ask them, will allow the Government to answer that very point. Are members agreed?

Members indicated agreement.

The Convener: The power in section 150(2) allows ministers to make further provision for penalties for a failure to make a tax return on or before the filing date, as defined in section 73(3). Further provision can include the circumstances in which such a penalty is payable, penalty amounts and types and arrangements for issuing, appealing and enforcing such a penalty.

Does the committee agree to ask the Scottish Government why the provision enables any amount of penalty, including fixed or daily penalties, to be imposed by regulation; why, therefore, the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts in relation to the two taxes that are currently devolved; and why, similarly, the bill could not specify initially the circumstances in which a penalty is payable, where a person fails to make a tax return by the filing date in respect of the two devolved taxes?

Members indicated agreement.

The Convener: The power in section 151(2) enables ministers to make further provision for penalties for a failure to pay tax on or before the due date, including the circumstances in which such a penalty is payable, penalty amounts and types and arrangements for issuing, appealing and enforcing such a penalty.

Does the committee agree to ask the Scottish Government why, as with the previously discussed power in section 150(2), the provision enables any amount of penalty, including fixed or daily penalties, to be imposed by regulation; why, therefore, the power could not be drawn more narrowly to provide initially for suitable maximum penalty amounts in relation to the two taxes that are currently devolved; and why, again, the bill could not specify initially the circumstances in which a penalty is payable, where a person fails to pay tax by the due date in respect of the two devolved taxes?

Members indicated agreement.

The Convener: Section 160(7) allows ministers to make further provision for penalties that apply when a person submits a "relevant document" that contains one or more errors amounting or leading to an understated tax liability or a false or inflated claim for relief. The error must be careless or deliberate, and a penalty is payable for each error or inaccuracy in the document. The Scottish ministers have the power to make further provision, specifying what the "relevant

documents” are, the penalty amounts and the arrangements for issuing, appealing and enforcing such a penalty.

Similarly, section 162(4) allows ministers to make further provision on the penalties that are applicable when a person submits a “relevant document” containing one or more errors that understate the tax liability or provide a false or inflated claim for relief but where the error is attributable to another person. A penalty is payable by the other person where they have deliberately supplied false information or withheld information from the person who submitted the document. Ministers have the power to make further provision specifying what the “relevant documents” are for the purposes of sections 160(7) and 162(4), the penalty amounts and the arrangements for issuing, appealing and enforcing the penalty.

With regard to both section 160(7) and section 162(4), does the committee agree to ask the Scottish Government why those provisions enable any amount of penalty to be imposed by regulation; why, therefore, the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts; why the power is appropriate in relation to specifying “relevant documents” that amount or lead to the circumstances set out in sections 160(2) or 162(1); and how that power could be exercised?

Stewart Stevenson: Looking at the way in which the bill is drafted, I have a minor point to raise, but it is a point about which I have some curiosity. The person who is paying the tax is designated as “person P” and the person who is creating the error is designated as “person T”. I am not clear why those letters were chosen—they seem to bear no relationship to anything sensible. I just wanted to put that on the record, but I do not think that we should take any action on it.

The Convener: I am grateful for your observations, but I am not quite sure what I am going to do with them. Nonetheless, I have to ask the committee whether it happy to ask the Government those questions. Is that agreed?

Members indicated agreement.

The Convener: Section 163(3) allows ministers to make further provision about the penalties that are applicable when a person fails to take reasonable steps to notify revenue Scotland about a revenue Scotland assessment that understates the tax liability. Ministers can make further provision specifying what “relevant”—devolved—taxes are for the purposes of that penalty. They may also prescribe the penalty amounts and the arrangements for issuing, appealing and enforcing such a penalty.

Does the committee agree to ask the Scottish Government why the power enables any amount of penalty to be imposed by regulation; and why, therefore, the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?

Members indicated agreement.

The Convener: Section 181(2) allows ministers to make further provision about penalties for a failure to register for the Scottish landfill tax. Ministers can make further provisions specifying the penalty amounts and the arrangements for issuing, appealing and enforcing such a penalty.

Does the committee agree to ask the Scottish Government why that power enables any amount of penalty to be imposed by regulation; and why, therefore, the powers could not be drawn more narrowly to provide initially for suitable maximum penalty amounts?

Members indicated agreement.

The Convener: The power in paragraph 21(1) of schedule 2 will enable provisions in connection with

“the investigation and determination of any matter concerning the conduct of members of the Tax Tribunals,”

and

“the review of any such determination.”

Paragraph 21(2) makes provision about what the rules may cover in particular. Paragraph 22(b) provides that the rules are to be published in such manner as ministers may determine. Paragraph 23 sets out the possible consequences of an investigation.

A similar power in paragraph 31 of schedule 2 enables the procedures to be followed at a fitness assessment tribunal to be set out in rules. Ministers will have responsibility for constituting a fitness assessment tribunal, when requested to do so by the president of the tax tribunals. The function of a fitness assessment tribunal is to assess whether a person is fit to hold the position of member of the tax tribunals.

The delegated powers memorandum states that the intended procedure applying to these rules is “not laid, no procedure”. However, the default position provided for by sections 27 and 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 is that rules made by the Scottish ministers under an enactment are made as a Scottish statutory instrument that is laid before the Parliament.

With regard to both paragraph 21(1) and paragraph 31 of schedule 2, does the committee agree to ask the Scottish Government for clarification of the parliamentary procedure that is

intended to apply to those rules and whether the provisions achieve that procedure; if it is proposed that the rules are not to be laid, why that is more appropriate than their being laid and made by Scottish statutory instrument; and why there is provision for publication of the rules under paragraph 21, but not, it appears, under paragraph 31?

Members *indicated agreement.*

The Convener: That completes a lengthy list of questions on a bill, and I hope that we will manage to change the procedures so that we do not need to do such exercises terribly often. I am looking at the convener of the Standards, Procedures and Public Appointments Committee as I say that.

Stewart Stevenson: Indeed, convener.

John Scott (Ayr) (Con): It is important to have those matters firmly on the record, for the avoidance of doubt.

The Convener: There is no doubt that we would get those matters on the record, but we may be able to do it in other ways, without my having to read them out. That is what I think is being proposed. I thank members for their patience.

Children and Young People (Scotland) Bill: After Stage 2

11:30

The Convener: Agenda item 5 is consideration of the delegated powers provisions in the bill after stage 2.

Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper. Stage 3 consideration of the bill is due to take place on Wednesday 19 February. The deadline for lodging amendments is 4.30 pm this Thursday 6 February, so the committee may wish to agree its conclusions today.

There are a number of powers to which the committee is invited to give particular consideration. Section 52(2)(b) allows the Scottish ministers to modify section 52(1) by order, to confer, remove or vary a duty on corporate parents. The power also allows ministers to provide that section 52(1) is to be read, in relation to a particular corporate parent or corporate parents of a particular description, with any modification conferring, removing or varying a duty.

At present the bill applies all duties to all corporate parents. A further power will allow ministers to alter this one-size-fits-all model so as to tailor the duties to specific corporate parents or classes of corporate parent. The power is framed in a way that suggests that the duties will become fragmented between primary legislation and its modification by subordinate legislation. The committee may consider that the proposed structure lacks transparency and could lead to confusion in determining which duties are owed by which authorities.

Stewart Stevenson: In the light of the way this has been drafted, it might be appropriate for the committee to agree that, where such lists are capable of being modified by secondary legislation, unless there is an overriding reason the complete list should be included in any secondary legislation, even if parts of the list merely re-present what existed already, so that the list is in a single place.

The Convener: Thank you for that suggestion: I am sure that the Government will give that some thought.

I suggest that the committee agree to report that, while it finds the power in section 52(2)(b) to be acceptable in principle, it is concerned that the proposed structure of the power—a mandatory list of duties in primary legislation, applied as modified

by standalone subordinate legislation—could lead to confusion and impede clarity.

Members indicated agreement.

The Convener: Section 60A inserts new section 26A into the Children (Scotland) Act 1995. New section 26A places a duty on local authorities to provide “continuing care” to “eligible persons” who cease to be looked after by them.

The provision confers several powers on the Scottish ministers within this framework. Ministers may specify the upper age limit of eligible persons and the period for which the duty to provide continuing care subsists. Ministers may also modify the bill to provide when the duty to provide continuing care does not apply or when it ceases. The powers are subject to the affirmative procedure.

The duty to provide continuing care for looked after children is a significant addition to the bill. Within the framework provided by the bill there are a number of powers that are important in structuring the scope and application of the duty over time. As a result of those having been inserted into the bill at stage 2, the committee does not have the opportunity to scrutinise the purpose of the power and its effects as effectively as at stage 1, since time does not permit that.

The powers offer maximum flexibility to ministers to structure the duty and to vary the application of the duty over time in the manner they consider appropriate. While it is understood that ministers intend to roll out the duty to different cohorts over time, the power could be used very differently. Each of the powers is subject to the affirmative procedure, which affords a high level of scrutiny and provides for active involvement by the Parliament, but there is no requirement for consultation with local authorities, Social Care and Social Work Improvement Scotland or persons who may be affected. The committee may consider that the subject matter is of sufficient importance that some prior consultation with such persons should be required when using the delegated powers to alter the scope of the duty. This could also assist the Parliament in its scrutiny of proposals for the roll-out of the duty.

Does the committee agree to express concern in its report that powers of this significance have been added at stage 2, which has reduced the level of scrutiny that the committee has been able to apply?

Does the committee also agree to recommend that there should be a requirement for consultations with local authorities, Social Care and Social Work Improvement Scotland and persons representing the interests of looked after children before the powers are exercised?

Members indicated agreement.

The Convener: A new power has been inserted into new section 13C(3) of the Adoption and Children (Scotland) Act 2007 by amendment at stage 2. The provision permits ministers to prescribe circumstances in which adoption agencies will not be required to disclose information relating to Scotland’s adoption register, despite the general duty to do so set out in new section 13C(1) of the 2007 act.

That change could be considered significant in terms of ensuring that the disclosure regime is compatible with the European Convention on Human Rights. On introduction, the bill required consent to disclosure to be obtained from the child’s parents and any other prescribed persons. The requirement to obtain consent to disclosure has now been removed from the bill. In its place is a power that permits the Scottish ministers to prescribe the circumstances in which prescribed information is not to be disclosed. This could include provision about the need for consent but need not require it. It should be noted that the bill already confers a power on ministers to require the information to be disclosed to a third party instead of to them.

By removing the consent requirements from the bill, the Parliament has given up its control over them to the Scottish ministers. The committee may consider that to be important.

Does the committee agree to express concern that the requirement for consent to be obtained for disclosure under new section 13C of the Adoption and Children (Scotland) Act 2007 has been removed from the bill and has been replaced with a power that enables ministers to prescribe those circumstances in which disclosure is not permitted but which does not require consent to disclosure to be obtained?

Members indicated agreement.

John Scott: I endorse those concerns. My concern is that we have moved from a situation that is demonstrably ECHR compliant to a position that is perhaps less obviously ECHR compliant. Given the recent track record on ECHR compliance, it is important that we make every endeavour to make certain that the legislation that we produce is absolutely and self-evidently ECHR compliant.

Stewart Stevenson: I acknowledge what John Scott says in relation to article 8 of the European Convention on Human Rights and the right to privacy, but there is a difficulty here. The issue of ECHR compliance or non-compliance will arise by the interaction of the commencement order—if there is a commencement order; it would be a commencement order for section 68 of the bill, which inserts section 13C(3)(d) into the 2007 act—

and any subsequent secondary legislation. While it is perfectly proper to put comment on the record today, the risk crystallises when we come to subordinate legislation a later date.

The Convener: It is suggested that the committee may wish to be content with all other provisions in the bill that have been amended at stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation. Are we content to report accordingly?

Members *indicated agreement.*

Marriage and Civil Partnership (Scotland) Bill: After Stage 2

11:37

The Convener: We come to agenda item 6. As members will recall, the committee agreed its report on the bill as amended at stage 2 at last week's meeting. In its report, the committee invited the Scottish Government to respond in relation to two matters relating to the laying of draft orders for consultation before the Parliament. Members have seen the response from the Scottish Government. Do members have any comments?

John Scott: I am content with the Government's explanation.

The Convener: Does the committee agree to note the Scottish Government's response?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: Stage 1

11:38

The Convener: We come to agenda item 7. This item is consideration of the Scottish Government's response to the committee's stage 1 report on the bill. Members have seen the briefing paper and the response from the Scottish Government. Do members have any comments?

John Scott: Again, I am content; but there possibly should be amendment at stage 2.

The Convener: Is the committee content to note the response and, if necessary, reconsider the bill after stage 2?

Members indicated agreement.

Deep Sea Mining Bill

11:39

The Convener: We come to agenda item 8. The bill is UK Parliament legislation. The committee is invited to consider the powers to make subordinate legislation conferred on the Scottish ministers in the bill. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect.

Do members agree to report to the lead committee that they are content with the delegated powers conferred on the Scottish ministers in the bill and that they are subject to the negative procedure?

Members indicated agreement.

11:39

Meeting continued in private until 11:43.

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