



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 29 October 2013

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CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1105
DRAFT INSTRUMENT LAID FOR CONSIDERATION.....	1106
Single Use Carrier Bags Charge (Scotland) Regulations 2014 [Draft] (SG 2013/199)	1106
INSTRUMENT SUBJECT TO AFFIRMATIVE PROCEDURE	1111
Budget (Scotland) Act 2013 Amendment Order 2013 [Draft]	1111
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE.....	1112
Bee Keeping (Colonsay and Oronsay) Order 2013 (SSI 2013/279)	1112
Loch Sligachan, Isle of Skye, Scallops Several Fishery Order 2013 (SSI 2013/280)	1112
Public Contracts (Scotland) Amendment Regulations 2013 (SSI 2013/282)	1112
Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2013 (SSi 2013/289).....	1112
Act of Sederunt (Commissary Business) 2013 (SSI 2013/291)	1112
INSTRUMENT NOT SUBJECT TO PARLIAMENTARY PROCEDURE	1113
Post-16 Education (Scotland) Act 2013 (Commencement No 1) Order 2013 (SSI 2013/281)	1113
TRIBUNALS (SCOTLAND) BILL: STAGE 1	1114

DELEGATED POWERS AND LAW REFORM COMMITTEE

27th 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 29 October 2013

[The Convener *opened the meeting at 11:37*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 27th meeting in 2013 of the Delegated Powers and Law Reform Committee and, as always, ask them to ensure that they have turned off their mobile phones.

Agenda item 1 is a decision on taking business in private. It is proposed that we take items 7, 8 and 9 in private. Items 7 and 8 are consideration of the committee's draft reports on the delegated powers in the Criminal Justice (Scotland) Bill and the Bankruptcy and Debt Advice (Scotland) Bill respectively. Item 9 is consideration of the committee's first quarterly report for the parliamentary year 2013-14.

Does the committee agree to take those items in private?

Members *indicated agreement.*

Draft Instrument laid for Consideration

Single Use Carrier Bags Charge (Scotland) Regulations 2014 [Draft] (SG 2013/199)

11:38

The Convener: Members have before them a written submission that the committee has received from Mr Bill MacDonald in relation to the regulations. Do members have any comments on the submission or the regulations?

John Scott (Ayr) (Con): I note that we have received a letter from Mr MacDonald, in which he raises his concerns about VAT and corporation tax—in particular, the incorporation of VAT in the charge and the expense of corporation tax and the ramifications thereof. I would like those issues to be considered by the Scottish Government, in addition to the points that our legal advisers have raised. To set the record absolutely straight, I am in no position to judge whether Mr MacDonald's views are important, but if there is an issue, it would be better if it were sorted out at the beginning rather than at the end of the process. I think that we should take the opportunity to at least seek the Scottish Government's views on Mr MacDonald's letter.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Essentially, the issue that Mr MacDonald raises for the committee is whether the proposed regulations are *intra vires* or *extra vires*. I note that our legal advisers suggest that they are *intra vires* rather than *extra vires*. The sole reference to VAT is made in regulation 8, which permits any VAT on a charge that a retailer makes to their customer to be a cost that may be deducted from the net proceeds of such a charge. It is very clear that the proposed charge is not a tax, because there are no receipts of financial benefit to the Government. The regulations will not affect the VAT regime and will most certainly not affect the corporation tax regime.

Given that the committee has previously felt that it should take a view on the *vires* of instruments that come before us, I believe that we should take the view that, as the regulations are *intra vires*, we should not refer the matter to the Government or anyone else.

The Convener: I wonder whether we could pick up on the issues that our advisers have raised and see where that leaves us. Do members agree to that?

Members *indicated agreement.*

The Convener: First, bags that are used for the supply of medicinal products or listed appliances

in accordance with a prescription and bags that are used for the supply of pharmacy medicines will be exempt from the charge that the regulations will impose. The circumstances in which a product is supplied under prescription and other relevant terms are defined in the schedule to the regulations by reference to statutory provisions that have been repealed or amended. Therefore, those references are not accurate and do not achieve the intended legal effect.

Does the committee therefore agree to draw the regulations to the attention of the Parliament under reporting ground (i), as the drafting is defective in that respect?

Members indicated agreement.

The Convener: Does the committee agree to note that the Scottish Government has undertaken to review the accuracy of all definitions in the regulations before laying a final draft for approval by the Parliament?

Members indicated agreement.

The Convener: The second point that our legal advisers have raised relates to a drafting error. In regulation 13(5), the reference to paragraph (4)(a) should be a reference to paragraph (4)(c).

Does the committee therefore agree to draw the regulations to the attention of the Parliament under the general reporting ground, as they contain a drafting error?

Members indicated agreement.

The Convener: Does the committee also agree to note that the Scottish Government has undertaken to correct that error in the final draft that is laid for approval by the Parliament?

Members indicated agreement.

The Convener: Does the committee also agree to welcome the Scottish Government's commitment to review whether the meaning of "domestic premises" is sufficiently clear in regulation 13(5) in light of the consultation responses that it receives?

Members indicated agreement.

The Convener: Having dealt with those matters, let us return to the issue of what we should do with the comments that we have received. I endorse what Stewart Stevenson said on the basis that, if we are content that the regulations are intra vires—which I think our advisers are telling us—all the other issues would appear to be for the policy committee rather than for us.

John Scott: I note that our advisers have taken the trouble to put Mr MacDonald's letter in front of us for our consideration. I am certainly not

competent to judge whether the regulations are intra vires, but I think that it would be reasonable for the Scottish Government to give us its views on his letter, given that our advisers have thought it sufficiently important to put in front of us. I do not think that that is an unreasonable request, given the stage in the process that we are at, and given that we will seek responses from the Scottish Government on the matters that the convener has raised.

The Convener: I do not think that that is in any way an unreasonable request.

Do members have any other comments?

Stewart Stevenson: It is perfectly proper for correspondence of such a nature be put in front of the committee, and I think that that has been done in such a way as to be entirely neutral on its content.

However, I understand informally that the correspondent has not sent his letter to the Government. I suggest that, if we were to take any action, if this is a matter for the Government, it is a matter for the correspondent to raise with the Government. Our sole interest in the matter is in the issue of vires. It is clear that regulation 8 does not affect the operation of the VAT system and does not impact on the VAT legislation, nor does it do so in relation to corporation tax. We have not received any advice to suggest that the regulations are extra vires, so we should follow the process that we have followed in the past, whereby, on matters of vires, if we consider an instrument to be intra vires, we take no further action. The *Official Report* of the meeting will give a sufficient indication of our consideration of the matter, which should be closed.

11:45

The Convener: I am in the committee's hands. Do members have any other thoughts or comments? I do not want us to be divided on the issue, as that will not help.

Richard Baker (North East Scotland) (Lab): I have a lot of sympathy with what Stewart Stevenson said about whether the regulations are intra vires—I tend to agree with him on that.

However, I also have a lot of sympathy with what John Scott said. Little would be lost by our adopting a belt-and-braces approach and drawing the Scottish Government's attention to the fact that we have received the letter and asking it to state its view. I imagine that the Government will make a robust case along the lines of the point that Stewart Stevenson made, but I do not think that any harm would be done by our taking a belt-and-braces approach and flagging up the fact that we

would be interested in receiving a response to the points that have been raised.

Stewart Stevenson: I suppose that my difficulty is that I understand that the correspondent has deliberately chosen not to send his letter to the Government and it is not our job to be his postman.

John Scott: With respect, it is still a free country and our correspondent can send correspondence to whomever he wishes.

The Convener: I would like to suggest a way forward, because the last thing that we want to do is be divided on the issue. That would be counterproductive. I suggest that we should write to the Government, note that we have received the letter and pass it on to it with our best wishes—perhaps that is not exactly what we should say, but I am sure that members are with me. We can also point out to the Government and to whoever else might be interested that, as far as we are concerned, we believe that the regulations are entirely *intra vires* and cause us no concerns whatever. We should say that the Government might like to see the correspondence, for what it is worth.

John Scott: And to pass comment on it.

The Convener: Indeed.

Stewart Stevenson: No. On the matter of *vires*, we decide. I think that we should make that decision. We should pass the correspondence on to the Government for information only.

John Scott: With respect, we do not decide on the matter of *vires*. The committee has divided on previous occasions on the matter of *vires*, and I suggest that, the way that we are heading, it will probably do so again.

Richard Baker: I endorse the convener's approach.

The Convener: I am sorry—I think that what I suggested was what Mr Stevenson is suggesting.

Stewart Stevenson: Correct.

The Convener: I suggested that we should pass on the letter for the Government's information, but that, as a committee, we are clear—I think—that the regulations are *intra vires* and that we have no concerns about them.

Stewart Stevenson: Yes.

The Convener: Are we comfortable with that?

Stewart Stevenson: It is up to John.

John Scott: Forgive me, but I am not certain what the convener is saying.

The Convener: I am saying that I think that, in relation to what the submission says, the

committee believes that we do not have a problem, but that we will send it to the Government for information so that it can respond to it, if it feels that it is appropriate to do so.

Richard Baker: I think that that is fine.

John Scott: I still think that we should adopt a belt-and-braces approach and seek comment on the correspondence. I cannot see what harm that would do. I cannot see why the Government would not wish to say—perhaps in one line—that there is no problem. Adopting a belt-and-braces approach and avoiding problems at the earliest opportunity, rather than building them up for the future, is what the committee is all about.

The Convener: So, all that we have to do is to ask the Government whether it has any comments that might be relevant to us.

Richard Baker: Yes.

John Scott: Indeed.

Stewart Stevenson: The correspondent is refusing to send his letter to the Government. If he believes that the issues that he has raised are a matter for the Government, he should correspond with it. As a courtesy, we should make the Government aware of the correspondence, but I do not accept that it is for us to ask the Government for a response on this matter. At the end of the day, the committee will decide what it decides.

The Convener: I am not suggesting that we ask the Government for a response; I am suggesting that we invite it to comment, should it wish to do so.

Stewart Stevenson: If that is the formulation, I would be content.

Richard Baker: That is fine.

John Scott: I accept that.

Christian Allard (North East Scotland) (SNP): We should also ensure that we copy in the lead committee. That is the most important thing because, ultimately, it will be for the lead committee to deal with the regulations.

The Convener: Okay. It has taken us a long time to get here, but if members are comfortable with that, that is the line that we will take.

**Instrument subject to Affirmative
Procedure**

**Budget (Scotland) Act 2013 Amendment
Order 2013 [Draft]**

11:50

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

**Instruments subject to Negative
Procedure**

**Bee Keeping (Colonsay and Oronsay)
Order 2013 (SSI 2013/279)**

**Loch Sligachan, Isle of Skye, Scallops
Several Fishery Order 2013 (SSI 2013/280)**

**Public Contracts (Scotland) Amendment
Regulations 2013 (SSI 2013/282)**

**Title Conditions (Scotland) Act 2003
(Conservation Bodies) Amendment Order
2013 (SSI 2013/289)**

**Act of Sederunt (Commissary Business)
2013 (SSI 2013/291)**

11:50

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

Instrument not subject to Parliamentary Procedure

Post-16 Education (Scotland) Act 2013 (Commencement No 1) Order 2013 (SSI 2013/281)

11:51

The Convener: The order commences provisions within paragraphs 2(7), 8(5) and 8(22) of the schedule to the Post-16 Education (Scotland) Act 2013 that amend and repeal provisions in the Further and Higher Education (Scotland) Act 1992 and the Further and Higher Education (Scotland) Act 2005 respectively. However, the order fails to commence paragraphs 2(1) and 8(1), which provide for the amendment of the 1992 and 2005 acts by subsequent subparagraphs. Although such drafting is not considered defective, the commencement of paragraphs 2(1) and 8(1) would have been appropriate to exclude any doubt as to whether the commencement of the specific provisions within paragraphs 2 and 8 could be properly interpreted as referring to the 1992 and 2005 acts. Does the committee therefore agree to draw the order to the Parliament's attention under the general reporting ground as it fails to commence certain provisions of the Post-16 Education (Scotland) Act 2013?

Members indicated agreement.

Tribunals (Scotland) Bill: Stage 1

11:52

The Convener: Item 6 is consideration of the Scottish Government's response to the committee's stage 1 report on the Tribunals (Scotland) Bill. Members will have seen the briefing paper and the Scottish Government's response and might wish to note that, unless substantial amendments are made to the delegated powers at stage 2, it is unlikely that the committee will consider the bill again. Do members have any comments?

Richard Baker: I think that it is worth flagging up to the lead committee the question whether it is appropriate for the location of tribunals to be set out in tribunal rules rather than subject to discussion in the Parliament and asking the Scottish Government for its comments on that point.

The Convener: Members might wish to write to the Scottish Government to seek further clarification on why the power in section 56(2), on the venue for hearings, is subject to tribunal rules rather than some other form of delegated power. Are we agreed?

Members indicated agreement.

The Convener: Thank you very much. I now move the meeting into private session.

11:53

Meeting continued in private until 12:14.

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