



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 5 August 2014

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**  
**23<sup>rd</sup> Meeting 2014, Session 4**

**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**

The Adam Smith Room (CR5)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 5 August 2014*

[The Convener *opened the meeting at 11:32*]

### Decision on Taking Business in Private

**The Convener (Nigel Don):** I welcome members to the 23rd meeting in 2014 of the Delegated Powers and Law Reform Committee and ask everyone to turn off their mobile phones.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 7, which is further consideration of the delegated powers provisions in the Welfare Funds (Scotland) Bill?

**Members** *indicated agreement.*

## Instruments subject to Affirmative Procedure

### Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2014 [Draft]

11:32

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

**Members** *indicated agreement.*

### Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Historic Environment Scotland as Specified Authority) Order 2014 [Draft]

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

**Members** *indicated agreement.*

### Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of the Convener of the School Closure Review Panels as Specified Authority) Order 2014 [Draft]

**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 2014 [Draft]

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

**Members** *indicated agreement.*

### Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2014 [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

### **Town and Country Planning (General Permitted Development) (Scotland) Amendment (Amendment) Order 2014 (SSI 2014/184)**

11:33

**The Convener:** We come to item 3. Although the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 have not been complied with in this case, the committee might, given the particular circumstances, wish to welcome the breach of the 28-day rule. The Government took prompt action to correct the errors in the Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2014 (SSI 2014/142).

Does the committee agree to draw SSI 2014/184 to the Parliament's attention on reporting ground (j), as the requirements of section 28(2) of the 2010 act have not been complied with?

**Members** *indicated agreement.*

**The Convener:** Does the committee agree, however, to welcome the breach of the 28-day rule in this instance, given the circumstances that I have outlined?

**Members** *indicated agreement.*

### **Protection of Seals (Designation of Haul-Out Sites) (Scotland) Order 2014 (SSI 2014/185)**

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

**Members** *indicated agreement.*

### **Local Authority Accounts (Scotland) Regulations 2014 (SSI 2014/200)**

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

**Members** *indicated agreement.*

### **Scotland Act 1998 (Agency Arrangements) (Specification) Order 2014 (SI 2014/1892)**

**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

### **Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No 1 and Saving) Order 2014 (SSI 2014/172)**

### **Tribunals (Scotland) Act 2014 (Commencement No 1) Order 2014 (SSI 2014/183)**

### **Act of Sederunt (Rules of the Court of Session and Sheriff Court Rules Amendment) (Miscellaneous) 2014 (SSI 2014/201)**

### **Public Bodies (Joint Working) (Scotland) Act 2014 (Commencement No 1) Order 2014 (SSI 2014/202)**

11:34

**The Convener:** We come to item 4. Although no points have been raised on the instruments, members might wish to note a couple of matters in relation to the timing of two of them. Scottish statutory instrument 2014/183 was laid before the Parliament on 23 June. As recess began on 27 June, the committee was not in a position to consider the instrument before it came into force on 14 July. However, members will note that the Scottish Government wrote to the committee prior to the instrument being laid to explain why it was considered necessary to bring it into force during recess.

That differs from the Government's approach to SSI 2014/202, which was laid and came into force during summer recess. In that case, the Scottish Government did not provide the committee with an explanation about why the instrument could not have been laid prior to the recess, thereby giving the committee an opportunity to scrutinise it. The committee might consider that to be an unsatisfactory approach to laying instruments, particularly given that the Public Bodies (Joint Working) (Scotland) Act gained royal assent on 1 April 2014.

Do members have any comments?

**John Scott (Ayr) (Con):** We might wish to consider improving this situation. The convention seems to have broken down with regard to the commencement order for the Public Bodies (Joint Working) (Scotland) Act 2014, and it would be worth finding some reasonable way for the committee to look at instruments that are not subject to parliamentary procedure during recess.

**The Convener:** As I understand it, we are not reporting this, because there has been no breach of the rules. As you have rightly pointed out, this is just convention, but it would seem good practice for instruments, even those that are not subject to parliamentary procedure, to be laid during the parliamentary year to allow us to look at them.

**John Scott:** Perhaps we can ask the minister to explain why we received a very full explanation with regard to one instrument but no explanation at all with regard to another. That seems, at best, inconsistent.

**The Convener:** Thank you for that suggestion. Are members comfortable with my writing a letter on behalf of the committee to the relevant minister, asking for an explanation as to why this happened?

**Mike MacKenzie (Highlands and Islands) (SNP):** We need to be clear that there are two issues here: a specific issue about the commencement order for the Public Bodies (Joint Working) (Scotland) Act 2014, for which there might be a perfectly reasonable explanation; and a general issue about instruments falling between the cracks of convention, rules and so on, which might give rise to some concern.

**The Convener:** On the basis that it could have gone wrong but, in this case, it did not.

**Mike MacKenzie:** Yes.

**The Convener:** Are members therefore agreed—

**Stuart McMillan (West Scotland) (SNP):** Convener—

**The Convener:** I wonder whether I could complete the sentence, at least for the record. Do members agree that, in this instance, I should write to the minister, seeking an explanation?

*Members indicated agreement.*

**Stuart McMillan:** It is important for purposes of clarity to put on record the recognition that no parliamentary rules have been broken, but there appears to be an issue with the convention.

**The Convener:** That is fine—thank you very much for the discussion. Is the committee otherwise content with the instruments?

*Members indicated agreement.*

## Legal Writings (Counterparts and Delivery) (Scotland) Bill: Stage 1

11:39

**The Convener:** We come to agenda item 5. Although as lead committee for the bill we will consider and report on its general principles, the purpose of this item is to consider its delegated powers provisions. Members will have seen the delegated powers memorandum and the briefing paper.

Section 5 provides the Scottish ministers with the power to

“make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with or for giving full effect to”

any provision of the bill. Does the committee agree to report that it finds this power to be acceptable in principle and that it is content that, where it amends primary legislation, it is subject to the affirmative procedure, but otherwise that it is subject to the negative procedure?

*Members indicated agreement.*

**The Convener:** Sections 5, 6 and 7 will come into force on the day after royal assent. Section 6(2) provides that the Scottish ministers may, by order, appoint days on which the bill's other provisions come into force, and section 6(3) provides that a commencement order

“may include transitional, transitory or saving provision.”

Does the committee agree to report that it finds this power to be acceptable in principle, and that it is content that the exercise of the power is not subject to parliamentary procedure?

*Members indicated agreement.*

**The Convener:** Given that no issues have been raised in relation to these powers, and that we do not wish to raise any questions with the Scottish Government, do we agree to report that the committee is content with the delegated powers provisions in the bill at stage 1?

*Members indicated agreement.*

## Mental Health (Scotland) Bill: Stage 1

11:41

**The Convener:** We come to agenda item 6: consideration of delegated powers in the 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, and it is suggested that those questions be raised in written correspondence. The committee will have the opportunity to consider the responses at a future meeting before the draft report is considered.

Section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003, which I will hereafter refer to as the 2003 act, provides a right of appeal against detention in conditions of excessive security to patients held in hospitals other than a state hospital. Such a right is available to “qualifying patients” in a “qualifying hospital”, but the meaning of each term is left to be defined in regulations made by the Scottish ministers under sections 268(11) and (12). The right therefore relies on the making of regulations to give it practical effect.

Section 11 of the bill makes a number of amendments to section 268 of the 2003 act. Together with section 12, the bill reformulates the right of appeal against detention in conditions of excessive security for patients other than those held in a state hospital. The 2003 act continues to provide that the right of appeal is available to patients in a “qualifying hospital”, but section 12(3) of the bill inserts new section 272A into the 2003 act to provide that a “qualifying hospital”

“is a hospital other than a state hospital and ... falls within such further meaning (if any) as is given to that expression by regulations.”

The right of appeal therefore appears to be conferred upon patients in all hospitals other than a state hospital, with the possibility that regulations could be made that restrict that right by further defining the expression “qualifying hospital”.

Does the committee agree to ask the Scottish Government to clarify the intended use of that power? In particular, does it agree to ask the Scottish Government to explain whether it is intended that, in the event that regulations giving further meaning to the expression “qualifying hospital” are not made by the Scottish ministers, the effect of new section 272A(1) of the 2003 act as inserted by section 12(3) of the bill is that the right of appeal will be available to patients detained in all hospitals other than a state hospital?

**Members indicated agreement.**

**The Convener:** Does the committee also agree to ask the Scottish Government why, if the Scottish Government agrees with that interpretation of the power, it is considered appropriate as a matter of principle to qualify the application of the right of appeal provided for in new section 272A(1) of the 2003 act in subordinate legislation, as opposed to specifying in the bill those patients to whom the right will and will not apply?

**Members indicated agreement.**

**The Convener:** New section 272A(3) of the 2003 act as inserted by section 12(3) of the bill provides that

“Regulations may make further provision as to the operation of sections 268 to 271”

of the 2003 act

“in particular circumstances.”

Does the committee agree to ask the Scottish Government whether it can provide examples of the “particular circumstances” in respect of which regulations made in exercise of the power in new section 272A(3) of the 2003 act may apply?

**Members indicated agreement.**

11:45

**The Convener:** The bill makes provision for a victim notification scheme for the victims of mentally disordered offenders by amending the Criminal Justice (Scotland) Act 2003. Section 43(3)(b) of the bill amends section 16 of the Criminal Justice (Scotland) Act 2003, while section 48(2) inserts new section 18B into the same act. Section 16 as amended and the power in new section 18B(1)(c) both permit the modification of new section 18A of the Criminal Justice (Scotland) Act 2003 as inserted by section 47(2) of the bill. Does the committee agree to ask the Scottish Government why it is considered necessary to take two separate powers to modify section 18A of the Criminal Justice (Scotland) Act 2003: the power in section 43(3)(b), and the power in new section 18B(1)(c) as inserted by section 48(2) of the bill?

**Members indicated agreement.**

**The Convener:** Does the committee agree to ask whether the Scottish Government considers that it would be clearer to consolidate the two provisions into a single provision?

**Members indicated agreement.**

**The Convener:** It would certainly make my life a lot easier.



Section 45 of the bill inserts new sections 17B to D into the Criminal Justice (Scotland) Act 2003. New section 17B affords a victim who is to be given information by virtue of the victim notification scheme a right to make representations before certain decisions are taken in respect of the offender. New section 17C(2) of the Criminal Justice (Scotland) Act 2003 obliges the Scottish ministers to issue guidance on how written and oral representations by victims or their families under new section 17B are to be made. Although the guidance will be published on the websites of the Scottish Government and the Scottish Courts and Tribunals Service, there is no requirement in the bill to publish the guidance that is issued, simply a statement to that effect in the delegated powers memorandum.

Does the committee agree to ask the Scottish Government whether it considers it necessary to include in the bill a requirement that the guidance issued in exercise of the power be published?

**Members** *indicated agreement.*

**The Convener:** As that completes the public section of the meeting, we will now move into private session.

11:46

*Meeting continued in private until 11:52.*



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