



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 12 August 2014

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DELEGATED POWERS AND LAW REFORM COMMITTEE
24th 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

THE FOLLOWING ALSO ATTENDED:

Colin Gilchrist (Legal Adviser)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 12 August 2014

[The Convener *opened the meeting at 11:34*]

Instruments subject to Negative Procedure

Food Hygiene and Official Feed and Food Controls (Scotland) Amendment Regulations 2014 (SSI 2014/213)

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2014 (SSI 2014/214)

The Convener (Nigel Don): I welcome members to the 24th meeting in 2014 of the Delegated Powers and Law Reform Committee and ask that mobile phones be switched off. I note that we have received apologies from Richard Baker.

Under agenda item 1, we have two instruments to consider, on which no points have been raised by our legal advisers. Is the committee content with them?

Members indicated agreement.

Instruments not subject to Parliamentary Procedure

Marriage and Civil Partnership (Scotland) Act 2014 (Commencement No 2 and Saving Provisions) Order 2014 (SSI 2014/212)

11:35

The Convener: We have two instruments to consider under agenda item 2.

On the first, SSI 2014/212, our legal advisers have raised a couple of points. The word “on” has been omitted between “commence” and “or after that date” in article 3(2)(a). The effect is that the provision makes a saving in respect of any marriages or purported marriages entered into before 1 September 2014, and any prosecution in relation to such marriages or purported marriages

“where proceedings commence or after that date”

rather than when they commence on or after that date.

Does the committee therefore agree to draw the order to the attention of the Parliament under reporting ground (h), as there is a lack of clarity in the meaning of article 3(2)(a)?

Members indicated agreement.

The Convener: In addition, the order fails to bring into force for a limited purpose sections 12(1), 13(1), 14(1) and 24(1) of the Marriage and Civil Partnership (Scotland) Act 2014 and paragraph 1(1) of schedule 1 and paragraph 1 of schedule 2 to that act. Those provisions introduce the various amendments that the order seeks to bring into force and specify which act is being amended. In commencing the amendments without the introductory provisions, the order may create uncertainty for users of the legislation.

Does the committee therefore agree to draw the order to the attention of the Parliament under the general reporting ground?

Members indicated agreement.

The Convener: Does the committee also agree to note that the Scottish Government has laid an amending instrument before Parliament in order to remedy both of the points raised?

Members indicated agreement.

Victims and Witnesses (Scotland) Act 2014 (Commencement No 2 and Transitional Provision) Order 2014 (SSI 2014/210)

The Convener: No points have been raised by our legal advisers on the order, but the committee

may wish to note that article 3 contains complex transitional provisions that will enable persons who had rights prior to 13 August to receive information in relation to offenders under the Criminal Justice (Scotland) Act 2003, as amended, to benefit from the enhanced information and representation provisions commenced by the order.

Given the complexity and length of those provisions, it would have been useful for the scrutiny of the order if the policy note or the explanatory note had contained more detail on the effects and purpose of the existing legislation that is affected by article 3, and the effects of the article. It might also have been useful if, when the timing of the order was being planned, a period of longer than 19 days had been allowed between the date on which the order was laid before Parliament and the date on which the provisions are brought into force, given that the Scottish Government aims, whenever possible, to allow a period of 40 days when an instrument contains complex transitional provisions.

Do members have any comments?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I have a brief comment to make on the 19-day period. Even had the period been 40 days, our ability to consider the order would still have been the result of happenstance, because at this time of year we are normally in recess. I am glad that we have had the opportunity to consider the order.

My main point is about the fact that the policy note, which is the only public record of how the order is intended to work, does not explain the substantial complexities. I understand that further information has been supplied but that the policy note has not been reissued. A reissued policy note would put into the public domain an enhanced description of the effect of the quite complex changes that are being made. Therefore, I think that it would be appropriate for the committee to consider whether it should encourage the Government to reissue the policy note in order to provide a full and more adequate description of the policy that it is introducing so that lawyers who operate within the framework and, indeed, the courts can have the benefit of that when they apply the legal provision that we are discussing.

John Scott (Ayr) (Con): I agree with Stewart Stevenson. I think that the length of time that has been provided is not reasonable to allow our legal assistants to consider the provisions in question, given that they are complex. I am concerned about that, and I am concerned about the process almost breaking down. Even though no fault can be found with the provisions, it was only after a bit of to-ing and fro-ing that they have been explained, so there is a process issue that needs to be addressed.

I suggest that we write to the Standards, Procedures and Public Appointments Committee about the issue as part of that committee's investigation into parliamentary processes with a view to improving them.

The Convener: Do members agree that we should at least draw that element to the SPPA Committee's attention?

Members indicated agreement.

The Convener: I am also concerned that these are complex provisions that have, as Stewart Stevenson said, come before us only as a matter of happenstance. The relevant policy committee will not see the order before it comes into force tomorrow. That does not sound like a good procedure, albeit that we believe that the order is okay.

I am with Stewart Stevenson on the view that, if the policy note was inadequate for our legal advisers and they had to go back and ask other questions, it is plainly inadequate for any legal adviser outside the Parliament. Therefore, if there is more explanation, it seems sensible that it should be in the public domain for those who may have to advise their clients. That would seem to be a good way of legislating.

I suggest to members that I write to the Government along those lines. We will also write to the SPPA Committee as suggested.

John Scott: There will be two letters: one to the Government and one to the SPPA Committee.

The Convener: Absolutely. Do members, having heard those comments, otherwise agree to register their contentment with the instrument?

Members indicated agreement.

Revenue Scotland and Tax Powers Bill: After Stage 2

11:41

The Convener: Item 3 is consideration of delegated powers provisions in the Revenue Scotland and Tax Powers Bill after stage 2.

Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum, and they will have seen the briefing paper.

Stage 3 consideration of the bill is due to take place on Tuesday 19 August. The committee may therefore wish to agree its conclusions today. The committee is invited to give particular consideration to a number of powers.

The committee may wish to note that section 46 as amended provides that the Scottish tax tribunal rules would be made by the Scottish ministers by regulations, rather than by the Court of Session by act of sederunt. Section 46 as amended puts in place a similar arrangement to that which is enacted by paragraph 4 of schedule 9 to the Tribunals (Scotland) Act 2014. That paragraph is a transitional provision that enables the Scottish ministers to make tribunal rules in regulations until the Scottish Civil Justice Council and the Court of Session are involved in making the rules.

The committee may also wish to note that, until the Scottish tax tribunals become judicially administered by the Scottish courts and tribunals service, with rules drafted under the auspices of the Scottish Civil Justice Council, the tax tribunal rules will be made by the Scottish ministers rather than by the Court of Session.

In that regard, section 46(3) is not framed as a transitional arrangement. Accordingly, it appears that the intended position—that the tax tribunal rules would in future be made by the Court of Session—would be dependent on appropriate provisions being enacted in future under the powers in the Tribunals (Scotland) Act 2014 in order to achieve that position.

Does the committee agree to note the matters that I have outlined in relation to the amended section 46 and report on them accordingly?

Members indicated agreement.

The Convener: The powers in sections 71D(2)(b), 159A(2)(b), 166A(2)(b), 180A(2)(b), 181G(2)(b) and paragraph 5D(2)(b) to schedule 3 enable provision or further provision about the amounts of several penalties that are specified in the bill.

Specifically, they enable the Scottish ministers to change penalty amounts, with no limit on the extent to which they may be changed. The committee may consider that, as a matter of principle, and as expressed by the committee in relation to previous bills, the bill should state suitable maximum levels of permitted increase in the amounts of penalty, beyond which any amounts specified in regulations could not go.

The specific level of those caps is a policy matter and therefore not for the committee to make a recommendation on. However, the committee may wish to report that it does not consider it appropriate to confer on the Scottish ministers an unlimited discretion to change the penalty amounts, and that it considers that the setting of maximum penalties is a matter on which the Parliament should legislate in the bill.

Do members wish to make any comments?

John Scott: It seems perhaps unreasonable that there are no caps on those amounts. It may be the policy intention, in order to create a deterrent effect, to have an unlimited level for penalties that may be applied, but if that is the case it should be made clearer. At present I am left with the feeling that it is, at best, unclear.

11:45

Stewart Stevenson: I support the general thrust of what John Scott says. It does not seem that it would be particularly constraining for the bill to contain specified limits that were passed by the Parliament at the outset. Section 71D(1) states:

“The Scottish Ministers may by regulations make provision (or further provision) about penalties under this Chapter.”

The penalties can, subsequently, be changed—there is a parliamentary procedure for that. Similarly, paragraph 5D(1) of schedule 3 contains a substantial provision that allows ministers to produce regulations for parliamentary consideration about anything related to penalties.

It would be unsatisfactory for us to have a lacuna between the passing of the bill and the laying of secondary legislation specifying the penalty amounts. It would be far better for there to be a statement in the bill of what the limits are at the point at which the bill is passed, given that the Government can produce regulations to make changes to those amounts at a later date. The committee has previously adopted that position in other contexts.

John Scott: It would be reasonable at the very least to seek an explanation of why the Government has chosen to approach the matter in this way rather than state the amounts in the bill.

The Convener: Do members share my concern that, in principle, penalties should be specified by the Parliament, preferably in primary legislation?

John Scott: Yes.

The Convener: To what extent do we feel that, in principle, it is appropriate that a change to a specified penalty should be in subordinate legislation? Do members share my view that the affirmative procedure must be used? I am trying to put some flesh on the principle that we have agreed before in the context of what we have in front of us.

Stewart Stevenson: The Government is likely to say to us that the act will not commence without its having indicated what the penalties are to be. However, the bill, as passed, will contain no penalties.

A commencement order, which could include commencement of the sections that relate to penalties, of which there are a number, could be produced by the current Government or a successor Government, and commencement orders are not subject to parliamentary procedure—that is the window through which the Parliament could find itself not having had the opportunity to formally agree moving to a regime in which there are no penalties. There is that legal window if the commencement order is passed before the ministers have produced orders to set the penalties, and that is unsatisfactory in the legal process.

Ministers could commit to producing the commencement order and making it subject to parliamentary procedure, but that would be a rather unusual approach. The simpler way of dealing with the matter would be for them to lodge an amendment that provided for an initial setting of the penalties and limits, which they would have the powers to change at any subsequent point through parliamentary procedure.

The Convener: I confess that I am a little bit confused and need to turn to our legal advisers. Will the Government set the numeric limits of the penalties when the bill has been passed?

Colin Gilchrist (Legal Adviser): The bill as it stands contains no provision for a maximum penalty. It is the power to make further provisions in regulations that would provide for an increase in the penalty.

The Convener: So we do not expect the bill to contain any numbers for a financial penalty for any offence.

Colin Gilchrist: The bill specifies the initial penalty amounts.

The Convener: It contains the initial amounts.

Colin Gilchrist: Yes, but with regard to the power to amend or increase the penalty, the bill itself does not set out a maximum amount.

The Convener: That was my understanding, but I am not convinced that it is necessarily the point that Stewart Stevenson was raising.

Stewart Stevenson: May I stand corrected, convener, as I clearly have been.

The Convener: Okay. I just want to ensure that we are all talking about the same thing. The bill specifies the initial amounts. What they are is not our concern, because that is at the very least a policy issue, but am I entitled to remain concerned that they can be changed to any extent by subordinate legislation under the affirmative procedure? Is my understanding correct?

Colin Gilchrist: That is correct.

The Convener: Thank you.

Stewart Stevenson: So a parliamentary process would be required. There is no window through which an unlimited penalty could be introduced without going through the parliamentary process.

The Convener: Thank you very much for that, Mr Stevenson, but it takes me back to my initial question about the extent to which the committee feels that in principle such an approach is acceptable if the original penalties are in the bill.

Stewart Stevenson: I suspect that we have to go back to paragraph 5D(2) of schedule 3, under which regulations can change

“the circumstances in which a penalty is payable, ... the amounts of penalties, ... the procedure for issuing penalties”,

appeals on penalties and the enforcement of penalties. Unless that provision were to be changed, it would always be possible to change the amounts of penalties at a future date—and I do not think that that would exclude the possibility of their being unlimited.

Now that the situation has been made clear and my confusion has, I hope, been somewhat addressed on the question whether there would be unlimited penalties without the Parliament's agreement, the bottom line is that my concerns are substantially less than they were a few minutes ago when I was in my more confused position.

John Scott: Thanks to the further clarification that we have received, I agree with Mr Stevenson.

The Convener: That brings me to my other point that any changes to the penalties will, as I understand it, be made for any cause, whereas my understanding of the policy statement that we have seen is that the issue is about dealing with

the value of money, otherwise known as inflation. To what extent does the committee share my view that if the power is intended to cover anything that we would call inflation it should simply say so? Would that not put in the bill what we would expect it to contain—in other words, the real intention?

Stewart Stevenson: I take a different view. When the Government introduces an order to change penalties, it is up to that Government, whatever it might be at that point, to proffer its explanation and reasons for doing so. I am content to move on and not consider this particular matter further, given that, as a result of our intervention in the first place, we now have an amended bill that sets out penalties.

The Convener: Do members have any other comments?

Stuart McMillan (West Scotland) (SNP): With regard to what you suggest, convener, I would consider that writing a reference to inflation into the bill would be a policy rather than a procedural matter.

The Convener: Am I right in thinking, therefore, that I might have talked us into a position where the committee is now content with the provision, given that the initial penalties are set out in the bill and the Government's option for changing those numbers—which is bound to be upwards—is through the affirmative procedure but without being subject to any explanation because, as Stewart Stevenson has correctly pointed out, the Government at the time might have its own reasons and would simply need to give them to the Parliament?

Stewart Stevenson: That is my position, convener.

Members indicated agreement.

The Convener: In that case, I think that I have taken us to a position where we are comfortable with what the Government is proposing. That is not what we might have expected, but that is what discussion is all about.

As for the committee noting the point about section 218(3)(da) seeking to implement the committee's recommendation at stage 1 that the exercise of the powers in section 102 should be subject to the affirmative procedure, I believe that we are now comfortable with that.

Members indicated agreement.

The Convener: Does the committee agree to report, however, that paragraph 218(3)(da) should refer to section 102, rather than 102(1), given that sections 102 and 103 repeatedly refer to the regulations under the whole of section 102?

Members indicated agreement.

The Convener: The committee might wish to note that its stage 1 report made recommendations on two other provisions on which the Scottish Government undertook to lodge amendments. However, the provisions were not so amended at stage 2.

First, the committee noted at stage 1 that the Scottish Government would lodge an amendment to provide that a copy of the ministerial guidance to Revenue Scotland issued under section 8(1) be laid before the Parliament. Secondly, the committee noted that the Scottish Government would lodge an amendment to paragraph 31 of schedule 2 to make provision to publish the rules for the procedures at a fitness assessment tribunal made under that paragraph. That would be consistent with the provision for rules made under paragraph 21 of the same schedule.

Does the committee agree to report that its recommendations on these provisions remain the same as at stage 1 and, in so doing, invite the Scottish Government to respond to them?

Members indicated agreement.

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

Members indicated agreement.

The Convener: Unless I have missed anything, I think that that brings us to the end of our agenda and therefore to the end of the meeting. Our next meeting will be held on Tuesday 19 August.

Meeting closed at 11:58.

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