The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 18 November 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
32nd 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 PARTICIPATED:

Fraser Gough (Scottish Government)
Neil Robertson (Scottish Government)
Catherine Scott (Scottish Government)
Neil Watt (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 18 November 2014

[The Convener opened the meeting at 11:00]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning. I welcome members to the 32nd meeting in 2014 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off mobile phones, please.

Under agenda item 1, it is proposed that we take item 6 in private. That will allow further consideration of the oral evidence that we are about to receive on the European Union opt-out. Does the committee agree to take item 6 in private?

Members *indicated agreement.*

European Union Framework Decisions (Opt-out)

Mutual Recognition of Criminal Financial Penalties in the European Union (Draft Order)

Mutual Recognition of Supervision Measures in the European Union (Draft Regulations)

11:01

The Convener: Agenda item 2 is the aforementioned European Union opt-out. We have the opportunity to take oral evidence from Scottish Government officials. I welcome Neil Watt, head of EU implementation; Neil Robertson, EU policy manager; Fraser Gough, assistant Scottish parliamentary counsel; and Catherine Scott, lawyer in the directorate for legal services.

Good morning, colleagues. I understand that Neil Watt wants to make an opening statement, which might forestall some of our questions.

Neil Watt (Scottish Government): It is the other Neil, convener.

The Convener: Ah—right. Thank you, Mr Robertson.

Neil Robertson (Scottish Government): The measures that we are here to discuss are included in a batch of 35 that the United Kingdom intends to opt into on 1 December. The UK Government announced in October 2012 that it would exercise the opt-out of all justice and home affairs measures, and that was confirmed in July 2013. In July 2014, the UK Government confirmed to the Scottish Government the final list of 35 measures that would be included in the package of measures that the UK would opt back into on 1 December 2014.

On 6 November, Spain lifted its block on the UK rejoining these measures. On 10 November, the House of Commons debated and voted on the UK Government's approach to transposing the remaining 11 of the 35 measures into UK law. Following the affirmative vote in the House of Lords yesterday, we understand that the UK will shortly confirm its wish to participate in the agreed package of 35 measures. Assuming that the European Council and the European Commission agree the necessary procedural arrangements, the opt-in will take place on 1 December.

There are two EU framework decisions that are subject to the UK opt-in for which we are taking a Scotland-only approach to implementation, and they are the subjects of the instruments that we

are before the committee to discuss today. Despite the uncertainty around the opt-in, we have tried to keep the committee updated on all measures in which we are participating.

The first Scottish statutory instrument—the draft Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No 2) Order 2014—transposes the requirements of the trials in absentia framework decision, amending the original mutual recognition of financial penalties framework decision. Transposition of the decision will help to continue to ensure consistency in the way in which financial penalties operate across the EU, and it will ensure that Scotland is not seen as an attractive destination for criminals because they are confident that their fines will not follow them here. It will do that by clarifying the circumstances in which a financial penalty that is imposed in a person's absence can be recognised and executed in another member state.

The provisions safeguard the accused's rights, ensuring that the correct procedures have been followed in a trial in absence before a request to process a financial penalty from another member state can be accepted. They will also help to ensure that criminals are not able to evade justice by arguing that it was unfair to impose a fine in their absence.

I move on to the second instrument: the draft Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014. The mutual recognition of supervision measures framework decision sets up a system for mutual recognition of bail across the EU, which is colloquially known as the European supervision order or ESO. It will help to ensure that a decision on bail that is taken by a judicial authority in one member state can be recognised and enforced in another. The aim is to allow accused persons to return home to be supervised there until their trial takes place in the member state where the offence took place.

It will also allow persons who are awaiting trial in their home country to move to another EU country while they are on bail—for example, to take up work. Implementation of the measure will mean that Scots who are awaiting trial abroad will be able to return home and continue with their normal home life, work or study until their trial starts, and EU citizens who are being held in Scottish prisons will be able to return to their home member state. To look at it from another angle, persons who are on bail and awaiting trial in their home country will be able to take advantage of work opportunities in other EU countries.

Implementation of the framework decisions supports the Scottish Government's purpose and vision for a safer and stronger Scotland where an individual's rights are supported.

As the Cabinet Secretary for Justice has indicated in recent correspondence with the committee, only once the United Kingdom opts back into the third pillar pre-Lisbon treaty justice and home affairs decisions do we have the necessary vires to transpose the framework decisions.

We are using the power conferred by section 2(2) of the European Communities Act 1972, which enables ministers to make provision by way of SSIs subject to negative procedure, which will be laid and come into force on 1 December. We appreciate that that will mean that the SSIs are not subject to the usual 28-day scrutiny period by the Parliament. That is an inevitable consequence of the opt-out, opt-in process, which means that ministers obtain the vires to make the two SSIs only on the very day that they have to come into force.

As he mentioned in correspondence with the committee, the cabinet secretary was particularly keen to factor in the Scottish Parliament's views on the procedural options available for making the necessary transposition instruments, and to enable the fullest possible scrutiny.

We thank the committee for its understanding and co-operation in agreeing to scrutinise drafts of the instruments in advance of 1 December. I hope that you have found that helpful background. The team is happy to answer any questions that the committee might have.

The Convener: I am grateful to you, Mr Robertson. You will appreciate that we are not here to cover the policy; rather, we need to look at the process. John Scott will start off the questions.

John Scott (Ayr) (Con): I ask you to explain in words of one syllable why it would not be possible to make the instruments before 1 December.

Catherine Scott (Scottish Government): Perhaps I should answer that. We are using section 2(2) of the European Communities Act 1972. That allows us only to make instruments to implement EU obligations. The framework decisions will not become EU obligations until 1 December, so we will get the power only on 1 December. That is due to a transitional arrangement that was put in place when the Lisbon treaty came in five years ago.

John Scott: Right.

The Convener: I will pursue that issue before Stewart Stevenson comes in. Although I understand that that may be the plain meaning of the words—I have looked at those words—there is a tendency to believe that we cannot see a train coming down a track and that, if it is not in the station, the train does not exist or it is not going to arrive on time. Could it not reasonably be argued

that, because we can see an obligation coming, it is an obligation? Could we not have introduced legislation under the affirmative procedure on the basis that we could see that the obligation would exist?

Catherine Scott: We discussed that approach with Parliament officials. We thought that there might be an argument for introducing an affirmative instrument. Indeed, that option was mentioned in correspondence with the committee. We were willing to do that, but the feedback from the committee was that the preferred route would be to use a negative instrument, so that is what we have done.

The Convener: I do not want to disagree with you—I signed the letter that said as much, so I am not trying to reverse our approach—but I am interested to know whether there is a school of legal thought that recognises that an obligation that has not crystallised is plainly going to do so. The objection to using the affirmative procedure may be more in our minds than in legal reality.

Catherine Scott: There is an argument that it would have been possible to lay an affirmative instrument ahead of ministers obtaining the vires to make the instrument. That is on one reading of the Interpretation and Legislative Reform (Scotland) Act 2010. Equally, I can see the view that would go otherwise. Perhaps to be on the safe side, we have done it this way.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to briefly explore the question of lacuna. In other words, at what time—what minute—will this happen? Will the power become available at the precise moment when the clock passes midnight between 30 November and 1 December? Is that correct?

Neil Watt: I will have a go at answering that. As regards what happens next, there was a vote in the House of Lords last night that removed all the UK parliamentary obstacles to us, as a UK member state, confirming that we wish to opt back into the measures. The European Commission and the Council then need to agree the procedural necessities.

I do not as yet have all the detail on how that will work in practice, but we understand that the Commission will confirm that the UK opt-in will take place for the measures at or around midnight on 30 November. That will be confirmed in the *Official Journal of the European Union*.

Stewart Stevenson: So, specifically, there is no gap. That is the essence of my question.

Neil Watt: As soon as the measures are published in the journal, which presumably will be synchronised to take place at midnight, they will have effect. At that point, they will be subject to the jurisdiction of the European Court of Justice.

Stewart Stevenson: But given the capacity of officials and ministers here, there is a momentary gap in our provision.

Neil Watt: I do not think that that needs to be the case.

Catherine Scott: It does not need to be the case, but it is something that we might consider in relation to the drafting. Basically, there is a legal principle that, if a minister signs an instrument at any time on a certain day, that instrument is valid for the whole day, so it goes back to a second after midnight the night before. There is a possible element of retrospection in that and, in some cases, if there is any question over it, a note can be put on an instrument that it is valid from the time that the minister signs it on the day. However, I am not sure that that is necessary in this case.

Stewart Stevenson: I just wanted to see whether there were gaps. That is really all I was interested in when I asked that little question.

Neil Watt: My non-legal answer to that question is that there is some understanding at European institution and member state level that these are quite unique circumstances, and transitional measures have been discussed. The risks of what you mentioned happening are very small.

The Convener: The concern—given that we are talking about criminal areas and therefore lawyers tend, quite rightly, to worry about the detail—is simply one about continuity. It is about the risk perceived by us that somebody might be let out of prison and indeed may find procedural ways of getting away from very significant challenges simply because there was, at least conceptually, some discontinuity in the provisions under which they were held.

What Catherine Scott suggested indicates to me that there is a principle of continuity which recognises that a signature during a day takes us back to just after midnight. If that continuity is recognised in European law, we appear to have explored the issue.

Stuart McMillan (West Scotland) (SNP): Mr Robertson, in your opening comments, you mentioned 6 November—the date when Spain lifted its block. If Spain had done that sooner, would that have had an effect on which type of instrument—affirmative or negative—could have been laid here in the Scottish Parliament?

Neil Robertson: No, because we have to wait until 1 December, when the UK opts back in, to have the vires to make the instruments. That is why, as Ms Scott said, we did not take the affirmative approach—we took the negative

approach. An earlier move by Spain would have had no impact on the decision.

John Scott: Mistakes happen everywhere. What would the implications be if the commencement date of 1 December is not met and the instruments are not commenced on that day?

Neil Watt: Contingency measures have been discussed in Brussels but I do not know as yet whether an agreement has been reached. I can update the committee once I have picked up the issue with UK colleagues. I understand that there will be a period of seven days for exactly that reason—to make sure that there is no chance of any operational gaps, to make sure that all the procedural arrangements are agreed and to cover any other events that conceivably could happen.

John Scott: Okay, but the position is not entirely clear to me. Could you explain again, for the record, why the draft order and regulations are considered to be enabled by the powers in section 2(2) of the European Communities Act 1972?

11:15

Catherine Scott: Section 2(2) of the 1972 act is a general, catch-all enabling power that enables ministers in the UK to implement EU obligations. They can do that through statutory instruments, using either an affirmative procedure or a negative procedure. That is quite useful in situations such as the one with the current instrument. We do not have a domestic enabling power that we can readily use to implement these particular measures, because they are novel.

John Scott: I see.

The Convener: Section 2(2) specifically says that

"any designated Minister or department may"

make such an order. Given that, in 1972, the Scottish Government was not even a twinkle in anyone's eye—well, with a few exceptions; it certainly legally did not exist—are we entirely clear that the Scottish ministers are designated ministers in that context?

Catherine Scott: Yes.

The Convener: Under what power?

Catherine Scott: Well, it is a designation that is made under section 2(2).

John Scott: Presumably, the Scotland Act 1998 covers it.

The Convener: Presumably, yes.

That takes us to Stuart McMillan's question.

Stuart McMillan: My question has been dealt with.

The Convener: I thought that it might have been. I think that we have covered questions 6 and 7 as well.

We have covered most of what we were interested in, but I would like to address the regulations. I note that they are free-standing regulations rather than ones that are brought through as an amendment to part 3 of the Criminal Procedures (Scotland) Act 1995. Could you explain why you have taken that particular route?

Fraser Gough (Scottish Government): There are a few reasons. One is that the 1995 act is already heavily overladen with material and is somewhat groaning under the pressure of it. It is no longer an easily navigable statute, so there is no real attraction in cramming yet more into it. That does not help anyone.

Also, the regulations cover a stand-alone procedure. The outgoing requests to other states to recognise Scottish bail tie into our bail arrangements in the 1995 act, but incoming requests from other states concern people who are not accused of any crime in Scotland, so to put the matter into the criminal procedure bracket is to somewhat miss the point. Someone who is going to court and is dealing with one of those things needs an instrument, and I would submit that it is far easier to have a single document doing that than it is to have something shoehorned into the 1995 act that does not properly belong there.

The Convener: That is a simple explanation. However, it begs the question of whether the 1995 act needs some consolidation. I appreciate that that question comes at you from out of left field, but what you have just said implies that the act might be in a less than perfect state.

Fraser Gough: I do not think that it is controversial to say that the 1995 act could do with, if not consolidation, at least being split into smaller statutes. The Criminal Justice (Scotland) Bill that is before the Parliament at the moment already does that to a certain extent. We are taking a lot of the police investigatory powers out of part 2, and they will now sit in a free-standing way in part 1 of the bill as enacted, if it is approved by Parliament. The process is something like de-consolidation.

The Convener: Thank you. It is always helpful to explore these things when we have the opportunity.

Stewart Stevenson: I think that this is the last point. We have ended up with something reasonably satisfactory in so far as the Parliament has been engaged in this issue with sufficient notice and the Government has provided draft

instruments—in a non-legal draft sense—to enable Parliament to express its view on the subject in advance of the relevant date, albeit that the mechanisms are, to use a word hated by so many civil servants, novel. However, for the sake of argument, if the Spaniards had taken their decision at midday on 30 November, for operation the following day, clearly we would be in a less satisfactory position in terms of Parliament's engagement, and there would be problems for the Government.

The question is: how likely is it that this will happen again in this kind of way? That may be unanswerable—I could probably work out why. More to the point, are there steps that we or others could take that would give us certainty that would enable us to act, consider and decide in advance of our having powers in this narrow kind of context, not in the generality?

Neil Watt: The answer to the question of how likely it is that this will happen again is that it is pretty unlikely. We are dealing with a pretty unlikely set of circumstances. If I am being honest, it has been a challenge for us to draft these proposals and give Parliament the sort of service that we are supposed to give you. If you asked my cabinet secretary the question, he probably would give you an answer about having the right to direct representation in the EU. That would be one way that the situation could play out differently.

It is a pretty unlikely set of circumstances. We have the relationships in Scotland to do such work quickly and effectively, and we have relationships with UK and EU counterparts to implement all of Scotland's EU obligations.

Stewart Stevenson: However, in Europe there is a history of moving right up to midnight and stopping the clock. This was not such a circumstance, but it could have been—we might have been in a less comfortable place.

Neil Watt: With these measures, all that would have happened is that we would not have participated in them until an agreement was reached. The discussion on the European arrest warrant is slightly different. We are not allowed to go into too much detail on it, but that has been the focus in the UK Parliament.

John Scott: So we would not have been in the position that we are in if there had been an initial all-member-state agreement. Is that what you are saying?

Neil Watt: A lot came down to how the opt-in was negotiated and the difference between the Schengen and the non-Schengen measures. We have set out the difference in correspondence with the committee, which will save me from attempting to explain it again.

The Schengen measures are reserved, so if you are asking me about the risks to Scotland I would say that those measures are not operational in Scotland at the moment.

Catherine Scott: The five-year transitional period following the Lisbon treaty is fairly unique. It is a bit of a one-off. The 1 December date is at the end of the five-year period and everything is happening at once. It is a fairly unique set of circumstances.

Mike MacKenzie (Highlands and Islands) (SNP): I accept everything that you say about the circumstances being unique, unusual and rare. On this occasion the committee is content with the negative procedure. However, could circumstances arise—however rarely—in which the committee would otherwise recommend the affirmative or even the super-affirmative procedure because of the nature of some instrument that comes before the committee?

Catherine Scott: That is possible. That would perhaps be an opportunity to explore further the reading of the powers in the Interpretation and Legislative Reform (Scotland) Act 2010, which was mentioned earlier. We think that there is an argument that an affirmative instrument could be laid formally for scrutiny ahead of ministers gaining the power to make that instrument. That is a possibility. If a future circumstance were to arise that was anything like this one, we would explore that further and see whether the Parliament was comfortable with our taking that approach.

Neil Watt: I think that we also decided that it was important for us to do Scottish regulations for the measures, to give us a bit more flexibility in how we develop them and how we engage with the Parliament on them. That has been beneficial for us, and I hope that it has been helpful for members, too.

Mike MacKenzie: That was a very interesting thought from Ms Scott. Consideration has been given to that option, which is one possibility. Are there any others? Have any others occurred to you?

Catherine Scott: I have to say no. There is an argument that the affirmative procedure could have been used, even in this case. That is something to pursue further for the future.

Mike MacKenzie: The committee has had some discussion about the possibility of some kind of super-negative procedure. Could that provide a remedy?

Catherine Scott: I am not sure that I understand exactly what is envisaged there.

Neil Watt: I have been involved in discussions with the committee about the super-affirmative procedure. I am very happy to defer to Mr

FitzPatrick's office and to come back to the committee on that point, if that would be helpful.

Mike MacKenzie: Thank you.

The Convener: Whatever a super-negative procedure might be in other people's minds, I think that it is probably pretty close to exactly what we are doing: an instrument is produced that everybody can have a look at and have a discussion about before the negative procedure is gone through. However, we may give that matter some more detailed thought.

Stewart Stevenson: I want to ask Catherine Scott a question. Can the process by which we might lay stronger foundations for the use of the affirmative procedure in advance of the powers being available be done via the Government going to court and seeking a declarator? What other mechanism would be likely to get us to that point to remove or substantially mitigate the doubt?

Catherine Scott: That could be considered in consequence of further discussion. I would not necessarily recommend it.

John Scott: Forgive me, convener, but as we deal with the minutiae of legislation and its enablement, I believe that, if there are things that the witnesses, having been through the experience, think that the Parliament's processes could benefit from, they might wish to write to us to point out whether we could adopt an enhancement in the procedures. Obviously, I appreciate that that would be a matter for Government ministers as well as Mr FitzPatrick's office, but we, too, would be interested if there was a development to be taken from the anomalous situation in which we find ourselves.

Neil Watt: I would be very happy to take that matter away and feed it back to the ministers. There is also the value of non-formal engagement to us: picking up issues with the clerk Euan Donald, his team and the lawyers has been hugely valuable. We have tried to develop the approach with our operational group, but we have tried to manage the Scottish Parliament part through that non-formal discussion. There is a lot that we can learn, perhaps not just for extremely novel cases such as the one that we have discussed.

The Convener: That concludes our questions. I thank the witnesses for being here and for what they have just spoken about. I do not think that there is any criticism of the process that we have been through over the past few weeks, which seems to have been the best. I think that it has been very effective on all sides, and I thank you for that.

If there are any thoughts about how we might deal with the issue or similar things in the future, we will always be willing to hear them. We worry about processes, and it is surprising how often we seem to have found ourselves with unique sets of circumstances. That is not a criticism of today's discussion, but they seem to turn up on the committee's desk quite often. I am grateful for your advice and contributions.

I suspend the meeting briefly while we reorganise.

11:30

Meeting suspended.

11:31

On resuming—

Instruments subject to Affirmative Procedure

Public Water Supplies (Scotland) 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.*

Instruments subject to Negative Procedure

Public Bodies (Joint Working) (Integration Joint Monitoring Committees) (Scotland) Order 2014 (SSI 2014/281)

11:32

The Convener: There is a lack of consistency in the terms of articles 3(5) and 4(6), notwithstanding that the two provisions are intended to have the same effect.

Further to that, article 4(7) has been drafted in a way that does not accurately give effect to the policy intention by going beyond what is required to achieve that intention. Although the drafting might not impede delivery of the intended policy intention, as it ensures that staff of the body to which integration functions are delegated are represented on an integration joint monitoring committee, it makes provision that goes beyond what is required to achieve that intention by providing that additional staff also may be represented.

In light of those issues, does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground?

Members *indicated agreement.*

Public Bodies (Joint Working) (Integration Joint Boards) (Scotland) Order 2014 (SSI 2014/285)

The Convener: A few points have been raised by our legal advisers in relation to the instrument.

Articles 3(1)(d) and 5(2)(d) provide that, when an integration joint board is established, it must include the chief officer of the integration joint board. However, section 10 of the Public Bodies (Joint Working) (Scotland) Act 2014 provides that the chief officer is to be appointed by the integration joint board once the board is established. Accordingly, it does not appear to be possible for the chief officer to be a member of the integration joint board as established, as that officer is not appointed until after the board is established.

Does the committee therefore agree to draw the instrument to the Parliament's attention under reporting ground (i), as articles 3(1)(d) and 5(2)(d) appear to be defectively drafted?

Members *indicated agreement.*

The Convener: Article 3(3) makes provision for establishing

"The number of persons to be appointed under paragraph 1(a) and (b)".

The Scottish Government intends that to mean the number of persons appointed under each of paragraphs 1(a) and 1(b). However, the committee may consider that the manner in which article 3(3) is worded does not accurately reflect that intention. The drafting as it stands could readily support the interpretation that the intention is for article 3(3) to refer to the total number of persons appointed under paragraphs 1(a) and (b) together. The committee may consider that article 3(3) could have been drafted in such a manner as to put the matter beyond doubt.

Does the committee therefore agree to draw the instrument to the Parliament's attention under reporting ground (h), as the meaning of article 3(3) could be clearer?

Members *indicated agreement.*

The Convener: There is a lack of consistency between the wording of articles 3(6) and 5(6), notwithstanding the fact that the provisions are intended to have the same effect.

Does the committee therefore agree to draw the instrument to the Parliament's attention under the general reporting ground?

Members *indicated agreement.*

Mike MacKenzie: It is worth putting on record the point that, albeit that such matters do not seem to have huge importance in themselves, clear drafting is not just a matter of elegance for its own sake but a matter of efficiency. When instruments are less clear than they ought to be or possibly even ambiguous, it consumes the resource of lawyers—perhaps multiple lawyers—pondering their meaning when, if the meaning was clear, they could get on more quickly and efficiently. It is not a mere matter of semantics.

The Convener: The point is well made and I am sure that we all agree.

Teachers' Pension Scheme (Scotland) (No 2) Regulations 2014 (SSI 2014/292)

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

Members *indicated agreement.*

South Arran Marine Conservation (Amendment) Order 2014 (SSI 2014/291)

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

Members *indicated agreement.*

Discretionary Housing Payments (Limit on Total Expenditure) Revocation (Scotland) Order 2014 (SSI 2014/298)

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

Act of Sederunt (Rules of the Court of Session and Sheriff Court Rules Amendment No 2) (SSI 2014/297)

11:36

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

Members *indicated agreement.*

The Convener: That concludes the public part of the meeting.

11:36

Meeting continued in private until 11:45.

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