



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 5 May 2015

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DELEGATED POWERS AND LAW REFORM COMMITTEE

15th Meeting 2015, Session 4

CONVENER

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

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*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 Robert Burns Room (CR1)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 5 May 2015

[The Convener opened the meeting at 13:04]

Instruments subject to Affirmative Procedure

Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2015 [Draft]

The Convener (Nigel Don): I welcome members to the 15th meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to turn off mobile phones.

No points have been raised by our legal advisers on the order. Is the committee content with it?

Members *indicated agreement.*

Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2015 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Certification of Death (Scotland) Act 2011 (Authorisation of Cremation – Death Outwith Scotland) Regulations 2015 (SSI 2015/162)

Certification of Death (Scotland) Act 2011 (Application for Review) Regulations 2015 (SSI 2015/163)

Certification of Death (Scotland) Act 2011 (Consequential Provisions) Order 2015 (SSI 2015/164)

13:05

The Convener: The three instruments, along with Scottish statutory instruments SSI 2015/165 and SSI 2015/166, which I will address later, were laid on 2 April 2015 and come into force on 13 May. That breaches the 28-day rule, given that no account has been taken of the days when Parliament was in recess over Easter.

The committee recognises that some complex issues involving representations from and discussions with various stakeholders led to a delay in laying the instruments. However, the committee considers that, when it is critical to announce in advance the coming-into-force date for a package of instruments, sufficient time should be built into planning those instruments so that any required review of the provisions after consultations can be done before the announced date, while respecting the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Does the committee therefore agree to draw those three instruments to the attention of the Parliament under reporting ground (j), as they fail to comply with the requirements of section 28(2) of the 2010 act?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I agree that we should draw that to the Parliament's attention, and I would like to highlight in part why that is the case.

In my constituency work, I have been working with undertakers and the health board on the introduction of the new system of certification. It is clear that a significant amount of preparation has to be done by both those parties, among others, so it is very important to give sufficient notice. I understand that the reason for the delay is precisely that there has been interaction, so there ought to be reasonable knowledge, but at the end of the day people do not know the final form of the

regulations until they are published. They therefore need time to ensure that they are as they had thought they would be and to be ready to implement them.

The reason for having the 28-day rule can, in some circumstances, be quite significant, and this is one such circumstance.

John Scott (Ayr) (Con): I agree. The five instruments in this series have breached the 28-day rule, and we should encourage the Scottish Government to do better. As Stewart Stevenson has said, there is a good reason for the notice period, and it should not be breached.

The Convener: Thank you.

**Certification of Death (Scotland) Act 2011
(Post-Mortem Examinations – Death
Outwith United Kingdom) Regulations
2015 (SSI 2015/165)**

The Convener: There is a patent drafting error in the form of the schedule to the regulations. It specifies that it is a

“Form of application under Section 19 of the Certification of Death (Scotland) Act 2015”.

Regulation 2 cites the act correctly, as enacted in 2011.

The Scottish Government proposes to correct the error by means of a corrections slip, on the basis that it is self-evident. That may be suitable in this instance, if agreed with the National Records of Scotland.

The committee may consider, having regard to the fact that the only purpose of the instrument is to provide for that form of application, that the patent error should be reported. Does the committee therefore agree to draw the instrument to the attention of the Parliament under the general reporting ground, on account of the aforementioned drafting error?

Members indicated agreement.

The Convener: As was the case with SSI 2015/162, SSI 2015/163 and SSI 201/164, SSI 2015/165 was laid on 2 April 2015 and comes into force on 13 May 2015. That breaches the 28-day rule, given that no account has been taken of the days when Parliament was in recess over Easter. The same comments apply to this instrument as applied to SSI 2015/162, SSI 2015/163 and SSI 2015/164.

Does the committee therefore agree to draw the instrument to the attention of the Parliament under reporting ground (j), as it too fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

**Registration of Births, Deaths and
Marriages (Scotland) Act 1965 (Prohibition
on Disposal of a Body without
Authorisation) Regulations 2015 (SSI
2015/166)**

The Convener: The meaning of regulation 8 and of form N in the schedule to the regulations could be clearer in a particular respect. They could more clearly implement the policy intention that the section of form N relating to post-mortem examinations will require to be completed by a registered medical practitioner who has appropriate expertise in pathology.

The Scottish Government has undertaken to bring forward an amendment to make this clarification

“at the next appropriate opportunity”.

Given that form N is significant as having effect to release body parts for disposal after a post-mortem examination, the committee may consider that the provision should be clarified by an amendment as soon as possible.

Does the committee agree to draw the instrument to the Parliament’s attention under reporting ground (h), as the meaning of regulation 8 and of form N in the schedule to the regulations could be clearer?

Members indicated agreement.

The Convener: Does the committee also agree to call on the Scottish Government to clarify the intended provision by bringing forward an amending instrument as soon as possible?

Members indicated agreement.

The Convener: Finally, as was the case with SSI 2015/162, SSI 2015/163, SSI 2015/164 and SSI 2015/165, this instrument was laid on 2 April and comes into force on 13 May, which breaches the 28-day rule, given that no account has been taken of the days when Parliament was in recess over Easter. Again, the same comments that applied to the previous instruments apply to this instrument.

Does the committee therefore agree to draw this instrument to the Parliament’s attention under reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members indicated agreement.

The Convener: Does the committee also agree to reinforce the point that, when it comes to a package of instruments, sufficient time should be built into planning the instruments to ensure that any required review of the provisions after consultations can be done before the announced date, while still respecting the requirements of section 28(2) of the 2010 act?

Members indicated agreement.

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Ordinary Cause Rules Amendment) (Proving the Tenor and Reduction) 2015 (SSI 2015/176)

13:11

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

Members *indicated agreement.*

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 12) Order 2015 (SSI 2015/177)

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

Members *indicated agreement.*

Community Care and Health (Scotland) Act 2002 (Commencement No 4) Order 2015 (SSI 2015/179)

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

Members *indicated agreement.*

Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2015 (SSI 2015/180)

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

Members *indicated agreement.*

Education (Scotland) Bill: Stage 1

13:12

The Convener: Agenda item 4 is consideration of the delegated powers in the Education (Scotland) Bill at stage 1.

Members will have seen the delegated powers memorandum and the briefing paper. The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the powers. It is suggested that these 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 7 relates to initial assessments of the need for Gaelic-medium primary education—or GMPE—and applies when an education authority receives a parental request under section 5. When such a request is made, the authority is required to make an initial assessment of the need for GMPE, both within the area designated as the GMPE assessment area under section 6 and within the specified child's year group. Section 7(5) provides that when, following an initial assessment, the authority is satisfied that the various conditions in section 7(6) are met, it must determine that there is a potential need for GMPE in the area.

Two conditions are set out in section 7(6)(a) and (b). Section 7(6)(a) provides that the child specified in the request and the children resident in that GMPE assessment area who are in the same year group as the specified child, and in respect of whose parents the authority holds information about demand as mentioned in section 5(3), must total five or more. Section 7(6)(b) provides that the demand for GMPE in respect of children in a different year group is at or is likely to increase to a level that the authority considers reasonable.

Section 7(7) provides that the Scottish ministers may by regulations amend section 7(6)(a) to substitute a different number for the number of children specified, and the power also enables ministers to provide that the number of children specified is to be read as a different number in the application of that subsection to such education authorities as may be specified in the regulations.

In essence, the power enables the Scottish ministers to change the threshold figure for determining whether there is demand for GMPE in a particular area that is sufficient to justify securing GMPE, or to apply different threshold figures for different education authorities. Although the power, which is subject to the negative procedure, does not alter the substance of the duty placed on education authorities to determine that there is a

need for GMPE in a particular area when a certain threshold is reached, it is nonetheless significant to the practical operation of part 2 of the bill and its scope and application.

Does the committee agree to ask the Scottish Government for further justification of the choice of negative procedure for the exercise of this power, given its apparent significance and the fact that it permits the variation of the threshold figure beyond which an education authority must determine that there is a potential need for GMPE in a particular assessment area?

13:15

John Mason (Glasgow Shettleston) (SNP):

This is a very important issue because, as you have correctly stressed, the numbers could be significant. A level of four, five or six would not make a significant difference, but more significant changes could be made and I would certainly like to hear the explanation as to why such an approach has been taken to this fundamental matter.

The Convener: Thank you.

Section 10 relates to full assessments of the need for GMPE. When, at the conclusion of the initial assessment process, an education authority determines that there is a potential need for GMPE in that assessment area, the authority must either carry out a full assessment or proceed directly to securing GMPE. When the authority concludes at the end of the initial assessment process that there is no potential need for GMPE in the area, it is not required to take any further action. However, it may still exercise its discretion and either undertake a full assessment or proceed directly to securing GMPE.

The full assessment procedure requires the education authority to consult the bodies specified in section 10(3), and it must then decide whether to secure the provision of GMPE in the particular assessment area. Section 10(7) sets out a list of matters to which the education authority must have regard in making its decision. In addition to the matters specified in the list in section 10(7), the authority must also have regard to any other matters that it considers to be relevant to the decision.

Section 10(8) provides that the Scottish ministers may, by regulations, modify sections 10(3) or 10(7), and they may also make such other modifications of section 10 as they consider

"necessary or expedient in consequence of any modification of"

section 10(3). That power is subject to the negative procedure and permits the modification of primary legislation.

Does the committee therefore agree to ask the Scottish Government why it is considered appropriate for the power in section 10(8)(b) to be subject to the negative procedure, given that it permits modifications to primary legislation, the nature of which is not specified beyond the requirement that ministers consider them to be

"necessary or expedient in consequence of any modification of"

section 10(3)?

Members indicated agreement.

The Convener: Section 12 enables the making of regulations to extend the provisions of part 2, which relates to GMPE, to early learning and childcare. At present, part 2 applies only in respect of primary school education: a request made under section 5 requires the education authority to assess the need for Gaelic-medium education only in primary schools.

The power is subject to the negative procedure, except when it is exercised to make textual modifications to primary legislation. The power would permit a request made under section 5 to be treated by the education authority as a request to assess the need for Gaelic-medium education in its area in respect of the duty to provide early learning and childcare.

Section 12(4)(a) provides that regulations made to extend part 2 to early learning and childcare may modify part 2, the Education (Scotland) Act 1980 or any other enactment, while section 12(4)(b) provides that such regulations may provide for any provision of part 2, the 1980 act and any other enactment to apply with or without modifications. The power is generally to be subject to the negative procedure but, when it is exercised to make textual amendments to primary legislation, the affirmative procedure will apply.

The extension of part 2 to early learning and childcare would represent a significant departure in policy terms from the position under the bill at present, as the present assessment process applies only in respect of primary education. Does the committee therefore agree to ask the Scottish Government for further explanation as to why the power is not subject to the affirmative procedure in its entirety rather than to the negative procedure when regulations made in its exercise do not make textual amendments to primary legislation?

Members indicated agreement.

The Convener: Thank you. Our next meeting will be on 12 May.

Meeting closed at 13:19.

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