



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 12 May 2015

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DELEGATED POWERS AND LAW REFORM COMMITTEE

16th 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 Sir Alexander Fleming Room (CR3)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 12 May 2015

[The Convener opened the meeting at 10:18]

Instruments subject to Affirmative Procedure

Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015 [Draft]

The Convener (Nigel Don): I welcome members to the 16th meeting in 2015 of the Delegated Powers and Law Reform Committee and, as always, I ask members to turn off their mobile phones.

The purpose of agenda item 1 is for the committee to consider its approach to the draft Public Services Reform (Scotland) Act 2010 (Part 2 Extension) Order 2015. The committee will have seen the relevant paper and the correspondence. The issue before the committee is whether it is content that no consultation exercise has been carried out to inform the Parliament's consideration of whether the draft order should be approved.

By way of recap, I note that section 134(4) of the Public Services Reform (Scotland) Act 2010 provides that part 2 of the act will cease to have effect on 1 August 2015 unless it is continued for a further period of five years by order. The purpose of the draft order is to continue the effect of those provisions for another five years.

Part 2 of the 2010 act allows the Scottish ministers to make orders to add, remove or change the functions of public bodies to improve efficiency, effectiveness and economy, and to remove burdens that result from legislation. The powers allow significant restructuring of public functions to be achieved through subordinate legislation rather than primary legislation. As members will recall, when the powers were proposed they were considered controversial, and the Parliament agreed to a sunset clause with an option of renewal to ameliorate some of those concerns.

The committee may wish to note that no consultation has been undertaken on the draft order and that the accompanying policy note offers no justification for the Government's not having done so. The Scottish Government's "Consultation Good Practice Guidance" states:

"The decision to consult will be informed by the history of the policy area, the issue under consideration, the existence of any Parliamentary/EU obligations to consult and the stage of the policy/legislative process."

The purpose of public consultation on proposed instruments is to inform parliamentary scrutiny of the proposals. That is particularly relevant to instruments that the Parliament is being asked to approve.

The committee may consider that the Scottish Government's view that the draft order did not require to be the subject of public consultation merits further inquiry, given the good practice guidance's direction that the Government should take into account the history of the policy area and the fact that questions have previously been raised about the appropriateness of the use of subordinate legislation for such a purpose.

Do members have any comments or observations to make?

John Scott (Ayr) (Con): Yes, I do. I am particularly concerned about what the draft order proposes. I am particularly concerned that, given the controversy that surrounded the provisions in question some five years ago, we are not looking at them again.

I am also concerned about the Government's response to our inquiry about why the matter is not being considered again and why there has not been a consultation, despite what the Government's own guidance says, which it appears to have ignored. If there is a change in policy here, it is that the Government will now decide when to adhere to its own guidance.

I am particularly concerned about the tone of the Government's response, in which it says:

"It is for Parliament to decide whether the Part should remain in force and we do not believe that stakeholders were likely to have any particular views on the issue of continuation."

Therefore, it now appears to be the case that it is the Government that decides that stakeholders are not likely to have a view. I find that position very unattractive and almost dangerous.

The matter must be looked at much more closely. I know that we will come on to discuss who will do that. Given the controversy that surrounded the provisions in question, it would be entirely reasonable and, indeed, appropriate for us to consider how they have worked in practice over the past five years. That is not a big ask.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I think that we should perhaps put the draft order in perspective: it provides for the continuation of an existing policy. That said, the Government should be invited to look at its processes and, more fundamentally, the changes

in policy that will be enabled through the continuation of the powers that are addressed in the draft order. Those powers are expressed in secondary legislation that comes before Parliament in the normal way.

The draft order is slightly unusual. Although John Scott makes a proper point, I think that he might be overegging the pudding a bit. I do not think that we should ignore what the Government has done, but mine is a more measured response.

John Mason (Glasgow Shettleston) (SNP): I share some of the concerns that John Scott has expressed. We have had a very minimalist response so far. At some stage, it would be good to have an official or the appropriate Government minister explain the approach that is being taken in the draft order to this committee or the Finance Committee and to answer a few questions on it so that members can understand the thinking behind it.

Margaret McCulloch (Central Scotland) (Lab): I totally agree with John Mason and John Scott.

The Convener: I plainly cannot ignore all those comments. One way forward would be to invite the Finance Committee to ask the questions. Because the draft order is an affirmative instrument, the relevant minister—who I think is the Cabinet Secretary for Finance, Constitution and Economy—and his officials will have to address it with the Finance Committee.

An obvious way forward would be for us to write to the Finance Committee—and, as a matter of courtesy, to the Government—to express our concerns, as they have just been set out, and to invite it to ask questions of the cabinet secretary and his officials when the order comes before it. I think that that would be better than trying to get officials to appear before us. I am not quite sure of the timescales; the more important point is that officials would say to us what they have already said in writing. I am not sure that anything different would emerge, so that might not be valuable.

That is my suggestion to the committee. How do members feel about it?

John Scott: I agree entirely with that suggestion. What we want is a justification for the change in approach. We also want to know whether it is the approach that is going to be taken in future. Will consultation be optional? It appears that there has been a change in approach, which I am concerned about.

The Convener: If members are comfortable with that general approach, I suggest that we should probably report the draft order on the general reporting ground, because it would be

rather strange for us to do what I have suggested but not to report the order.

I therefore suggest that we report the draft order under the general ground for having failed to meet expectations as regards consultation. I propose that we also write to the Finance Committee and the Government in the terms that have been suggested. Is that agreed?

Members indicated agreement.

Instruments subject to Negative Procedure

Outer Hebrides (Landing of Crabs and Lobsters) Order 2015 (SSI 2015/183)

10:26

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

Members *indicated agreement.*

Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/188)

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

Bovine Viral Diarrhoea (Scotland) Amendment Order 2015 (SSI 2015/186)

10:26

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

Members *indicated agreement.*

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill: Stage 1

10:26

The Convener: The purpose of agenda item 4 is for the committee to consider the delegated powers in the Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill at stage 1.

The schedule to the bill sets out a scheme under which a fixed penalty may be applied for as an alternative to a prosecution under the criminal law. Paragraph 8 confers power on the Scottish ministers to make regulations about the application of the proceeds of fixed penalties, the keeping of accounts and the preparation and publication of statements of account relating to the proceeds. The proposed parliamentary procedure is the affirmative procedure, given that the power relates to the use of public resources.

The committee may consider that the justification for using the affirmative procedure appears sound when it is applied to regulations concerning how the proceeds should be defrayed, but in so far as the power relates to the administrative matter of the keeping of accounts the committee may take the view that it would not be an effective use of parliamentary time to require it to be subject to the affirmative procedure.

Does the committee wish to recommend that the negative procedure would provide a more appropriate form of scrutiny with regard to the administrative matters that are dealt with in paragraph 8(b)?

Members *indicated agreement.*

The Convener: Is the committee otherwise content with the power?

Members *indicated agreement.*

The Convener: Is the committee content with the other powers in the bill and the associated procedure?

Members *indicated agreement.*

The Convener: The next meeting will be next Tuesday.

Meeting closed at 10:28.

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