



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 30 May 2017

Session 5



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Pàrlamaid na h-Alba

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DELEGATED POWERS AND LAW REFORM COMMITTEE

18th Meeting 2017, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Alison Harris (Central Scotland) (Con)

Monica Lennon (Central Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Pauline McNeill (Glasgow) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law
Reform Committee

Tuesday 30 May 2017

[The Convener opened the meeting at 10:48]

Interests

The Convener (John Scott): I welcome members to the Delegated Powers and Law Reform Committee's 18th meeting in 2017. Monica Lennon cannot attend and has submitted her apologies; Pauline McNeill is attending in her place.

Under agenda item 1, I invite Pauline McNeill, in accordance with section 3 of volume 2 of the "Code of Conduct for Members of the Scottish Parliament", to declare any relevant interests.

Pauline McNeill (Glasgow) (Lab): I have nothing to declare.

The Convener: Thank you.

Instruments subject to
Affirmative Procedure

10:49

The Convener: No points have been raised by our legal advisers on the following three instruments.

Criminal Justice and Licensing (Scotland)
Act 2010 (Consequential Provisions) Order
2017 [Draft]

Mental Health (Cross-border transfer:
patients subject to requirements other
than detention) (Scotland) Regulations
2017 [Draft]

Mental Health (Cross-border transfer:
patients subject to detention requirement
or otherwise in hospital) (Scotland)
Amendment Regulations 2017 [Draft]

The Convener: Both mental health instruments contain minor drafting errors. When a drafting error is identified in an instrument that has been laid in draft, the committee tends to recommend that the instrument should be withdrawn and relaid with the error corrected. If there is no time for re-laying, there is the option of laying an amending instrument. In our view, that is normally the correct approach.

However, in this instance, the numbering and cross-referencing errors are highly evident. The Scottish Government has considered the matter and decided that the errors should be corrected on the signing copy. The committee could agree that it might appear disproportionate, in this instance, for the regulations to be withdrawn and relaid or for an amending instrument to be laid.

Therefore, as a very limited exception to our normal approach, does the committee agree to accept the proposed approach of correcting the highly evident errors on the signing copy?

Members *indicated agreement.*

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Loch Carron Urgent Marine Conservation Order 2017 (SSI 2017/158)

10:51

The Convener: The Loch Carron Nature Conservation Marine Protected Area Order 2017 designated Loch Carron as a nature conservation marine protected area with effect from 19 May 2017. That order provides that the flame shell beds in Loch Carron are protected features.

The order that the committee is considering has been brought into force urgently to further the stated conservation objectives of the Loch Carron marine protected area order. SSI 2017/158 fails to comply with the 28-day rule in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which provides that an instrument that is subject to the negative procedure must be laid before Parliament as soon as practicable after it is made, and in any event at least 28 days before it comes into force.

As SSI 2017/158 was made and laid before Parliament on 18 May 2017 and came into force on 20 May 2017, it does not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.

Accordingly, does the committee agree to draw the order to Parliament's attention under reporting ground (j), as there has been a failure to lay it in accordance with section 28(2) of the 2010 act, for the reason that I just outlined?

Members *indicated agreement.*

The Convener: Does the committee also agree to find the failure to comply with section 28(2) to be acceptable in the circumstances, as outlined in the letter of 18 May 2017 from the head of marine conservation, on behalf of the Scottish ministers, to the Presiding Officer, which is included in our meeting papers?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 (Commencement No 3, Transitional and Saving Provisions) Regulations 2017 (SSI 2017/155 (C 13))

10:54

The Convener: The regulations commence provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 on 15 June 2017 in so far as they are not already in force, and they save the old regime under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 (SI 1977/191) for inquiries that were applied for prior to 15 June 2017.

The terms of regulation 3 of SSI 2017/155 could make it clearer that the references to an inquiry in sections 30 to 35 of the 2016 act relate only to an original inquiry that was conducted under the 1976 act. Accordingly, does the committee agree to draw the regulations to Parliament's attention under reporting ground (h), on the basis that the meaning of regulation 3 could be clearer?

Members *indicated agreement.*

Forestry and Land Management (Scotland) Bill: Stage 1

10:55

The Convener: The purpose of agenda item 5 is to consider the committee's approach to the scrutiny of the delegated powers in the bill at stage 1. The item gives the committee an opportunity to identify matters that it might wish to raise with the Scottish Government in relation to those powers.

The bill's overall policy aim is to complete the devolution of forestry by transferring to the Scottish ministers the powers and duties of the Forestry Commission, in so far as they relate to Scotland, and to provide a modern statutory framework for forestry in Scotland. That framework will replace the application in Scotland of the Forestry Act 1967, which currently governs forestry in England, Wales and Scotland.

It is suggested that the committee might wish to raise four questions with the Scottish Government about the delegated powers in the bill.

Section 24 gives the Scottish ministers a power to make regulations that set out exemptions to the offence of unauthorised felling. Regulations that are made under section 24 may provide that the offence provision does not apply to particular categories of person; particular places or activities; particular circumstances; and trees of particular descriptions. Regulations that are made under section 24 may also modify any enactment, including the act that flows from the bill. As the Government acknowledges in its delegated powers memorandum, the exemptions under the section are key to determining which situations will be caught by the forestry regulatory regime in the bill, and that in turn will establish when the act of felling might amount to an offence under the bill.

Does the committee agree to ask the Scottish Government why it is considered appropriate in section 24 to take a power to create exemptions from the offence of unauthorised felling that section 23 provides for, rather than providing for such exemptions in the bill? Does the committee also agree to ask the Scottish Government to explain why that approach is considered to strike an appropriate balance between primary and secondary legislation and to ask it to consider whether the alternative approach of setting out initial exemptions in the bill and having a power to amend those exemptions by regulations could strike a more appropriate balance?

Members indicated agreement.

The Convener: Section 27(7) gives the Scottish ministers a power to set out in regulations further provision in relation to decisions on applications

for felling permission. Such regulations may include, but are not limited to, provision about power for the Scottish ministers to enter land in order to make a decision about the application; how decisions are to be notified; the imposition of conditions on felling permission; and situations in which persons who have made an unsuccessful application for felling permission may be restricted from making a further application in relation to the same circumstances.

11:00

The delegated powers memorandum concludes that, given the administrative nature of the regulation-making power in section 27(7), the negative procedure provides an appropriate level of scrutiny. Despite the non-exhaustive list that is provided in that section, it is not immediately clear whether the exercise of the power would be limited to matters of purely administrative detail or whether the power could be used to make provision in relation to the way in which such decisions should be taken by the Scottish ministers. If the latter is the case, that would appear to go beyond purely administrative provision, and use of the power could have a significant effect on those who apply for felling permission.

On that basis, does the committee agree to ask the Scottish Government for further clarification as to how the power is intended to be exercised?

Members indicated agreement.

The Convener: Section 29 provides that a person who suffers loss as a result of a decision by the Scottish ministers to refuse an application for felling permission is entitled to compensation in accordance with regulations that are made under subsection (2). Section 29(2) provides that such regulations may include, but are not limited to, provision about persons who are entitled to compensation; the procedure for applying for compensation; information to be included in applications; the way in which compensation is to be determined; the way in which disputes about compensation are to be determined; and detail on appeals against compensation.

The delegated powers memorandum concludes that, given the administrative nature of the regulation-making power in section 29(2), the negative procedure provides an appropriate level of scrutiny. Section 29(2) provides that regulations that are made under that section may include, among other things, provision about persons who are entitled to compensation. To the extent that that could extend to provision that sets out in what circumstances persons may or may not be entitled to compensation, which would affect the scope of the compensation provision that is made by

section 29(1), that would appear to go beyond purely administrative provision, and use of the power could have a significant effect on persons who suffer loss as a result of a refusal by the Scottish ministers to grant felling permission.

On that basis, does the committee agree to ask the Scottish Government to provide further clarification as to how the power is intended to be exercised? Does the committee agree to ask, in particular, for an explanation of the policy intention behind the taking of a power to make provision about persons who are entitled to compensation, and how that is intended to interact with the provision in section 29(1) that a person who suffers loss as a result of a decision by the Scottish ministers to refuse an application for felling permission is entitled to compensation in accordance with regulations that are made under section 29(2)?

Members *indicated agreement.*

The Convener: It is also suggested that the committee might wish to raise a question about the power that is delegated to the Scottish ministers under section 64, although it is not a power to make subordinate legislation. That section gives the Scottish ministers a power, for the purposes of, or in connection with, the carrying out of their functions under the bill, to impose charges of such amounts as they consider appropriate.

Does the committee agree to ask the Scottish Government to explain the policy intention behind the taking of the power in section 64 for the Scottish ministers to impose charges of such amounts as they consider appropriate, for the purposes of, or in connection with, the carrying out of their functions under the bill? In particular, does the committee agree to ask for an explanation of the circumstances in which the power might be exercised and of the types and levels of fees that might be imposed under section 64? Does the committee also agree to ask the Scottish Government to consider whether taking a power to impose such charges by way of executive action—as opposed, for example, to a power to set and amend charges by way of subordinate legislation—is appropriate?

Members *indicated agreement.*

The Convener: I thank members for their forbearance.

Meeting closed at 11:05.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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