



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 28 April 2015



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**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**14<sup>th</sup> 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 Mary Fairfax Somerville Room (CR2)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 28 April 2015*

*[The Convener opened the meeting at 11:30]*

### Decision on Taking Business in Private

**The Convener (Nigel Don):** I welcome members to the 14th meeting in 2015 of the Delegated Powers and Law Reform Committee and, as always, I ask members to switch off their mobile phones.

Agenda item 1 is a decision on taking business in private. It is proposed that we take agenda item 6—consideration of a draft report on the delegated powers provisions in the Carers (Scotland) Bill at stage 1—in private. Does the committee agree to do that?

**Members** *indicated agreement.*

## Instruments subject to Affirmative Procedure

### Enhanced Enforcement Areas Scheme (Scotland) Regulations 2015 [Draft]

11:31

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

**Members** *indicated agreement.*

### Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2015 [Draft]

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

**Members** *indicated agreement.*

## Instruments subject to Negative Procedure

### Firefighters' Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141)

11:31

**The Convener:** In inserting new paragraph 38 in part 3C of schedule 2 to the Firefighters' Pension Scheme (Scotland) Regulations 2015 (SSI 2015/19)—the 2015 regulations—regulation 22(d) appears to be defectively drafted.

Paragraph 38(2)(b) determines the date on which a member is taken to join the new pension scheme if they decide not to appeal against refusal of an ill-health award under the firemen's pension scheme 1992 as set out in schedule 2 to the Firemen's Pension Scheme Order 1992 (SI 1992/129). It does so with reference to

"the expiry of 28 days from the date on which the member received the last of the documents which the authority is required to supply under rule H2(4) of the 1992 Scheme".

Rule H2(4) of the 1992 scheme as it applies in Scotland does not require the fire authority to provide any documents, although the equivalent rule in England and Wales requires the relevant fire authority to do so. In the absence of a requirement under the Scottish rules to supply documents, the provision does not give effect to the apparent policy objective of establishing the alternative of two dates on which a member is taken to join the new scheme in circumstances in which the member decides not to appeal against refusal of an ill-health award under the 1992 scheme.

Regulation 26(i)(ii), which amends rule 9 of the new firefighters' pension scheme (Scotland)—the NFPS—as set out in schedule 1 to the Firefighters' Pension Scheme (Scotland) Order 2007 (SSI 2007/199) regarding commutation of pensions, also appears to be defectively drafted. The provision inserts new paragraph (1A) in rule 9. As the Scottish Government has acknowledged, the wording of the text to be inserted as new paragraph (1A) does not make sense. The meaning of the provision is accordingly unclear and does not deliver the intended policy objective.

Regulation 34(b), in so far as it inserts new rule B1A(3)(b) in the 1992 scheme, also appears to be defectively drafted. As the Scottish Government has acknowledged, the wording of the text to be inserted as new rule B1A(3)(b) does not make sense. The meaning of the provision is accordingly unclear and does not deliver the intended policy objective.

Does the committee therefore agree to draw the regulations to the attention of the Parliament under reporting ground (i), as they appear to be defectively drafted?

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I am distressed—that is probably as good a word as any to use—at the inadequate quality of the drafting of the regulations. I am particularly distressed in that I understand informally that the problems that have been described thus far—I think that the convener is going to mention others—are in some senses patent. In other words, sentences do not make sense. It does not require enormous legal skill to spot that sort of error.

As far as the errors in cross-referencing are concerned, I understand that it is comparatively straightforward—albeit that the work needs to be done by someone who is legally trained and experienced—to establish that the cross-references in question do not work.

We are not necessarily talking about needing to engage with great legal principles, which can be difficult, in order to detect that there are errors in what is a very important piece of legislation for people who are receiving pensions. I absolutely acknowledge that the timescale over which this has had to be dealt with has been set by others and has presented significant challenges. However, the instrument coming to the committee and to the Parliament in this form and the substantial amount that we are going to say about it demonstrate that the drafting and checking processes that the Scottish Government has adopted in relation to it are wholly inadequate for purpose.

Whatever else we say—we have to agree with the proposition that you are putting to us, convener, and I am going to do that—we should nonetheless think very carefully as a committee about what we want to say to the Government overall on this particular instrument and the Government's approach to dealing with it. It is not at all satisfactory.

**The Convener:** Thank you for those comments. I have quite a lot of detail to go through, and it would be good to get through that first. Perhaps we could have a general discussion at the end as to how we handle this—are members comfortable with that?

**John Scott (Ayr) (Con):** I am absolutely fine with that.

**The Convener:** Thank you.

Furthermore, as members have indicated, the meaning of regulation 7, which amends regulation 59(2) of the principal regulations, is lacking in clarity. The amendment does not indicate whether

the sum referred to in new regulation 59(2)(ba) is to be included in the calculation referred to in regulation 59(2). The intended effect of new subparagraph (ba) is accordingly unclear.

The meaning of regulation 38(a)(i), which inserts new subparagraph (ab) in rule F2(1) of the 1992 scheme, is also lacking in clarity. The word “or” is included at the end of new subparagraph (ab), instead of the intended word “and”. The use of the word “or” rather than “and” indicates that the period of service mentioned in new subparagraph (ab) is to be regarded as an alternative to one or more of the other periods of service mentioned in subparagraphs (a), (b) and (c) of paragraph (1). However, the apparent policy intention is that each period of service mentioned in existing paragraph (1), including the period in new subparagraph (ab), is to be calculated cumulatively.

Does the committee therefore agree to draw the instrument to the attention of the Parliament under reporting ground (h), as the meaning of regulations 7 and 38(a)(i) could be clearer?

**Members indicated agreement.**

**The Convener:** There also three matters that the committee may wish to report under the general reporting ground. First, regulation 9 amends regulation 65 of the principal regulations by substituting paragraph (3). Substituted subparagraph (3)(a) refers to entitlement to payment of a lower tier ill-health pension under “rule 2(2) of the NFPS”.

There are several rules numbered “2(2)” in various parts of the NFPS, at least two of which refer to entitlement to lower tier ill-health pension. The omission of the words “of Part 3” after “rule 2(2)” is a drafting error.

Secondly, regulation 22(d) inserts paragraphs 26 and 28 in new part 3B of schedule 2 to the principal regulations. Paragraph 26(3) refers to a bereavement pension that is payable to a spouse or civil partner under rule E8 of the 1992 scheme, while paragraph 28(2) refers to a bereavement pension that is payable to an eligible child under rule E8A of the 1992 scheme. Those references have been included in error. Rule E8 of the 1992 scheme, as it has effect in Scotland, does not make provision for bereavement pensions, while rule E8A has no effect in Scotland at all. The provisions have effect in England and Wales only. The references to bereavement pensions in paragraphs 26(3) and 28(2) of the principal regulations are accordingly unnecessary.

Thirdly, and finally, the instrument contains a number of minor drafting errors that have been identified by the committee's legal advisers.

In new paragraphs (6) to (8) of rule 1 of part 11 of the NFPS, as inserted by regulation 28(a)(ii) of

the instrument, the references to “paragraph 33” of schedule 2 to the 2015 regulations should be references to “paragraph 32” of that schedule.

In new paragraph (2A)(b) of rule 2 of part 11 of the NFPS, as inserted by regulation 28(b)(ii) of the instrument, the reference to “paragraph 33(4)” of schedule 2 to the 2015 regulations should be a reference to “paragraph 32(4)” of that schedule.

In new rule B1A(3)(a) of the 1992 scheme, as inserted by regulation 34(b) of the instrument, the reference to “paragraph (1)(a)” of rule B1 should be to “paragraph (1)(b)” of rule B1.

In new rule B2A of the 1992 scheme, as inserted by regulation 34(d) of the instrument, the reference to “regulation 65(4)(a)” of the 2015 regulations should be to “regulation 65(3)(b)” of those regulations, and the reference to “rule B1A(3)(i)” of the 1992 scheme should be to “rule B1A(3)(a)” of that scheme.

In new paragraph (1A) of rule B5D of the 1992 scheme, as inserted by regulation 34(h)(ii) of the instrument, the reference to “paragraph (3)(i)” of rule B1A should be to “paragraph (3)(a)” of rule B1A.

Finally, in new paragraphs (9), (10) and (12) of rule G1 of the 1992 scheme, as inserted by regulation 39(a)(ii) of the instrument, the references to “paragraph 34” of schedule 2 to the 2015 regulations should be references to “paragraph 33” of that schedule.

Does the committee therefore agree to draw the instrument to the attention of the Parliament under the general ground on account of drafting errors in regulations 9 and 22(d) and the minor drafting errors that have been identified by the committee’s legal advisers?

**Members indicated agreement.**

**The Convener:** That gives me the opportunity to thank our legal advisers for spotting all those issues. Just reading that out tells us something.

**John Scott:** I support Stewart Stevenson’s remarks in their entirety. To be frank, from all that we have heard it is almost insulting to us as a committee that the piece of work was presented to Parliament in that way. Of course we recognise the difficulties in timings, but it appears that not even the most minimal of effort has been made to check the policy intentions or, indeed, any of the detail, which even a cursory examination would have revealed to be problematic. It seems to me that the committee is being forced to do the work that should reasonably be carried out by the Scottish Government, and it is not acceptable that the parliamentary resource should be used in that way to carry out the Government’s work.

We have to consider our options. I am not certain what they are; there are possibly several. One option is to invite the Deputy First Minister, John Swinney, who has ultimate responsibility for the piece of legislation, I believe, to appear before the committee. Others may have a view on that, of course, but the regulations are one of the worst examples that we have seen in a very long time.

**The Convener:** Before I invite further comments, I would like to deal with the other issues that are in my brief.

The Scottish Government’s response to questions on the instrument from our legal advisers—that happens in the normal way, of course—states that it

“will deal with identified errors by way of an amending instrument (with retrospective effect as from 1st April 2015)”.

However, the committee may consider that it is unclear from the response which of the points that our legal advisers have raised are accepted by the Scottish Government as identified errors. Does the committee therefore agree to urge the Scottish Government to amend all the errors that the committee has reported under reporting grounds (i) and (h) and the general reporting ground with retrospective effect as from 1 April 2015?

**Members indicated agreement.**

**The Convener:** There are a few other thoughts that we might note as issues that arise from the Scottish Government’s response.

First, there are various references in the response to the fact that the same errors appear in the equivalent regulations that apply in England and Wales. Secondly, the Scottish Government is unable to confirm the meaning of various provisions in the Scottish regulations and defers to the relevant United Kingdom department on the issue. Thirdly, in some cases, the Scottish regulations simply copy over amendments that relate to provisions that have effect in England and Wales but not in Scotland, as previously discussed.

All that indicates that we are looking at regulations that came from Westminster—which has ultimate responsibility for the matter—and which simply needed to be transposed into Scots law.

Do members wish to make any other comments on how we might proceed?

11:45

**Stewart Stevenson:** I think that the bottom line is that greater care is required, particularly in complex areas. The provision that has been brought forward here is properly a pretty complex

one. What we need to hear from the Government is what additional steps it is putting into its processes to minimise and preferably eliminate the errors that the committee is picking up.

We are the last possible safety net in the process before the courts, and the Government needs to turn its mind to the fact that we pick up such manifest errors, such large numbers of errors and things that could relatively straightforwardly be checked through cross-referencing, and to consider how it is going to stop that.

The Government might come along and say, "This is the last of these instruments." We have had a whole series of them. If so, that will give it time to put in place processes that mean that, next time it has to engage with such things, it does not find itself in the same difficulties.

We would wish to support the Government absolutely in ensuring that there is a greater amount of time for it to follow such processes as it requires but, at the end of the day, it has to do it right, however little time there may be in which to do it. That means that it must look to its processes.

We as a committee should certainly write to the Scottish Government and make that point most robustly and reserve the right, if we are not satisfied with the response thereafter, to consider what further actions we might take including, as John Scott said, perhaps having the responsible member of the Government appear before us to explain what it is seeking to do.

In the first instance, however, we should certainly write and ask for the explanation as to how the Scottish Government is going to step up the quality of its processes to improve the quality of what we get.

**John Scott:** Absolutely. There is a failure of process here. We are not seeking to cast aspersions or blame; we only want the process to work and for the Parliament to be presented with instruments that have reasonably been considered by the Government before they reach us, notwithstanding all the difficulties that it has to overcome in that regard.

That is not a problem for us; it is a problem for the Government. Like Stewart Stevenson, I would like to hear how the issue will be addressed in future.

**The Convener:** Are there any other comments?

**Margaret McCulloch (Central Scotland) (Lab):** I agree with Stewart Stevenson and John Scott.

**The Convener:** Right. I suggest that we start by writing. I think that what needs to be said is already on the record—I do not think that I need to

add to that. I suppose that we have an opportunity given that there will be a new Westminster Government, regardless of its politics, that will be able to reflect on the processes that it wants to bring in, and it will not be responsible for what we have before us because it came from the previous Government. Let us not argue the politics; the point is that the Government will change.

**Stewart Stevenson:** The convener makes an important point. One of the duties to good governance in the round is that we would want to be assured in relation to the errors. We cannot say with certainty, but it looks as if they will also adversely affect legislation that applies elsewhere in the UK. We need to be satisfied that the UK Government will become aware of what our officials and our committee have been made aware of. That might be a question of the Presiding Officer writing to the UK Government—which I understand is the protocol—or otherwise.

Given that we have established that the Scottish legislation is defective and that there is the inference that the UK legislation, for which we are not responsible, may be similarly defective, it is good behaviour for us to ensure that that message gets back to those who can fix it.

**John Scott:** I think that Stewart Stevenson has made a very good point. It is a matter of courtesy and kindness on our part to point out the weaknesses of the legislation, which has been transmitted to us entirely as it left Westminster, and there is a warning here for us in Scotland about doing the same in future.

As for your comments about a change of Government, convener, there might be or might not be such a change; I am making no suggestion in that respect. However, I point out that that will not necessarily mean a change in drafters or civil servants. The fundamental issue that we are concerned with is not the Government but the process.

**The Convener:** I am with you on that: I was not making a political comment. I recognise that the drafters will be the same, but they work under certain instructions and the process requires political leadership there as much as here. Part of the problem is that they work to a 21-day rule and we work to a 28-day rule; things are the wrong way round.

**Stewart Stevenson:** I do not think that we should get too bogged down with the 21 and 28-day rules. Those at Westminster have a timetable, but the issue is that, without our having rigorously sought to identify its fitness for purpose in UK legislative terms, we appear to be of a view that the instrument is likely to be defective. It would appear that they have not used the 21 days that



they had available. It is not about their working to a 21-day rule and our working to a 28-day rule.

In fact, I could at the drop of a hat fall into unparliamentary language about this matter.

**The Convener:** Please do not do so. We all know enough about the processes.

Do members feel that we have discussed the matter adequately?

**Members indicated agreement.**

### **Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142)**

**The Convener:** The comments on these regulations are rather shorter.

The drafting of this instrument is defective, in that regulation 66(3) does not include, in error, an equivalent to subparagraph (d) of regulation 76(3) of the Police Pensions Regulations 2015, which introduce the counterpart police pension scheme in England and Wales.

The effect of the error is that regulation 66(3) does not set out in full the basis on which a selected medical practitioner must decide that a member of the scheme is permanently medically unfit for engaging in any regular employment. The regulation should include a provision requiring the practitioner to decide whether the inability is likely to continue until normal pension age or death.

The Scottish Government has agreed to address this point by way of an amending instrument, with retrospective effect from 1 April 2015. Notwithstanding that, does the committee agree to draw the instrument to the Parliament's attention under reporting ground (i) as it appears to be defectively drafted?

**Members indicated agreement.**

**The Convener:** The instrument also includes a number of minor drafting errors.

In regulation 132(1), the word "pension" should be added after "adult's"; in regulation 137(5), the reference to "paragraph (3)" should be to "paragraph (4)"; in regulation 149(4)(a), the reference to "regulation 159" should be to "regulation 150"; in regulation 170(1), the reference to "regulation 174" should be to "regulation 166"; in regulation 198(3), the reference to "regulation 115" should be to "regulation 215"; and in paragraph 1 of schedule 1, the reference to "regulation 97" in subparagraph (d) of the definition of medical decision should be to "regulation 96".

Although the Scottish Government has confirmed that those points will be addressed in an amending instrument, with retrospective effect from 1 April 2015, does the committee also agree

to draw the instrument to the Parliament's attention under the general reporting ground on account of the aforementioned drafting errors?

**Members indicated agreement.**

**The Convener:** As was the case with SSIs 2015/140 and 2015/143, which were considered by the committee last week, this instrument and SSI 2015/141, which the committee has just considered, were laid on 26 March 2015 and came into force on 1 April 2015. The very short period of time between laying the instruments and their coming into force has meant that there was no opportunity for the instruments to be scrutinised prior to their coming into force.

Does the committee therefore agree to draw both SSI 2015/141 and SSI 2015/142 to the Parliament's attention under reporting ground (j) as they fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

**Members indicated agreement.**

**The Convener:** The committee may consider that this breach of the 28-day rule again raises a broader issue about the timetabling of instruments that are prepared and laid in parallel with UK instruments that make similar provision. The committee reiterates the point that there is a clear need for projects of this nature to be planned in a way that allows for the procedural requirements of both Parliaments to be met.

Although we note again that the Minister for Parliamentary Business has, in recent correspondence with the committee, undertaken to review the processes for laying instruments in such circumstances and to take steps to improve awareness within the UK Government of the challenges involved, the committee may again wish to express its dissatisfaction that that has yet to be achieved. We have probably already made that point.

### **Common Agricultural Policy Non-IACS Support Schemes (Appeals) (Scotland) Amendment Regulations 2015 (SSI 2015/167)**

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

**Members indicated agreement.**

### **Firemen's Pension Scheme (Amendment No 2) (Scotland) Order 2015 (SSI 2015/173)**

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

**Members indicated agreement.**

### **Police Pensions (Amendment) (Scotland) Regulations 2015 (SSI 2015/174)**

**The Convener:** No points have been raised on the regulations. Is the committee content with them?

**Members** *indicated agreement.*

### **Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill: Stage 1**

11:55

**The Convener:** The purpose of this item is for the committee to consider the delegated powers in the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill at stage 1. Members 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 delegated powers in the bill. It is suggested that those questions are 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 34(1) confers wide powers on the Court of Session to make rules by act of sederunt to regulate: first, the practice and procedure to be followed at fatal accident inquiries in the sheriff court; and, secondly, matters that are incidental or ancillary to such FAls. Section 7 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 currently confers power on the Lord Advocate to make rules about FAls. Section 34 of the bill widens those rule-making powers and confers them on the Court of Session.

Section 34(3) provides that

“An act of sederunt under subsection (1) may make ... incidental, supplemental, consequential, transitional, transitory or saving provision”

and

“different provision for different purposes.”

In the context of providing a broad discretion to the court to regulate inquiry practice and procedure without parliamentary interference, but also to respect matters properly reserved to the legislature and ministers, does the committee agree to ask the Scottish ministers to explain: first, the limits of the power in section 34(1)(b) to make provision for or about any matter incidental or ancillary to an inquiry; secondly, whether such power permits the court to make provision in relation to matters other than procedure and practice in inquiry proceedings, including issues of substance relating to inquiry proceedings; and thirdly, the interaction between the power in section 34(1)(b) and the power in section 34(3), and in particular why the court requires the power in section 34(3) to make provision that is incidental or supplemental to matters that are in themselves incidental or ancillary to inquiries?

**Stewart Stevenson:** We have had some of this discussion previously. I am content to allow this to go through without too much comment, but I suspect that this is the sort of thing that Parliament in future—our successors in office—should tuck away as perhaps being suitable for post-legislative scrutiny once it has seen how the legislation pans out and how the powers that we are highlighting are exercised in practice. I put that on the record for future generations.

**The Convener:** Do we agree to ask those questions?

**Members** *indicated agreement.*

## Apologies (Scotland) Bill: Stage 1

11:58

**The Convener:** The Apologies (Scotland) Bill contains one delegated power, set out in section 2(3), which permits the Scottish ministers to modify the list of civil proceedings that are excepted from the effect of the bill. The power enables additions to be made to the list of exceptions, for an exception to be removed, or for the description of the exception to be adjusted. That power is subject to the affirmative procedure.

Does the committee agree to report to the Parliament that it is satisfied with the taking of the power in section 2(3), and that the affirmative procedure is appropriate?

**Members** *indicated agreement.*

**The Convener:** Thank you. If there are no further comments, we will continue in private.

11:59

*Meeting continued in private until 12:03.*



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e-format first available  
ISBN 978-1-78568-450-0

Revised e-format available  
ISBN 978-1-78568-464-7