



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 March 2013

Session 4

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**Tuesday 19 March 2013**

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**SUBORDINATE LEGISLATION COMMITTEE**

**10<sup>th</sup> Meeting 2013, Session 4**

**CONVENER**

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

**DEPUTY CONVENER**

\*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

**COMMITTEE MEMBERS**

\*Jim Eadie (Edinburgh Southern) (SNP)

\*Mike MacKenzie (Highlands and Islands) (SNP)

\*Hanzala Malik (Glasgow) (Lab)

John Pentland (Motherwell and Wishaw) (Lab)

John Scott (Ayr) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

John Paterson (Scottish Government)

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

Committee Room 4



**Scottish Parliament**  
**Subordinate Legislation**  
**Committee**

*Tuesday 19 March 2013*

[The Convener *opened the meeting at 09:32*]

**Decision on Taking Business in**  
**Private**

**The Convener (Nigel Don):** I welcome members to the 10th meeting in 2013 of the Subordinate Legislation Committee. As always, I ask members to turn off their mobile phones.

We have received apologies from John Pentland and John Scott. I understand that Jim Eadie will arrive late.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee takes items 7 and 8 in private. Item 7 is consideration of a draft report on the delegated powers in the Victims and Witnesses (Scotland) Bill at stage 1. Under item 8, the committee will consider the evidence that we are about to take on the draft Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013 (SG 2013/12). Do members agree to take items 7 and 8 in private?

**Members indicated agreement.**

**Draft Instrument not subject to**  
**Parliamentary Procedure**

**Public Services Reform (Functions of the**  
**Common Services Agency for the Scottish**  
**Health Service) (Scotland) Order 2013**  
**(SG 2013/12)**

09:32

**The Convener:** We come to agenda item 2, which gives members an opportunity to question Scottish Government officials about the draft order.

It is my great pleasure to welcome John Paterson, who is divisional solicitor from the food, health and community care division, and Stuart Aitken, who is a policy officer in the directorate for finance, e-health and pharmaceuticals. Good morning, gentlemen; thank you for joining us.

Would one of you—perhaps John Paterson—like to make a brief opening statement, if you feel that that is appropriate?

**John Paterson (Scottish Government):** Thank you very much.

We are here to talk about the draft Public Services Reform (Functions of the Common Services Agency for the Scottish Health Service) (Scotland) Order 2013, which was laid in January for consultation as part of the super-affirmative procedure. It is intended that the order will be made under section 17 of the Public Services Reform (Scotland) Act 2010, and it must comply with the provisions in both sections 17 and 18 of that act.

I will say something briefly about the purpose of the order. Its overarching purpose is to remove an obstacle to the efficiency and productivity of the Common Services Agency and other public bodies. The agency was established by section 10 of the National Health Service (Scotland) Act 1978. That section sets out the agency's functions, which are to perform functions on behalf of the Scottish ministers and health boards, and to provide services and perform tasks for bodies associated with the health service. In consequence, the agency provides a range of services to national health service bodies, including counter-fraud, data protection and information technology services.

In addition to its functions under section 10 of the 1978 act, by virtue of section 15 of the 2010 act the agency has power to supply goods and services to local authorities and certain other bodies. The agency's business support services are of interest to the public sector in Scotland generally, but there has been some doubt as to

exactly what the effect of section 15 is. Because the powers are conferred on the agency by virtue of section 15, they are not described in terms of functions. Questions have been raised as to whether the agency can procure additional staff or goods in order to provide the services. One purpose of the order is to clarify that, so that at a practical level the agency can operate section 15 properly. It is proposed that the 1978 act be amended to remove any obstacle to efficiency and productivity by making it clear that the use of the powers in section 15 is a function of the agency and expanding the range of bodies to which it can provide accommodation, goods and services in order to rectify the current anomalous situation whereby the agency can provide certain goods and services to certain bodies but not to every body in the Scottish public sector.

I turn now to the test in section 18(1), which is:

“The Scottish Ministers may not make provision under section 17(1), other than provision which merely restates an enactment, unless they consider that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.”

As the committee will know, the conditions in section 18(2) are that:

“(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means,

(b) the effect of the provision is proportionate to the policy objective,

(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it,

(d) the provision does not remove any necessary protection,

(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.”

**The Convener:** Can I stop you there, Mr Paterson? Thank you. That is a wonderful introduction. If that is a logical place to stop and you have said what you would like to say, we would like to interrogate the three final points that you have just made. Is that sensible in the context of what you were going to say?

**John Paterson:** Yes, absolutely.

**The Convener:** In which case, let us do that, please, and we will start with Stewart Stevenson.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** Our interest as a committee of course is simply in the way in which subordinate legislation is being used rather than the policy objective that is sought to be delivered, which is a matter for others. However I will ask first about the issue of proportionality under section 18(2)(b) of the 2010 act. In doing so, I take from your opening remarks that the policy objective to which this

power is asserted by you to be proportionate is that of clarifying the operation of section 15 in relation to local government and extending the range of bodies to which services can be provided. I think that your opening remarks captured the policy objective to which proportionality needs to be applied.

The first part of my question is about the manner in and extent to which Scottish Government ministers have considered whether the proportionality test is met. You might illustrate that for me by illustrating what would have to be excluded because the test could not be met. In other words, can you give us some understanding of where you think the boundary of proportionality would be so that we can understand whether the proportionality test is properly met in delivering the policy objective that you seek, through the order?

**John Paterson:** Yes, I can do that. Before I describe how we address the proportionality issue, it would be useful to look first at section 18(1) of the 2010 act. The test there is whether the Scottish ministers are satisfied as to that matter. The role of this committee is, in some ways, very much like the role of the Court of Session during a judicial review, as you are looking at whether or not the view that the Scottish ministers have taken is a view that a reasonable minister could take.

How we approached the issue of proportionality was to think first of all what the provision is about. It seemed to us that it is intended to prevent the Scottish ministers from using a sledgehammer to crack a nut. The two things that we considered had to be balanced are the legislative provision on the one hand and the policy objective on the other. The policy objective is as set out in the consultation's explanatory document at paragraphs 2.17, 2.18 and 2.23. As I said, the policy objective is first to clarify the powers of the Common Services Agency under section 15 so that that provision will be used—different views can be taken on the powers—and, secondly, to expand the agency's powers to enable it to provide shared services to the wider Scottish public sector.

We then thought about what provision we needed to do that. The one that we could have made—although I think that it would have fallen foul of proportionality—would have simply been to take all controls away from the Common Services Agency and say that it can provide goods and services to anyone who agrees to purchase them, thereby allowing it to provide services to the private and public sectors and charge for them. However, it seemed to us that that was inappropriate in two ways. First, that was not what ministers envisaged as the purpose of the change and, secondly, it would fall foul of the proportionality test because it would be

disproportionate to allow the agency to provide goods and services to the wider public when in fact all that we want to do is enable it to be a shared service to the Scottish public sector.

The argument can be made that we could have focused even more narrowly than we have, but it is difficult to reduce the scope further when the policy objective is to allow the agency not simply to provide, for example, information services or procurement services to the whole of the Scottish public sector. We have therefore specified that it can provide a wide range of services because it is envisaged that it can save money and provide a better service to the public sector by doing so.

**Stewart Stevenson:** I understand the argument that you deploy that, if the agency were to go outside the public services, it would be unlikely to meet the test of proportionality. It is helpful that we see some of the boundaries because that helps us to understand the proportionality. However, the order as it is laid is essentially an enabling order rather than an order that specifies what the CSA will do.

Is going beyond specifying what is mandatory to specifying what can be done proportionate to your policy objective? In section 15 of the 2010 act that seemed to be anchored primarily on local government, with expanding the range of bodies very much an afterthought, or is that to misunderstand the ministers' intentions? Is it the intention to extend the range of public bodies? Should that be given equal force in considering the proportionality test?

09:45

**John Paterson:** When section 15 was originally drafted and enacted, the intention was that the Common Services Agency would provide services to local authorities as the only other range of bodies that it dealt with outside the Scottish health service. Ministers' intention now is that it should be a shared service for the Scottish public sector as a whole, including the non-departmental bodies. In order to ensure competition, it is not envisaged that non-departmental bodies would be told, "You must use this service", but they would have the opportunity to use it. A number of them have already expressed interest in using different aspects of the Common Services Agency's services.

**Stewart Stevenson:** Given that this is a potentially significant expansion of the Common Services Agency's role, is it proportionate to allow the extension, in view of the potential impact that it might have on the role that the agency already has? Is that part of the consideration that ministers have given to the proportionality test?

**John Paterson:** That has been part of the consideration, although I would argue that that is not a matter of proportionality. It really relates to ensuring that services that are currently delivered continue to be delivered to the same high standard. Part of the consideration was that, as currently drafted, neither section 10 nor section 15—nor indeed the functions order, which confers other functions on the Common Services Agency—put in place a statutory control on how much effort the Common Services Agency applies to any particular part of its business. It seemed to us that to try to control the Common Services Agency's day-to-day use of its staff and resources by legislation would most likely be ineffective. The way to ensure that resources and staff are used effectively is by having good management. The Common Services Agency has demonstrated over the years that it is well managed and provides a good service. It seems to us that the answer lies not in what would necessarily have to be a very clumsy regime for trying to control exactly how resources are used, but rather in ensuring continued good management of the service.

**Stewart Stevenson:** I will conclude, because I think that we have explored this as much as we reasonably can. On what sections 10 and 15 say about the existing duties, ministers, in considering proportionality, consider that management is in place that protects and minimises the risks to the existing services that are derived from the extension of services and that, therefore, it is proportionate to extend the services. Is that the essence of what you said?

**John Paterson:** That is correct.

**The Convener:** Hanzala Malik wishes to ask a question.

**Hanzala Malik (Glasgow) (Lab):** My question is more for clarification than anything else. As far as the Common Services Agency is concerned, will we be allowing private companies to engage and, indirectly almost, privatising sections of the service?

**John Paterson:** No—private companies would not be allowed to engage. That said, under the current health service, there are not only health boards and special health boards, which are all public bodies, but private bodies that the health boards engage with. For example, general practitioners are private contractors, and health boards will also buy services from, say, Initial or some other cleaning contractor. The health service has always been a public service, but it deals as necessary with private contractors and suppliers, such as drug suppliers. That will not change, but the order itself will allow the Common Services Agency, which is itself a public body, to provide a wider range of services to other Scottish public bodies.

**Hanzala Malik:** I am sorry to return to this issue, but I am not quite sure what you mean. My very specific question—which is not technical; it simply requires a yes or no response—was whether the order will allow additional privatisation. On the one hand, you are saying that you want to widen its range of services but, on the other, you are saying that it will not allow for additional provision. As I said, I am not actually sure what you mean by that.

**John Paterson:** If you want a yes or no answer, the answer must be no. It will not allow for further privatisation.

**Stewart Stevenson:** Just to make things absolutely clear, is it not correct to say that GPs and general dental practitioners who are and have always been private contractors to the health service are at the moment able to get services from the CSA?

**John Paterson:** That is my understanding.

**Stewart Stevenson:** So for the private contractors who supply services to the health service and always have done since its inception the order will have no adverse and probably no beneficial effect.

**John Paterson:** That is correct.

**The Convener:** Mike MacKenzie will explore issues related to section 18(2)(c) of the Public Services Reform (Scotland) Act 2010.

**Mike MacKenzie (Highlands and Islands) (SNP):** Section 18(2)(c) of the 2010 act states that any provision made under section 17 must, when “taken as a whole”, strike

“a fair balance between the public interest and the interests of any person adversely affected by it.”

What do you understand to be “the public interest” in relation to this order?

**John Paterson:** The Government’s view of the public interest is that public services are provided as efficiently as possible and to the highest possible quality. In this case, we see the public interest in improving the quality, cost and efficiency of the services that are provided to the public sector.

**Mike MacKenzie:** Can you explain, then, how the order

“strikes a ... balance between the public interest and the interests of any person adversely affected by it”?

**John Paterson:** The first stage of this process was to consider who might be affected by the order, and our view was that the persons who were likely to be “adversely affected by it” were primarily commercial contractors who in some cases would no longer provide services to the

bodies that the CSA will begin to provide services to.

We considered that there was a balance to be struck, given that there will always be winners and losers in every situation. Is it better that a non-departmental public body pays a little bit more for a service that is possibly not as good as that which the Common Services Agency could provide, but the service provider retains its turnover and in which profitability, or is it better that the Common Services Agency provides the service and the private contractor earns a little less profit and has a little less turnover? We thought that, on balance, the public interest outweighs that private right. We are not in a situation in which we are taking property away from someone and not giving them compensation. When commercial contractors operate in the market, they do so in the knowledge that there may be other people out there who are able to provide the same service and might be able to do so better and more cheaply because they are operating under a different structure.

**Mike MacKenzie:** Is the Scottish Government content that the explanatory document accurately reflects the effect of the order and addresses the public interest balance?

**John Paterson:** Yes, we are. The consideration of section 18(2)(c) is set out in paragraphs 3.14 and 3.15 of the explanatory document.

**Mike MacKenzie:** You have described some of the potential adverse effects of the proposed changes. Has there been any other consideration of potential adverse effects? How does the order mitigate against potential adverse effects?

**John Paterson:** The other potential adverse effect that was identified by your advisers concerned patients of the health service. We had considered that, but felt that the potentially adverse effect was neither bad enough nor likely enough to warrant its being set out in the explanatory document.

The suggestion was made that allowing the Common Services Agency to provide services to bodies outside the health service will have an adverse effect on its provision of services to the health service, and that that, in turn, will have an adverse effect on the provision of healthcare to patients. However, we took a different view almost from the outset. Taking procurement as an example, it seemed to us that, if the Common Services Agency was providing procurement services to a broader range of bodies—to 20 per cent more bodies, say—it could further develop its procurement function. At the moment, it might have an expert in procuring drugs and hospital equipment. However, if it had an extra 20 per cent of business, it might be able to secure an expert in procuring office furniture and so on. The agency



would also have greater buying power. Instead of buying 5,000 boxes of paper, it might buy 6,000 or 7,000, which would give it greater negotiating power. It seems that there is nothing in what is proposed that would lead to a decline in service or a negative effect on patients.

10:00

**Mike MacKenzie:** You are optimistic rather than pessimistic.

**John Paterson:** The background is that the Common Services Agency seems to be a respected and well-managed organisation that provides a good service to the Scottish health service. It seems reasonable to suppose that if a well managed organisation has the opportunity to expand, that expansion would also be well managed. You may be right, perhaps I am an optimist rather than a pessimist.

**Mike MacKenzie:** Okay, thank you very much.

**The Convener:** I have no objection to optimism, but perhaps I could extend that point. Commercial history shows us the risk that an organisation that expands will lose its focus. It is potentially very easy for somebody to say, "Ah, there is a more profitable opportunity out there." The profit is good because it gives the organisation—in this context, the public sector organisation—the money to do the other things that are its core business, but it might then genuinely lose focus by concentrating on the outside things. I think that that is the risk to which our advisers are referring: the risk that, because an organisation has the opportunity to focus on outside things, it fails to concentrate on providing the basic inside things.

I have outlined the problem and, as I understand it, your solution is management. I think that that is probably the right answer, but should there be defences and protections in the order?

**John Paterson:** It is very difficult to put in place effective protections against poor management in statute. It is very difficult to put in place protections against poor management full stop, but particularly in statute because that sets out a broad rule. If someone is managing poorly, they might first ignore that broad rule and secondly look for ways around it in order to justify or allow what they are doing.

To go back to my earlier answer, if we were talking about a health board that is primarily concerned with patient care and providing a health service to the patients in its area, the idea of shifting focus from patient care to procurement for other bodies, for example, would be much more focused. However, the Common Services Agency has never directly provided patient care; it supports other bodies to provide that by carrying

out facilities management and other such functions on behalf of those bodies. Provided that its focus remains on things such as procurement, information technology and legal services, which are currently the things that it does for the health service, it should continue to provide a good service. Whether you are buying a lot of hospital beds or, for example, a lot of hospital beds and care home beds, it seems to me that that is very much the same skill.

**The Convener:** That is very helpful. We will now move on to the issue of whether section 18(2)(d) removes any necessary protections. The health and safety of persons is one example on the protected list. Could you comment on the Common Services Agency's role in relation to health and safety, particularly in connection with this order?

**John Paterson:** Health and safety is a different beast from health. When we talk about health and safety at work or on railway lines for example, that is about preventing people from being injured or contracting some kind of industrial disease, rather than about providing a health service.

To rewind a little, section 18(3) gives a number of examples of a necessary protection. They include:

- "(a) the independence of judicial decision-making, or decision-making of a judicial nature ...
- (b) civil liberties,
- (c) health and safety of persons,
- (d) the environment,
- (e) cultural heritage".

Subsections (4) to (7) further illuminate those matters.

What is the necessary protection on judicial decision making? It is about maintaining the independence of the judiciary. The necessary protection is that the Government does not sit on the bench when someone goes to challenge it. That is very much a necessary protection because, if we did not have it, people would go before the court and be completely dissatisfied with the outcome.

**The Convener:** You are absolutely right but, forgive me, I do not think that we need to go through the list. We will buy the general principles. The question is the extent to which there is anything in the draft order that goes anywhere near any of those issues.

**John Paterson:** My view is that there is nothing that does so. We are talking about allowing a public body to provide services to other public bodies. We are not doing anything structural that would create a constitutional difficulty, anything that takes away someone's right to retain their

property or anything like that. My submission is that we are not removing a necessary protection. You heard my comments on the difference between health and safety, and health.

**The Convener:** We take your line on health and safety. What will the effect of the order be on the current restrictions on the sharing of premises?

**John Paterson:** At the moment, the Common Services Agency has a limited ability to share premises with other bodies. I think that the limitation is that it can share premises with education authorities for certain limited purposes. We propose to expand that so that the agency can share premises with a number of other bodies, including Government departments and non-departmental public bodies.

It is worth bearing in mind that there will still be the restriction that the premises must be occupied for the purposes of the health service. The extension would not allow the Common Services Agency to go out and buy a building—it does not have that power anyway, as I recall—or rent one and then provide it to four NDPBs. If there was a building that was occupied for the purposes of the health service but had an extra bit of space—possibly a hospital but, to be frank, that is unlikely; it is more likely to be an administrative block that is four fifths occupied by a health service body—the extension would allow the Common Services Agency to permit some other body to rent that space. It is no more than that.

**The Convener:** That seems reasonable, I have to say. Do members have any other questions?

**Jim Eadie (Edinburgh Southern) (SNP):** Can I stay with that theme, convener? We are talking about the impact that the expansion and diversification of the CSA's duties will have on the sharing of NHS premises. Is that correct?

**John Paterson:** Yes.

**Jim Eadie:** I would like to understand why, although the ministers may determine which public bodies may share premises, the order does not provide for any control over that arrangement. Is that your understanding of the order?

**John Paterson:** Yes, that is right.

**Jim Eadie:** Do you therefore understand why some people might think that there is a lack of transparency, detail and clarity on how those arrangements can be implemented, if there is no provision in the order to control them?

**John Paterson:** The order follows the style of the 1978 act, which sets out that certain bodies can be provided with various services as determined by ministers. I should check that that is a correct statement. Can you give me one second?

Sorry. At the moment—

**Jim Eadie:** You have been very helpful in clarifying our understanding that the expansion of the CSA's duties would allow the sharing of premises, although there is no provision in the order to control that arrangement.

**John Paterson:** Yes. As I said—sorry for having to check—the order follows the style of the 1978 act, in that section 15(1)(b), which relates to the purchase and store of goods and materials, provides for Scottish ministers to determine bodies or classes of bodies that may be provided with those.

As we are looking to expand the power of the CSA to provide the use of premises, we adopted the same style, which is that it would be determined by ministers.

**Jim Eadie:** I will put the question in another way: did the CSA explore with the Government why it was not necessary to address this issue specifically in the order?

**John Paterson:** The reason why it was not addressed in the way that you suggest was, first, the desire to have similar arrangements apply to the use of property as apply to the purchase of goods and materials. In addition, lying behind section 15(1)(b) is the fact that it would be extremely clunky to say that Scottish ministers may specify by order that a body can use particular premises. The Government would have to come back to the Parliament regularly to ask permission to make an order to specify that a particular building must be leased for a particular period.

10:15

Where we are talking about, for example, a short-term lease or a licence to occupy a building that is being run down but which someone wants to use for a couple of years, it would almost not be worth going through that process, given the time that it would take for everything to be agreed at policy level and an order to be prepared and put through the Parliament, which takes four to six months.

**Jim Eadie:** I understand the case that you are making, and we want you to have maximum flexibility. However, can you see that the down side of not going through the parliamentary process is a lack of transparency about the basis on which decisions have been made? You might argue that your proposed approach is necessary and desirable but, from the perspective of legislators, it seems to lack transparency.

**John Paterson:** The order certainly does not specify that a further order must be made. However, if someone wanted to know what was

happening, they could simply make a freedom of information request, for example for information about which buildings had been let. Transparency is therefore achievable, although the level of transparency that you are talking about is not provided for in the order itself.

**Jim Eadie:** That is interesting. Thank you.

**Hanzala Malik:** Mr Paterson, you said that additional privatisation is not envisaged, but your explanation suggests that there might be an element of that. You talk about an increase in service and involvement, without there being an increase in consultation. Jim Eadie rightly suggested that there is a lack of transparency. Are you comfortable with there being no requirement for consultation, or might you revisit the area?

**John Paterson:** I respectfully disagree with the premise of your question, which is that there is increased privatisation as a result of—

**Hanzala Malik:** But you were talking about additional services and powers.

**John Paterson:** Yes, but the additional services are being provided by a public body.

**Hanzala Malik:** Not if you are using common services agencies, which surely are not public bodies.

**The Convener:** The point is that the Common Services Agency is and will remain a public body.

I am looking at the National Health Service (Functions of the Common Services Agency) (Scotland) Order 2008. Under article 2(g), a function of the CSA is

“to provide supplies of human blood”,

which might be one of those primary medical services that Mr Paterson suggested that the CSA does not provide. I am not sure that that changes any answer that you gave me, but I wondered whether you wanted to reflect on that function.

**John Paterson:** Is your point that that service is closer to the provision of healthcare?

**The Convener:** That is indeed my point. All the other functions, in paragraphs (a) to (n) of article 2, seem to be to do with the IT and other services to which you referred, but paragraph (g) seems to be something of an exception. Is that relevant in the context of what I said about focus?

**John Paterson:** You make a fair point. The Common Services Agency is a single legal entity, of course, but it is divided into divisions, which provide different services. My understanding is that the service that you mentioned is distinct from services such as information technology and legal services. The focus of that particular division—I think that it is called patient services—would remain, or one would certainly expect it to remain.

However, it is something that we can take away and think about.

**The Convener:** Okay. I invite you to do that. Thank you.

That brings us to the end of our questions. I thank Mr Paterson and Mr Aitken for coming along. I suspend the meeting briefly to allow them to leave.

10:20

*Meeting suspended.*

10:23

*On resuming—*

## Instrument subject to Affirmative Procedure

### CRC Energy Efficiency Scheme Order 2013 [Draft]

**The Convener:** The provision made by paragraph 7 of schedule 9 has no effect as it imposes a requirement to submit applications for registration as a participant in the first phase of the CRC energy efficiency scheme by 1 February 2010 rather than by 30 September 2010. The Scottish Government has confirmed that the provision has no effect. It is impossible to implement it with effect from the date when the order will come into force.

Does the committee agree to draw the draft order to the Parliament's attention on the general reporting ground?

**Members** *indicated agreement.*

## Instruments subject to Negative Procedure

### Scottish Police Authority (Provision of Goods and Services) Order 2013 (SSI 2013/73)

10:24

**The Convener:** The form or meaning of the order could be clearer. Column 2 in schedule 1 purports to specify types of person to whom the specified services in column 1 may be supplied. However, the types of person are so widely specified that it is possible to read the provisions as being outwith competence and, to bring the order within devolved competence, the provisions have to be read as narrowly as is required for them to be within competence. The consequence is that the types of person specified in schedule 1 are very much narrower than would appear to be the case on the face of the instrument and, accordingly, its meaning could have been more clearly expressed, particularly as it is the Scottish ministers' stated intention that the order relate only to the provision of goods and services in or "as regards Scotland".

Further to that, the Scottish ministers have been unable to comment on the practical effect of reading the provisions sufficiently narrowly as to bring them within competence. That arises, at least in part, because no view has been ventured as to the circumstances in which the specified services could be provided to persons who are outwith Scotland in a manner which is "as regards Scotland".

Does the committee agree to draw the order to the Parliament's attention on reporting ground (h) as the meaning could be clearer?

**Members** *indicated agreement.*

**Stewart Stevenson:** Obviously it is necessary to draw the order to the Parliament's attention in the terms proposed, and I support that. However, we need a section 104 order from the Westminster Government or otherwise that allows the Scottish Police Authority to provide services for the purposes of justice to other authorities that are not within Scotland's scope. I am thinking specifically of incidents that might occur on the border between Scotland and England—or, if it came to the push, the border between Scotland and Northern Ireland—where we would not wish to see the SPA unable to provide goods or services to another police force or part of the justice system in pursuance of our shared justice objectives in the various jurisdictions.

**Late Payment of Commercial Debts  
(Scotland) Regulations 2013 (SSI 2013/77)**

**The Convener:** Under directive 2011/7/EU, certain remedies are required to be available in respect of late payment of debts under commercial contracts. Although they are available as a matter of European Union law from 13 March 2013, the Scottish ministers in implementing this measure for Scotland have not applied those remedies available under the directive to contracts concluded between 13 March and 28 March 2013 as the directive requires. As a result, the regulations do not appear to be compatible with EU law. It would appear that the decision not to apply the directive to such contracts was made because the Scottish ministers have not implemented the directive on time.

Does the committee therefore agree to draw the instrument to the Parliament's attention under reporting ground (f) as it raises a devolution issue?

**Members** *indicated agreement.*

**Stewart Stevenson:** In doing so, I think it appropriate that we note that the Scottish ministers seem to have had difficulties in responding to an appropriate timetable because of late delivery of the UK legislation to which the regulations relate, despite the shared desire that both pieces of legislation be implemented simultaneously. Although it is appropriate that we report to Parliament on the proposed basis, that report should also refer to the circumstances that I have referred to.

**The Convener:** Indeed.

The Scottish ministers' implementation programme for this directive adopted the negative procedure to avoid further delay in meeting EU obligations. However, their choice of procedure has resulted in a reduced level of parliamentary scrutiny being applied than that which the committee considers appropriate for relatively complex amendments to primary legislation.

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

**Members** *indicated agreement.*

**Teachers' Superannuation (Scotland)  
Amendment Regulations 2013  
(SSI 2013/71)**

**Non-Domestic Rates (Enterprise Areas)  
(Scotland) Amendment Regulations 2013  
(SSI 2013/78)**

**Tenant Information Packs (Assured  
Tenancies) (Scotland) Amendment Order  
2013 (SSI 2013/90)**

**Criminal Legal Aid (Fixed Payments)  
(Scotland) Amendment Regulations 2013  
(SSI 2013/92)**

*The committee agreed that no points arose on the instruments.*

## Instruments not subject to Parliamentary Procedure

### Act of Adjournal (Criminal Procedure Rules Amendment) (Miscellaneous) 2013 (SSI 2013/72)

10:29

**The Convener:** Although rule 40.13 is intended to apply to both compatibility issues and devolution issues, it limits the description of referrals to which it applies by referring only to the provision under which compatibility issues are referred. The rule therefore inadvertently excludes its application to devolution issues.

Does the committee agree to draw the instrument to the Parliament's attention under reporting ground (i) as rule 40.13 appears to be defectively drafted?

**Members indicated agreement.**

**The Convener:** Paragraph 6 of form 23A.1-A should be shown as optional as it applies to the form when used in connection with requests under section 273(2) of the Criminal Procedure (Scotland) Act 1995 but not to its use in connection with requests under section 273A(2) of the same act.

Does the committee agree to draw the instrument to the Parliament's attention under the general reporting ground as it contains a minor drafting error in form 23A.1-A?

**Members indicated agreement.**

**The Convener:** Does the committee also agree to note that the Lord President's private office has undertaken to correct these matters the next time the criminal procedure rules are amended?

**Members indicated agreement.**

### Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI 2013/81)

**The Convener:** New rule 58A.1(1)(c), which is inserted by paragraph 2(2) of this instrument, provides that new chapter 58A of the rules of the Court of Session will apply to applications and appeals that include a challenge to a decision, act or omission that is subject to the public participation provisions of Council directive 85/337/EEC, otherwise known as the environmental impact assessment directive. The drafting of that subparagraph appears to be defective as the EIA directive has been repealed

by directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. That codifying directive has repealed and replaced the EIA directive.

Does the committee agree to draw the instrument to the Parliament's attention on reporting ground (i)?

**Members indicated agreement.**

**The Convener:** The Lord President's private office has undertaken to consider an amendment to correct this error. Does the committee agree to recommend that it would be prudent to amend the text of the new rule to refer to the directive currently in force?

**Members indicated agreement.**

## Scottish Independence Referendum (Franchise) Bill: Stage 1

10:32

**The Convener:** The purpose of this item is for the committee to consider the delegated powers in the Scottish Independence Referendum (Franchise) Bill at stage 1. Members will have seen the delegated powers memorandum and the briefing paper.

Does the committee agree to report that it is content in principle with the proposed power in section 11?

**Members indicated agreement.**

**The Convener:** Does the committee also agree to report that it is content for the power to be subject to the affirmative procedure?

**Members indicated agreement.**

**The Convener:** That completes the public part of the meeting. We will now move into private.

10:33

*Meeting continued in private until 11:04.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

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