



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 21 January 2014

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**Tuesday 21 January 2014**

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**  
**3<sup>rd</sup> Meeting 2014, Session 4**

**CONVENER**

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

**DEPUTY CONVENER**

\*Stuart McMillan (West Scotland) (SNP)

**COMMITTEE MEMBERS**

\*Richard Baker (North East Scotland) (Lab)

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

\*Margaret McCulloch (Central Scotland) (Lab)

\*John Scott (Ayr) (Con)

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

\*attended

**CLERK TO THE COMMITTEE**

Euan Donald

**LOCATION**

Committee Room 4



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 21 January 2014*

[The Convener *opened the meeting at 11:00*]

#### Decision on Taking Business in Private

**The Convener (Nigel Don):** I welcome members to the third meeting in 2014 of the Delegated Powers and Law Reform Committee and ask members to turn off mobile phones.

Agenda item 1 is a decision on taking in private item 5, which is consideration of the committee's draft report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill, and item 6, which offers the committee the opportunity to further consider the draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014, oral evidence on which was taken by the committee last week. Does the committee agree to take those items in private?

**Members** *indicated agreement.*

## Instruments subject to Negative Procedure

### National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2013 (SSI 2013/355)

11:00

**The Convener:** Regulations 3(b) and (e) substitute new definitions of "primary eye examination" and "supplementary eye examination" in regulation 2(1) of the principal regulations, the National Health Service (General Ophthalmic Services) (Scotland) Regulations 2006 (SSI 2006/135). The meaning of the regulations could be clearer in that the definitions of "primary eye examination" and "supplementary eye examination" in regulations 3(b) and (e) could be made consistent in referring to tests and procedures that are appropriate to the patient's needs. The definition of "primary eye examination" has for the purposes of the regulations been modified to refer in general to

"other tests and procedures appropriate to the needs of the patient",

while the definition of "supplementary eye examination" has been modified to refer to the fact that it

"includes the tests and procedures appropriate to the clinical needs of the patient".

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

**Members** *indicated agreement.*

**The Convener:** Does the committee also wish to note that the Scottish Government will lay an amendment at the next convenient opportunity in recognition of the fact that it would be preferable for both definitions to use consistent terminology?

**Members** *indicated agreement.*

**Police Service of Scotland (Amendment)  
Regulations 2014 (SSI 2014/1)**

**Sea Fish (Prohibited Methods of Fishing)  
(Firth of Clyde) Order 2014 (SSI 2014/2)**

**Water and Sewerage Services to Dwellings  
(Collection of Unmetered Charges by  
Local Authority) (Scotland) Order 2014  
(SSI 2014/3)**

**Environmental Protection (Duty of Care)  
(Scotland) Regulations 2014 (SSI 2014/4)**

**Sports Grounds and Sporting Events  
(Designation) (Scotland) Order 2014 (SSI  
2014/5)**

**Common Agricultural Policy Schemes  
(Cross-Compliance) (Scotland)  
Amendment Regulations 2014 (SSI 2014/6)**

**Less Favoured Area Support Scheme  
(Scotland) Amendment Regulations 2014  
(SSI 2014/7)**

**Long Leases (Appeal Period) (Scotland)  
Order 2014 (SSI 2014/8)**

**Long Leases (Prescribed Form of Notices  
etc) (Scotland) Regulations 2014 (SSI  
2014/9)**

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

**Members** *indicated agreement.*

**Housing (Scotland) Bill: Stage 1**

11:03

**The Convener:** Item 3 is consideration of the delegated powers in the Housing (Scotland) Bill at stage 1.

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 these questions be raised in written correspondence, and the responses received will help to inform a draft report on the bill. The committee will have the opportunity to consider the responses at a future meeting before the draft report is considered.

Section 21 of the Housing (Scotland) Act 1987 relates to rules made by social landlords regarding the priority of allocation of houses. In addition to the power conferred on the Scottish ministers to make regulations, section 4(2) of the bill also inserts new subsection (3A) into section 21 of the 1987 act to require a social landlord,

“In making or altering its rules governing the priority of allocation of houses”,

to

“have regard to ... any local housing strategy ... for its area, and ... any guidance issued by the Scottish Ministers.”

The power to issue guidance to which a social landlord must have regard is not discussed in the delegated powers memorandum as it is not a power to make subordinate legislation.

Does the committee agree to ask the Scottish Government for an explanation of the purpose of the power in section 21(3A)(b) of the Housing (Scotland) Act 1987, as that provision is inserted by section 4(2) of the bill; in particular, whether it is expected that ministers will use the power to make guidance regarding the same matters as could be prescribed in regulations under new section 21(3B) of the 1987 act and, if so, what considerations will inform the choice of guidance or regulations; and whether the Scottish Government intends to publish the guidance, in light of the potentially significant effect on individuals of a social landlord’s rules on housing allocation?

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** It might be useful to make the observation that, as a committee, we seem to be saying to the Government fairly regularly that, if it is to produce guidance, that guidance should be published. If other members are of the same mind as I am, this might be a useful opportunity simply to say that that will be our position generally, so that the Government can take some account of that from here on in.

Of course, I agree with the proposition that the convener has put.

**The Convener:** Thank you for that observation.

Are members content that we ask those questions?

**Members indicated agreement.**

**The Convener:** The bill also inserts in the 1987 act new section 20A(3), which requires a social landlord, in considering whether to impose a requirement as to the minimum period before an applicant is eligible for the allocation of housing, to have regard to any guidance issued by the Scottish ministers. The power that is conferred on ministers is the power to issue guidance on the same matters as may be prescribed in regulations under section 20A(4) of the 1987 act.

The provision in section 20B(3) of the 1987 act, as inserted by section 7(2) of the bill, confers on the Scottish ministers the power to issue guidance on the same matters as may be prescribed in regulations under section 20A(4) of the 1987 act, as inserted by section 7(2) of the bill.

Does the committee agree to ask the Scottish Government in what circumstances it is envisaged that guidance will be issued, as opposed to regulations being made; and whether the Scottish Government intends to publish the guidance, in light of the potentially significant effect on individuals of a social landlord's rules on eligibility periods? Stewart Stevenson's point about guidance was well made, but I will not invite him to make it again. Are we content to ask those questions?

**Members indicated agreement.**

**The Convener:** Section 8(1) of the bill amends section 34 of the Housing (Scotland) Act 2001 on the creation of short Scottish secure tenancies. It inserts new subsection (9), which provides that a landlord must have regard to any guidance issued by the Scottish ministers regarding the creation of a short Scottish secure tenancy on the new antisocial behaviour grounds. As before, the power to issue guidance is not discussed in the delegated powers memorandum, nor is it explained in any of the supporting documents that accompany the bill.

In the absence of such explanation, does the committee agree to ask the Scottish Government what the purpose is of the power to issue guidance in section 34(9) of the Housing (Scotland) Act 2001, as inserted by section 8(1) of the bill; why it is considered appropriate for the power to be exercised by way of guidance rather than in subordinate legislation; and whether the Government intends to publish guidance that is issued under that power?

**Members indicated agreement.**

**The Convener:** Section 41 of the bill provides for the Scottish ministers, by regulations, to set out a code of practice that makes provision about the standards of practice of persons who carry out letting agency work. Before finalising the code, the Scottish ministers must consult on a draft of it under section 41(3). The delegated powers memorandum explains that it is considered appropriate for the code to be set out in regulations rather than on the face of the bill, as it may require a detailed set of requirements to be developed. Although that could be considered reasonable, consideration of the choice of parliamentary procedure may be appropriate.

The bill proposes that compliance with the code of practice will have important legal consequences. Failure to comply could lead to revocation of a letting agent's registration under section 35, or the imposition of a letting agent enforcement order under section 43. Failure to comply with a letting agent enforcement order without reasonable excuse is an offence under section 46.

Failure to comply with the code of conduct issued under section 14 of the Property Factors (Scotland) Act 2011 has similar legal consequences in relation to property factor registration and enforcement, but the order that brings that code into force is subject to the affirmative procedure. Does the committee therefore agree to ask the Scottish Government to explain why it is considered appropriate for the regulations that set out the letting agency code of practice under section 41(1) of the bill to be subject to the negative procedure?

**Members indicated agreement.**

**The Convener:** New section 32N of the Caravan Sites and Control of Development Act 1960 gives the Scottish ministers the power, by regulations, to make provision in relation to the procedures to be followed for an application for a site licence, an application for consent to a transfer and the transfer of a site licence on death. It also allows ministers to make provision in relation to appeals against a decision by a local authority to refuse a licence application, to transfer a licence, to refuse consent to a licence transfer or to revoke a licence. Subsection (2) of new section 32N of the 1960 act gives an indicative list of matters that the regulations may make provision for or in connection with.

The power allows ministers to set out procedures and time limits in relation to the site licensing system and provides that that level of procedural detail is best dealt with through regulations. The Scottish Government considers the negative procedure to be appropriate.

However, it would appear that, as drafted, the power is not restricted to enabling provision to be made about procedural matters. In particular, paragraph (d) of subsection (1) of new section 32N enables provision to be made in relation to appeals generally and not merely in relation to the procedure or time limits for appeals. Although the list in subsection (2) indicates some matters that relate to appeals about which provision may be made, the power is not restricted to that extent.

In addition, there is no requirement on the face of the bill for a local authority to give reasons for its decision to determine a relevant permanent site application or an application for consent to transfer a licence under new section 32E of the 1960 act, or for its decision to transfer a licence under new section 32G.

Does the committee therefore agree to ask the Scottish Government, regarding appeals, why, if the power in new section 32N of the 1960 act is intended to enable provision to be made about the procedure and time limits for appeals, it is drawn more widely than that; and what sort of provision regarding appeals it is anticipated that the power will be used to make?

**Members** *indicated agreement.*

**The Convener:** New section 32I of the 1960 act, as inserted by the bill, requires a local authority to notify its decisions under the licensing regime to determine applications or to transfer licences. However, an authority is required to give reasons for its decisions only in the circumstances that are provided for in regulations that are made under new section 32N(1) of the 1960 act, if any. The giving of reasons is a significant aspect of procedure and could be expected to inform the decision of anyone with a right to appeal under section 32M about whether to exercise that right.

Does the committee therefore agree to ask the Scottish Government why it is considered appropriate for those circumstances to be subject to provision that is made in delegated legislation rather than set out on the face of the bill; and why the negative procedure is considered to provide an appropriate level of scrutiny for the exercise of such a power?

**Members** *indicated agreement.*

**The Convener:** Sections 63 and 64 of the bill insert new sections 32R, 32S and 32V into the Caravan Sites and Control of Development Act 1960. Those provisions set a maximum fine of £50,000 on conviction for operating a caravan site without a licence; a maximum fine of £10,000 on conviction for breaching licence conditions; and a maximum fine of £10,000 on conviction for failure to comply with an improvement notice.

New section 32T of the 1960 act gives the Scottish ministers the power to amend those maximum fine levels, through an order that would be subject to the affirmative procedure. The reason that is given for taking that power is to enable the maximum fines that are imposed to be adjusted in line with inflation and other relevant factors. However, although it would be subject to the affirmative procedure, the power is not expressed as being restricted in that way.

A comparative power in section 226 of the Criminal Procedure (Scotland) Act 1995 enables ministers to amend enactments passed after 1 April 1996 by substituting a new sum for a maximum fine that is specified in such an enactment. That power enables the substitution of a new sum only when ministers consider that that sum is justified by inflationary changes, or to reflect the fact that the standard scale that applies to other, lesser offences is being increased.

Does the committee therefore agree to ask the Scottish Government whether it considers that it might be appropriate for similar restrictions to apply to the exercise of the power in new section 32T of the 1960 act? In the absence of such restrictions, does the Government consider that the power that is taken in section 32T reflects the policy intention in taking such a power?

**Members** *indicated agreement.*

## High Speed Rail (London – West Midlands) Bill

11:15

**The Convener:** Agenda item 4 is consideration of the High Speed Rail (London – West Midlands) Bill, which, of course, is United Kingdom Parliament legislation. Under this item, the committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the bill. A briefing paper has been provided, which suggests that the committee could seek a written explanation of the parliamentary procedure aspects of clause 49 of the bill. The committee would consider the response at a future meeting, with the intention of agreeing a draft report. Accordingly, the committee may wish to ask the Scottish Government for an explanation of a number of matters in relation to the powers in clause 49.

An effect of clause 49(2)(b) is that the laid-only procedure will apply to an order that is made under clause 49(1), unless the conditions for which section 13(1) of the Transport and Works (Scotland) Act 2007 provides apply to the order. In that event, the order would be subject to the affirmative procedure.

An order that authorises the carrying out of work that constitutes national development in the national planning framework would, by virtue of the application of section 13 of the 2007 act, be subject to the affirmative procedure. The national planning framework includes as the third listed national development,

“High-speed rail lines linking Edinburgh and Glasgow city centres with London and offering good connections to the rest of the rail network.”

Does the committee therefore agree to ask the Scottish Government for clarification of the circumstances in which an order under clause 49 to authorise works in Scotland for high speed 2 “Phase One purposes” would be subject to the laid-only procedure, when it would be subject, instead, to the affirmative procedure and why that position is appropriate?

**Members indicated agreement.**

**The Convener:** Section 30(4) of the Interpretation and Legislative Reform (Scotland) Act 2010 has the effect that orders under the 2007 act are not subject to the laid-only procedures that are set out in sections 30 and 31 of ILRA when they are not subject to the affirmative or negative procedures under the 2007 act. Instruments that are excepted by virtue of section 30(4) are not considered by the committee.

As clause 49 of the bill does not apply or modify section 30(4) of ILRA, it appears that when an order under clause 49(1) was not subject to the affirmative procedure, it would be subject to the laid-only procedure and so would be considered by the committee. That would appear to be the position unless an order were brought forward under section 30(5) of ILRA to exempt an order under clause 49 from the procedure, as is presently the case for orders under the 2007 act.

Does the committee agree to ask the Government why that approach has been taken and whether there is any intention to amend the bill or to bring forward an order under section 30(5) of ILRA?

**Members indicated agreement.**

**The Convener:** That completes that item and I move the meeting into private.

11:18

*Meeting continued in private until 12:33.*



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