



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 25 November 2014

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**Tuesday 25 November 2014**

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**33<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**

The Adam Smith Room (CR5)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

Tuesday 25 November 2014

[The Convener opened the meeting at 11:30]

### Draft Document subject to Approval

#### Scottish Regulators' Strategic Code of Practice (SG 2014/236)

**The Convener (Nigel Don):** I welcome members to the 33rd meeting in 2014 of the Delegated Powers and Law Reform Committee. As always, I ask members to turn off mobile phones.

Agenda item 1 is a draft document subject to approval. The code of practice is not a Scottish statutory instrument but, in accordance with section 6 of the Regulatory Reform (Scotland) Act 2014, it is subject to approval by resolution of the Parliament.

Section 5(5) of the 2014 act places a duty on relevant regulators to have regard to the code in determining general policies or principles that are relevant to specified regulatory functions, and in exercising those specified functions. In light of the statutory requirement, the Scottish ministers' intention—as expressed in paragraph 9 of the introduction and overview of the code—that the code should not apply to the exercise of regulatory functions in individual cases appears to be an unusual or unexpected use of the power that is conferred on the ministers by section 5.

Does the committee therefore agree to draw the code of practice to the attention of the Parliament under reporting ground (g), as the way in which the enabling powers have been used is unusual or unexpected?

**Mike MacKenzie (Highlands and Islands) (SNP):** As I sit on the subject committee that dealt with the Regulatory Reform (Scotland) Bill, I can tell members that considerable emphasis was placed on the code of practice. Given the anomaly that our legal advisers have pointed out, I hope that the Government will pay attention to the points that have been made and will endeavour to correct that and clarify the situation.

**The Convener:** So are we agreed?

*Members indicated agreement.*

## Instruments subject to Negative Procedure

### Products Containing Meat etc (Scotland) Regulations 2014 (SSI 2014/289)

11:32

**The Convener:** Agenda item 2 is instruments subject to negative procedure.

In the first instrument, regulation 7 applies various provisions of the Food Safety Act 1990 for the purposes of the regulations. The Scottish Government intends that section 22 of that act will also be applied, but reference to that section is omitted. Section 22 specifies certain circumstances that provide a defence for a person who would otherwise commit an offence under the act consisting of the advertisement for sale of food.

Does the committee therefore agree to draw the instrument to the Parliament's attention on reporting ground (i), as regulation 7 appears to be defectively drafted in that it omits references to section 22 of the Food Safety Act 1990?

*Members indicated agreement.*

**John Scott (Ayr) (Con):** This should be dealt with as a matter of urgency. I hope that we will impress that on the Government, to allow the due process of law to carry on.

**The Convener:** Indeed.

Does the committee agree to note, however, that the Scottish Government has undertaken to amend the provision at the earliest opportunity? I think that we are saying that the earliest opportunity might be very soon.

**John Scott:** I certainly hope that it will be sooner rather than later.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** I have a drafting observation on the schedule, which gives the required percentages of meat in various products and in various circumstances. Item 5 in the table, which relates to corned beef and so on, gives the figure of 120 per cent, but that is explained only by a note four pages later. In future, when the Government uses percentages of more than 100 per cent, it would aid the comprehension of people who read such instruments to put the note that explains why the figure exceeds 100 per cent—as it properly does in this case—adjacent to that figure.

**The Convener:** Indeed.

### **Charities Accounts (Scotland) Amendment Regulations 2014 (SSI 2014/295)**

**The Convener:** This instrument contains some minor drafting errors.

First, regulations 3(a) and (b) refer to an inaccurate date of issue for the two statements of recommended practice for accounting and reporting by charities—the date of issue should be 16 July 2014. Secondly, regulation 4(a) refers to an inaccurate document name and date of issue—the regulation should refer to the “Statement of Recommended Practice: Accounting for Further and Higher Education” issued on 17 September 2014. Finally, regulation 4(b) refers to an inaccurate document name and date of issue—the regulation should refer to the “Statement of Recommended Practice for registered social housing providers” issued on 24 September 2014.

Does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground as it contains minor drafting errors?

**Members** *indicated agreement.*

**The Convener:** Does the committee agree to note, however, that the Scottish Government will correct those minor errors by amendment in due course?

**Members** *indicated agreement.*

### **Town and Country Planning (General Permitted Development) (Scotland) Amendment (No 2) Order 2014 (SSI 2014/300)**

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

**Members** *indicated agreement.*

### **Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment (No 2) Regulations 2014 (SSI 2014/301)**

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

**Members** *indicated agreement.*

### **Civil Partnership (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/303)**

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

**Members** *indicated agreement.*

### **Same Sex Marriage (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/305)**

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

**Members** *indicated agreement.*

### **Marriage and Civil Partnership (Prescribed Forms) (Scotland) Regulations 2014 (SSI 2014/306)**

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

**Members** *indicated agreement.*

### **Public Bodies (Joint Working) (Health Professionals and Social Care Professionals) (Scotland) Regulations 2014 (SSI 2014/307)**

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

**Members** *indicated agreement.*

### **Public Bodies (Joint Working) (Membership of Strategic Planning Group) (Scotland) Regulations 2014 (SSI 2014/308)**

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

**Members** *indicated agreement.*

### **Looked After Children (Scotland) Amendment Regulations 2014 (SSI 2014/310)**

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

**Members** *indicated agreement.*

### **Notice of Potential Liability for Costs (Discharge Notice) (Scotland) Order 2014 (SSI 2014/313)**

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

**Members** *indicated agreement.*

## Instruments not subject to Parliamentary Procedure

### Act of Sederunt (Rules of the Court of Session and Sheriff Court Rules Amendment No 2) (Marriage and Civil Partnership (Scotland) Act 2014) 2014 (SSI 2014/302)

11:37

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

**Members** *indicated agreement.*

## Air Weapons and Licensing (Scotland) Bill: Stage 1

11:37

**The Convener:** The purpose of this item is for the committee to consider the delegated powers in the bill at stage 1. The committee is, as always, 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 36(1) allows ministers to make provision for the charging of fees by the chief constable in respect of applications under part 1 of the bill, and otherwise in respect of the performance of functions by the chief constable under part 1. Fees may be set for various aspects of the air weapon licensing regime in regulations.

Sections 32 and 35 of the Firearms Act 1968 initially specified the fee levels payable for the grant, renewal and variation of a firearm certificate or shotgun certificate, or for registration as a firearms dealer, though fees are variable by order.

Does the committee therefore agree to ask the Scottish Government why a comparable approach is not taken to specify on the face of the bill the initial fee levels proposed for an application for an air weapon certificate and other functions chargeable by the chief constable in connection with the air weapon licensing regime?

**Members** *indicated agreement.*

**The Convener:** Section 37 enables the Scottish ministers to make further provision for the purposes of part 1. In particular, this enables further provision for the application and approvals process for air weapon certificates, police permits, visitor permits, event permits or club approvals. That includes prescribing the mandatory conditions that will attach to certificates, permits or air weapon club approvals.

Specific matters may be prescribed by regulations under section 37(1), as provided for in sections 4(1), 6(1), 7(2), 13(9), 14(2), 15(1), 17(6), and 18(2) and (4). Beyond that, section 37(1) enables any further provision for the purposes of part 1 of the bill.

Does the committee agree to ask the Scottish Government what is enabled by that power to make further provision that would not, in the absence of such power, be enabled by the ancillary powers to make incidental, supplementary or consequential provisions in

sections 75 and 76, and how might that power be used, beyond prescribing the matters set out in sections 4(1), 6(1), 7(2), 13(9), 14(2), 15(1), 17(6), and 18(2) and (4)?

**Members indicated agreement.**

**The Convener:** Section 68 creates a new licensing regime for sexual entertainment venues by inserting new section 45A in the Civic Government (Scotland) Act 1982, which I will hereafter refer to as the 1982 act. Subsections (2) to (7) of proposed new section 45A of the 1982 act define what is meant by a "sexual entertainment venue". It is any premises at which sexual entertainment is provided before a live audience for or with a view to the financial gain of the organiser.

The power in proposed new section 45A(7)(b) of the 1982 act, which is inserted by section 68(3) of the bill, enables the Scottish ministers to prescribe other types of premises that would not be sexual entertainment venues. The delegated powers memorandum explains that the power is intended to have a very narrow focus and would be used in very limited circumstances if sexual entertainment venues were inadvertently caught within the licensing regime in section 68.

Does the committee agree to ask the Scottish Government why it has been considered appropriate for the power to be drawn broadly to enable the exemption of any other premises, as specified by order; why it could not be drawn more narrowly to define the very limited circumstances or range of premises that might potentially be exempted; why it is not possible to avoid the need for the power by using more appropriate or clearer definitions in proposed new section 45A of the 1982 act to remove the possibility that certain types of venue or premises could inadvertently be caught within the licensing regime; and what, in general terms, might be inadvertently included?

**Members indicated agreement.**

**The Convener:** Proposed new section 45A(11) of the 1982 act allows ministers to prescribe descriptions of performances or displays of nudity that are not to be treated as sexual entertainment for the purposes of the licensing regime. The delegated powers memorandum explains that that power is also intended to have a very narrow focus and would be used in very limited circumstances if certain types of performance were inadvertently caught within the licensing regime in section 68.

Does the committee agree to ask the Scottish Government why it has been considered appropriate for the power to be drawn broadly to enable the exemption of any descriptions of performances or descriptions of displays of nudity, as specified by order; why it could not be drawn

more narrowly to define the very limited circumstances or range of performances or displays that might potentially be exempted; why it is not possible to avoid the need for the power by using more appropriate or clearer definitions in proposed new section 45A of the 1982 act to remove the possibility that certain types of performance or display could inadvertently be caught within the licensing regime; and what, in general terms, might be inadvertently included?

**Members indicated agreement.**

**The Convener:** Proposed new section 45B of the 1982 act, as inserted by section 68(3) of the bill, confers powers by resolution on a local authority for sexual entertainment venue licensing to have effect in its area.

The authority may resolve that schedule 2 of the 1982 act, as modified by new section 45B, is to have effect in its area. The section also confers power on a local authority to determine an appropriate number of sexual entertainment venues for its area. That determination must be publicised by the local authority.

Proposed new section 45B also provides that local authorities, in carrying out the functions conferred by the section, must have regard to any guidance issued by ministers.

Does the committee agree to ask the Scottish Government why those powers are appropriate; why it is appropriate for them to be exercised by means of published resolution and determination; why the power of ministers to issue guidance is appropriate; and why there appears to be no provision for the guidance to be published when a resolution or determination by a local authority under the section would be published?

**Members indicated agreement.**

**The Convener:** Section 71, which seeks to insert new section 45D in the 1982 act, allows ministers to set mandatory conditions that would apply to all licences issued under part 3 of the 1982 act. That includes the regime for sexual entertainment venues, which is inserted by section 69, and sex shops. That could encompass different licences and particular purposes and sets of circumstances or cases.

By inserting new section 45E in the 1982 act, section 71 also confers a power on a local authority to determine standard conditions to which such licences are to be subject. Again, that could encompass different licences and particular purposes and sets of circumstances or cases. Any such conditions must be published, and they must be consistent with any mandatory conditions set by the Government.

Does the committee agree to ask the Scottish Government why it has been considered



appropriate that any mandatory conditions set in regulations under section 37 in relation to an air weapons certificate or permit should be subject to parliamentary scrutiny by the negative procedure, while any mandatory conditions set by regulations in relation to sex shops and sexual entertainment venues would be subject to the affirmative procedure? Furthermore, does the committee agree to ask why the powers conferred on a local authority in section 71, which inserts new section 45E into the 1982 act, are appropriate, and why it would be appropriately exercised by informal published determination?

**Members indicated agreement.**

**The Convener:** In section 76(1), which confers the power to make

“incidental, supplementary, consequential, transitional, transitory or saving provision as”

the ministers

“consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, any provision of this Act or any provision made under it”,

the words

“or any provision made under it”

expand the scope of the ancillary powers and are unusual in comparison with recent acts that contain a comparable number of delegated powers or powers of potentially wider scope than are contained in this bill. Does the committee agree to ask the Scottish Government why, for this particular bill, that proposed expansion of the ancillary powers has been considered necessary?

**Members indicated agreement.**

## Serious Crime Bill

11:46

**The Convener:** Agenda item 5 is consideration of the powers to make subordinate legislation that are conferred on the Scottish ministers by the Serious Crime Bill, which is United Kingdom legislation. The briefing paper that has been provided suggests that the committee could seek a written explanation of matters relating to clause 19, and the committee would then consider the response at next week’s meeting, with the intention of agreeing a draft report.

Clause 19 of the bill amends section 118 of the Proceeds of Crime Act 2002 in relation to the enforcement of confiscation orders, which are imposed to enable the recovery of criminal assets following a person’s conviction. Some individuals choose not to pay their confiscation orders and instead serve a period of imprisonment, known as a default sentence. Clause 19 provides for a new sliding scale of default sentences that will be applicable to confiscation orders in Scotland and which mirrors the scale that the bill will introduce in England and Wales. The scale provides for maximum periods of imprisonment of six months, five years, seven years and 14 years, depending on the value of the compensation order that has been imposed.

Proposed new section 118(2B) of the 2002 act, as inserted by clause 19, confers power on the Scottish ministers to amend the sliding scale

“so as to remove, alter or replace any entry ... or to add any entry”.

Accordingly, the Scottish ministers will have the power, through subordinate legislation, to vary the maximum term of imprisonment that might be imposed in respect of a confiscation order of any amount. Clause 10 of the bill confers a similar power on the secretary of state in respect of the scale that applies in England and Wales.

Proposed new section 118(2B) also confers power on the Scottish ministers

“to provide for minimum periods of imprisonment in respect of amounts ordered to be paid under a confiscation order”

and to

“apply (with or without modifications) any provision of”

the Criminal Procedure (Scotland) Act 1995

“relating to enforcement of fines in consequence of exercising”

either that power or the power to amend the sliding scale referred to above. All three powers are subject to the affirmative procedure.

Does the committee agree to ask the Scottish Government why it has been considered appropriate for the Scottish ministers to have an unlimited power to vary through subordinate legislation the maximum periods of imprisonment provided for in the bill that may be imposed in respect of amounts to be paid under a confiscation order, rather than the maximum periods being determined or varied by Parliament and set out in primary legislation, and why it has been considered appropriate for the minimum period of imprisonment imposed in respect of amounts to be paid under a confiscation order to be subject to determination by the Scottish ministers through subordinate legislation, rather than its being determined by Parliament and set out in primary legislation?

**Members** *indicated agreement.*

**The Convener:** Unless anyone has any other comments, that brings us to the end of the agenda.

*Meeting closed at 11:49.*

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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