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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

South of Scotland Enterprise Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 27 November 2018, 15 and 22 January 2019, the Delegated Powers and Law Reform Committee considered the delegated powers in the South of Scotland Enterprise Bill (“the Bill”).ⁱ
2. This Scottish Government Bill was introduced by the Cabinet Secretary for the Rural Economy, Fergus Ewing MSP, on 24 October 2018.
3. The Scottish Government issued a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ
4. The Committee submits this report to the lead Committee for the Bill (Rural Economy and Connectivity Committee) under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The DPM is available [here](#).

Bill overview

5. The Bill consists of 22 sections and 2 schedules. It establishes a new body corporate called South of Scotland Enterprise (“SoSE”) as an enterprise agency for the south of Scotland. This will sit alongside the two existing enterprise agencies in Scotland: Scottish Enterprise (“SE”) and Highlands and Islands Enterprise (“HIE”).
6. The Bill makes provision about matters such as the aims and powers of SoSE. It also sets out various operational matters. For example, it makes provision for regulations to identify certain property and liabilities of SE to be transferred to SoSE.

Consideration of the delegated powers in the Bill

7. At its meeting on 27 November 2018, the Committee agreed to write to the Scottish Government to raise questions in relation to two delegated powers in the Bill, in sections 5(3) and 15(1). The Committee's questions, and the response received from the Scottish Government to them, are reproduced in the Annex.
8. The Committee reports as follows on these delegated powers in the Bill. The Committee is content with the remaining powers in sections 17(2) (transfer of property and liabilities), 19 (ancillary provision) and 21 (commencement) of the Bill.

Section 5(3) – Power to amend the aims of SoSE

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Provisions

9. Section 5(1) of the Bill provides that the aims of SoSE are to further the economic and social development of the south of Scotland and to improve the amenity and environment of the south of Scotland. Further provision is made in section 5(2) about what furthering the economic and social development of the South of Scotland includes.
10. The delegated power is contained in section 5(3), which allows Scottish Ministers by regulations to alter the aims of SoSE by modifying section 5. This power is subject to affirmative procedure.

Correspondence with the Scottish Government

11. The Committee asked three questions of the Scottish Government:
 - why does the Bill take a different approach to the powers that apply to alter the aims of SoSE compared to the Enterprise and New Towns (Scotland) Act 1990 (the "1990 Act"), where there are no powers to modify the equivalent general functions of SE or HIE and only limited powers to confer certain limited functions on those bodies "in connection with unemployment, training for unemployment or employment" (section 14A);
 - for further explanation of the sorts of amendments that may be required to the already widely expressed aims of SoSE in section 5 of the Bill, and
 - whether the power in section 5(3) could be expressed more narrowly.
12. The Scottish Government responded that the comparable provision in the 1990 Act "reflects the approach of the time to legislating for public bodies, as well as the needs and objectives of government at that time", and that drafting approaches have subsequently changed.

13. The Government’s policy intention is to provide SoSE with “maximum flexibility” to decide how to exercise its functions to achieve its outcomes. The power in section 5(3) allows Ministers to adapt the focus of the body to any changes in circumstances to ensure that these can be responded to effectively and quickly.

Committee consideration

14. The Committee has previously stated in its 2016/17 Annual Report that “there is a clear need for delegated powers to be fully explained, their terms appropriately framed, and their scope clearly delineated.”ⁱⁱⁱ In addition, the Committee recently commented on the balance to be struck between the requirement for flexibility and the need for adequate parliamentary scrutiny in its Stage 1 report on the Transport (Scotland) Bill and on the breadth of the delegated powers in the Fuel Poverty (Target, Definition and Strategy) (Scotland) Bill as set out its Stage 1 report on that Bill.^{iv}

15. Some general principles that apply to delegated powers were also considered in a recent report by a House of Lords’ Select Committee on the Constitution, entitled *The Legislative Process: The Delegation of Powers*.^v Paragraph 48 observed:

” Delegated powers should be sought only when their use can be clearly anticipated and defined. Broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. There must be a compelling justification for delegated powers and it is for Parliament to decide if that justification is acceptable.

16. The Committee recognises that it is appropriate that SoSE has the necessary powers to respond to a change in economic circumstances. Conferring flexibility to alter SoSE’s aims would in principle be desirable.
17. However, the aims of SoSE are currently expressed broadly in section 5(1) of the Bill as being to further the economic and social development of the South of Scotland and to improve the amenity and environment of that area. The Scottish Government indicated that it is not easy to identify a specific example of when the aims stated in section 5 may need to change.
18. The Scottish Government referred to the foot and mouth crisis, but gave no specific examples of how SoSE’s aims would need to be altered to respond effectively to such a crisis. The Committee notes that the Bill already permits SoSE to take steps

iii See paragraph 142 of the Committee’s [2016/17 Annual Report](#).

iv In its [Stage 1 report on the Transport \(Scotland\) Bill](#), the Committee stated at paragraph 17 that “*an appropriate balance needs to be struck between the requirement for flexibility and the need for adequate parliamentary scrutiny*”. Furthermore, at paragraph 35 of the Committee’s [Stage 1 report on the Fuel Poverty \(Target, Definition and Strategy\) \(Scotland\) Bill](#), the Committee stated that it “*accepts that future Governments may require some flexibility to react to social and economic changes that could occur over the lifetime of the Bill as enacted. However, considered as a whole, the powers in sections 2(4) and 10 [of that Bill] are particularly wide*”.

v House of Lords, Select Committee on the Constitution, [The Legislative Process: The Delegation of Powers](#) , 20 November 2018.

to safeguard employment and support community organisations to help them meet the needs of the community.

19. The Scottish Government also states that drafting approaches have changed since 1990. However, there are recent instances where the power to modify the functions of a public body is limited. For example, section 4 of the Community Justice (Scotland) Act 2016 allows regulations to add to or modify the functions of Community Justice Scotland, but only if the added or changed functions relates to community justice.

Recommendations

20. **Subject to the following observations, the Committee accepts that the power in section 5(3) of the Bill is appropriate in principle to allow SoSE to adapt to unforeseen events and changing circumstances.**
21. **The Committee draws the lead Committee’s attention to the already broad nature of SoSE’s aims in section 5(1) and (2). The Committee recommends that further consideration is given to whether the power in section 5(3) is limited to setting out in more detail what “furthering the economic and social development of the South of Scotland”, or “improving the amenity and environment” of that area, can include, rather than a power to modify section 5 as a whole.**
22. **The Committee also reports to the lead Committee that it is content that the affirmative procedure applies to the power in section 5(3) of the Bill. However, the Committee considers that it would be appropriate that wider and longer term social and economic changes are addressed in primary legislation rather than through delegated powers.**

Section 15(1) – Power to issue direction to SoSE

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

Provisions

23. Section 15(1) provides that SoSE must comply with any direction issued to it by the Scottish Ministers. Such a direction may be general or relate to a particular function or matter and may vary or revoke an existing direction made under section 15.
24. Directions must be published but are neither laid nor subject to any parliamentary procedure.

Correspondence with the Scottish Government

25. The Committee asked the Scottish Government to consider whether there should be requirements on the face of the Bill to consult SoSE before giving it a direction and also to provide reasons in the published direction for making the direction.

26. The Scottish Government's response indicates that it expects that the power in section 15 of the Bill would only be used in exceptional circumstances – indeed, a power to direct SE and HIE in the 1990 Act has never been used.
27. The Scottish Government also responded that although a requirement to consult is not included on the face of the Bill, it expects that Scottish Ministers would consult closely with affected interested parties, including SoSE, before issuing a direction and be clear about the reason for the direction.

Committee consideration

28. A power similar to that contained in section 15(1) of the Bill exists in section 14 of the 1990 Act. Section 14 allows the Secretary of State to issue directions of a general or specific character to SE and HIE as to the exercise by those bodies of their functions. Unlike the direction-making power in the Bill, the Secretary of State is required under section 14 of the 1990 Act to consult with SE and HIE before making any direction, which is binding on those bodies.
29. The Committee notes that the lead committee has already posed questions to the Scottish Government in relation to the direction-making power in section 15 and is aware of the inconsistency with the similar power in the 1990 Act in respect of the requirement to consult.
30. At the evidence session before the lead Committee on 28 November 2018, the Scottish Government confirmed that the absence of a consultation requirement in the Bill was not a conscious omission and could be considered for inclusion on the face of the Bill if the lead Committee thought it necessary.^{vi}
31. Including a consultation requirement in the Bill would add clarity to the legislation and ensure it is in line with existing legislation for similar bodies; and in particular the 1990 Act in relation to directions issued to SE and HIE.
32. The Committee also considers that it would be appropriate for section 15 of the Bill to be amended to include a requirement that Scottish Ministers must provide written reasons for the making of a direction, and that those reasons should be published with the direction under section 15(3).^{vii}

Recommendations

33. **The Committee recommends that the lead Committee calls on the Scottish Government to amend section 15 to require the Scottish Government to consult SoSE before issuing it with a direction.**
34. **The Committee also recommends that section 15 includes a requirement that Scottish Ministers must provide written reasons for the making of a**

^{vi} Rural Economy and Connectivity Committee Session, Official Report, [28 November 2018](#)

^{vii} Commitment has recently been given to the Committee by the Scottish Government to include a requirement on the face of section 39(2) of the Transport (Scotland) Bill to give reasons when Scottish Ministers issue a direction to a local transport authority to make or vary a ticketing scheme.

direction, and that those reasons should be published with the direction under section 15(3).

Annex

Correspondence with the Scottish Government

27 November 2018

South of Scotland Enterprise Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on 27 November 2018 and seeks an explanation of the following matters:

Section 5(3) – Power to amend the aims of SoSE

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Section 5(3) of the Bill allows the Scottish Ministers to alter the aims of South of Scotland Enterprise (“SoSE”) by modifying section 5. The aims of SoSE are already expressed in broad terms in section 5(1) and (2) of the Bill and it is not clear in that context how these broad aims would need to change.

Furthermore, unlike the power to alter the aims of SoSE in section 5(3) of the Bill, there is no power to modify section 1 of the Enterprise and New Towns (Scotland) Act 1990 (the “1990 Act”), which contains similar “general functions” of Scottish Enterprise (“SE”) or Highlands and Islands Enterprise (“HIE”). The power in section 14A to confer or impose functions on those bodies is limited, insofar as those functions must be in connection with unemployment, training for employment or employment.

(a) Please explain why, in this bill, a different approach is being taken to the powers that apply to altering the aims of SoSE from those taken in the 1990 Act that apply to confer or impose certain limited functions on SE and HIE.

(b) Please provide further detail of the sorts of amendments that may need to be made to the already widely expressed aims of SoSE in section 5 of the Bill.

(c) Please also consider whether the power in section 5(3) of the Bill could be expressed more narrowly.

Section 15 – Power to issue direction to SoSE

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Direction**
- **Parliamentary procedure: None**

Section 15 provides that SoSE must comply with any direction issued to it by the Scottish Ministers. The DPM does not consider this power.

A similar power is contained in section 14 of the 1990 Act, except that the Secretary of State is required to consult SE or HIE before giving the relevant body a direction. Furthermore, there is no requirement on the face of the Bill to provide reasons in the published direction.

Please consider whether there should be requirements on the face of the Bill to consult SoSE before giving it a direction under section 15 and to provide reasons in the published direction for making the direction.

Scottish Government response:

14 December 2018

The Delegated Powers and Law Reform Committee has sought clarification on the section 5(3) power to amend the aims of SoSE and the section 15 power to issue directions to SoSE.

Section 5(3) – Power to amend the aims of SoSE

(a) Please explain why, in this bill, a different approach is being taken to the powers that apply to altering the aims of SoSE from those taken in the 1990 Act that apply to confer or impose certain limited functions on SE and HIE.

(b) Please provide further detail of the sorts of amendments that may need to be made to the already widely expressed aims of SoSE in section 5 of the Bill.

(c) Please also consider whether the power in section 5(3) of the Bill could be expressed more narrowly.

The terms of Part 1 of the 1990 Act have been extremely useful in informing the approach we have taken in preparing this Bill, but that Act is about the powers and duties of Scottish Enterprise (SE) and Highlands and Islands Enterprise (HIE) and reflects the approach of the time to legislating for public bodies, as well as the needs and objectives of government at that time. Drafting approaches have changed considerably since then.

The policy behind the SoSE bill seeks to provide the new body with the maximum flexibility to decide what it needs to do and exercise functions to achieve those outcomes. An example of this flexibility, in relation to powers of the body, is that section 7 of the Bill is very different from the list of powers in section 8 of the 1990 Act.

In relation to flexibility of aims, we believe it is prudent to provide Scottish Ministers with a power to amend the aims of the body, and for similar reasons it was not felt appropriate to limit the ability of Ministers to adjust the aims of the new body in the way set out in the 1990 Act. The power in section 5(3) provides Ministers with flexibility to adapt the focus of the body to any changes in the circumstances (of Scotland or the south of Scotland) over the coming years and to allow such changes to be responded to effectively and nimbly.

There is no intention by Ministers at this stage to use this power and it is not easy to identify at present a specific example of when a change in the section 5 aims would be appropriate. However, Ministers want this body to operate for the long term and it is conceivable that exceptional events or changes of focus could arise which could mean that the aims should be altered.

The lesson of a catastrophic event like the 2001 Foot & Mouth crisis serves to show the impact which such an event can have on the whole community of an area, far beyond the farming sector directly affected. If an event like that were to happen in the south of Scotland in the future it might be appropriate to adjust the aims of the new body to reflect the change in economic circumstances of the area and to ensure it had all the powers it needed to respond effectively to such a crisis.

For reasons outlined above, we do not think there is any merit in narrowing the power in section 5(3). Reducing the flexibility of the power (for example, by limiting its exercise only to specific aims or only in specific circumstances) would reduce the ability of Ministers to deal, without unnecessary delay, with whatever circumstances, currently unforeseen, might arise.

Section 15 – Power to issue direction to SoSE

Please consider whether there should be requirements on the face of the Bill to consult SoSE before giving it a direction under section 15 and to provide reasons in the published direction for making the direction.

We have noted your comments on section 15. A similar point was raised by the Rural Economy and Connectivity Committee (RECC) when Scottish Government officials gave evidence on 28 November. We explained to RECC that we would expect Scottish Ministers to only use the power in exceptional circumstances. Indeed, the similar power in relation to SE and HIE has never been used in the 28 years of operation of the 1990 Act. While not included on the face of the Bill, we would expect Scottish Ministers to consult closely with affected interested parties, including the body itself, before issuing such a direction and be clear about the reason for the direction.

I trust that this provides sufficient clarity in relation to the Committee's queries.

