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

Scottish Elections (Reform) 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 5 November 2019 and 26 November 2019, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Scottish Elections (Reform) Bill ("the Bill") at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill (the Standards, Procedures and Public Appointments Committee) under Rule 9.6.2 of the Standing Orders.
3. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Bill is available [here](#).

ⁱⁱ The Delegated Powers Memorandum ("DPM") is available [here](#).

Overview of the Bill

4. This Government Bill was introduced by the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, on 2 September 2019. The lead committee is the Standards, Procedures and Public Appointments Committee.
5. Additional powers regarding the control of Scottish Parliament and local government elections were devolved to the Scottish Parliament by the Scotland Act 2016.
6. Following the enactment of the Scotland Act 2016, the Scottish Government held a public consultation exercise on electoral reform between 19 December 2017 and 29 March 2018. The Bill includes provisions which were consulted upon, as well as some more specialised or technical changes to electoral law.
7. The Bill comprises 36 sections which cover a wide range of issues associated with the reform of Scottish Parliament and local government elections in Scotland.

Delegated Powers Provisions

8. When the Committee considered this Bill at its meeting on 5 November 2019, it was content with the delegated powers in the following provisions:
 - Section 10 – Attendance of observers at Scottish parliamentary elections, which inserts new section 6FA (Code of practice on attendance of observers at Scottish Parliamentary Elections) into the Political Parties, Elections and Referendums Act 2000
 - Section 11 – Controlled expenditure of third parties at Scottish local government elections
 - Section 21 – Electoral Commission: election expenses at Scottish local government elections
 - Section 22 – Electoral Commission: donations to candidates at Scottish local government elections
 - Section 30 – Changes to boundaries of parliamentary constituencies: procedure
 - Section 31 – Changes to local government areas or electoral arrangements: procedure, which inserts a new section 17 (Boundaries Scotland’s reports and their implementation) and a new section 17A (Further reviews and reports by Boundaries Scotland) into the Local Government (Scotland) Act 1973
 - Section 34 – Ancillary provision
 - Section 35 - Commencement
9. The Committee sought further information from the Scottish Government in relation to the following provisions:
 - Section 8 - Expenditure of candidates at Scottish parliamentary elections, which inserts new section 6H (Code of practice on expenditure of candidates at Scottish Parliamentary elections) into the Political Parties, Elections and Referendums Act 2000
 - Section 9 – Expenditure of candidates at Scottish local government elections, which inserts new paragraph 12A (Guidance by the Electoral Commission) into schedule 4B of the Representation of the People Act 1983
10. The full correspondence with the Scottish Government can be found in the Annex.
11. The Committee then reconsidered the delegated powers in these provisions at its meeting on 26 November 2019.

Section 8 - Expenditure of candidates at Scottish parliamentary elections, which inserts new section 6H (Code of practice on expenditure of candidates at Scottish Parliamentary elections) into the Political Parties, Elections and Referendums Act 2000

Power conferred on: the Electoral Commission

Power exercisable by: Code of Practice

Parliamentary procedure: laid before the Scottish Parliament (for approval)

Provision

12. Section 8 inserts a new section 6H into Political Parties, Elections and Referendums Act 2000, which permits the Electoral Commission to prepare a draft code of practice in relation to the election expenses incurred by candidates at Scottish parliamentary elections. After preparing the draft code, the Electoral Commission must submit it to the Scottish Ministers for approval.
13. New section 6H(3) enables the Scottish Ministers to approve that draft code with or without modifications. They must then lay a copy of the draft code, as approved by them, before the Parliament. If the draft code includes modifications by the Scottish Ministers, then they must also lay a statement of their reasons for making those modifications. New section 6H(6) enables the Scottish Parliament to approve the draft code within 40 days.

Committee Consideration

14. The Committee wrote to the Scottish Government to ask whether, if the Scottish Parliament did not approve a draft code of practice under this section, there could be a period during which no code was in place, and if so, whether this could be problematic during the period of an election.
15. The Committee also asked how the process of preparing the code is expected to work in practice before the point at which the Electoral Commission formally issues it to the Scottish Ministers.
16. In response to the first question, the Government has explained that if the Scottish Parliament resolved not to approve a draft code, it would be possible for a further draft code to be laid before the Scottish Parliament. Once a code had been approved by the Scottish Parliament and published by the Commission, it would remain in place until the Scottish Parliament approved a replacement.
17. The Committee recognises that as the proposed power is new, there will not be a code in place immediately after the Bill is enacted. This means that if the Scottish Parliament refuses to approve the first draft code that is laid, there would be a period during which there is still no code in place. However, a further draft code could then be prepared by the Electoral Commission to be submitted to the Scottish Ministers and then laid for approval by the Parliament. It follows that the problem might be temporary and could be rectified before an election period.
18. In relation to the second question, the Scottish Government has explained that the expectation is that the Electoral Commission will always consult ahead of using its regulation-making powers. The Government cites the example of the Commission's consultation on Codes of Practice on spending by candidates and political parties, which took place in September 2018.
19. The Committee is content with the response from the Scottish Government.

20. The Committee is content with this power in principle and that the Code of Practice will be laid before the Parliament for approval.

Section 9 – Expenditure of candidates at Scottish local government elections, which inserts new paragraph 12A (guidance by the Electoral Commission) into schedule 4B of the Representation of the People Act 1983

Power conferred on: the Electoral Commission

Power exercisable by: Code of Practice

Parliamentary procedure: laid before the Scottish Parliament (for approval)

Provision

21. Section 9 inserts a new paragraph 12A into schedule 4B of the Representation of the People Act 1983, which permits the Electoral Commission to prepare a code of practice for candidate expenditure at Scottish local government elections. The procedure for the preparation of the code by the Electoral Commission, approval by the Scottish Ministers (with or without modifications), and subsequent approval by the Scottish Parliament mirrors that for the code prepared under the new provisions in section 8 of the Bill.

Committee Consideration

22. The Committee asked the Scottish Government the same questions regarding section 9 as it did in relation to section 8, which is discussed above.
23. The response provided by the Scottish Government in relation to section 8 (discussed above), applies equally to the questions regarding section 9 and the Committee is content with this response.

24. The Committee is content with this power in principle and that the Code of Practice will be laid before the Parliament for approval.

Annex

Letter to the Scottish Government Dated 5 November

Scottish Elections (Reform) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill this morning and seeks an explanation of the following matters:

Section 8 - Expenditure of candidates at Scottish parliamentary elections, which inserts new section 6H (Code of practice on expenditure of candidates at Scottish Parliamentary elections) into the Political Parties, Elections and Referendums Act 2000; and

Section 9 – Expenditure of candidates at Scottish local government elections, which inserts new paragraph 12A (guidance by the Electoral Commission) into schedule 4B of the Representation of the People Act 1983.

The Committee noted that both of these sections require the Electoral Commission to submit a draft code of practice to the Scottish Ministers for approval, which the Scottish Ministers may then approve (with or without modifications). Once a draft code is approved, the Scottish Ministers must lay a copy of it before the Scottish Parliament for its consideration. There follows a process around approval and issue of the draft code and for its publication by the Commission. The Scottish Parliament may resolve not to approve a draft code and if the Parliament makes such a resolution, the Scottish Ministers may not take any further steps in relation to the draft code.

The Committee discussed whether, if the Scottish Parliament did not approve the draft codes of practice under these sections, there could be a period during which no codes were in place. The Committee would be grateful to know whether this is the case, and if so, could this be problematic during the period of an election?

The Committee also discussed the extent to which the Electoral Commission and the Scottish Ministers would be involved in discussions about the content of any Code before the Electoral Commission formally issues the Code to the Scottish Ministers. Can you please confirm how the process of preparing the codes under these sections is expected to work in practice before the point at which the Electoral Commission formally issues them to the Scottish Ministers?

I would be grateful if you could email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Thursday 14 November 2019.

Thank you.

Andrew Proudfoot

Clerk to the Delegated Powers and Law Reform Committee

Response from the Scottish Government Dated 18 November 2019

Scottish Elections (Reform) Bill: Codes of practice on expenditure of candidates

Thank you for your letter of 5 November in relation to the Committee's consideration of the Scottish Elections (Reform) Bill. I have been asked to reply as Bill Team Leader.

The expectation is that the Electoral Commission will always consult ahead of using its regulation-making powers. For example, the Commission launched a consultation on Codes of Practice on spending by candidates and political parties in relation to its existing powers issued in September 2018. The Electoral Commission's written submission to the Standards, Procedures and Public Appointments Committee on the Bill notes at paragraph 16 that:

“We aim to prepare and consult on draft codes on candidates and political parties for Scottish Parliament elections to enable them to be in force well ahead of the regulated period at the 2021 elections which commences on 6 January 2021. However, the codes can only be finalised once the secondary legislation for the conduct of the 2021 elections has been approved by Parliament. The Scottish Government will need to ensure that all secondary legislation is in place in sufficient time for us to prepare and finalise the codes.”

At present, there is no power in legislation to enable the Commission to create codes of practice for candidate expenditure at devolved elections. Once a code has been approved by the Scottish Parliament and published by the Commission, that version would remain in place if the Scottish Parliament subsequently decided not to approve a replacement draft code of practice.

The Bill provides that if the Scottish Parliament resolves not to approve a draft code within a 40-day period, the Scottish Ministers must take no further steps in relation to the draft code. The mechanisms echo the existing provisions in relation to approval of Electoral Commission codes of practice by the UK Parliament.

If the Scottish Parliament made a resolution not to approve a draft code it would be possible for a new draft code to be laid before the Scottish Parliament (in terms of both section 8 and section 9 of the Bill).

I hope that this information is of assistance to the Committee.

Yours sincerely,

Iain Hockenhull

