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

South of Scotland Enterprise Bill: as amended at Stage 2



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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 meeting on 28 May 2019, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the South of Scotland Enterprise Bill (the "Bill") [as amended at Stage 2](#).
2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
3. This Scottish Government Bill was introduced by the Cabinet Secretary for the Rural Economy, Fergus Ewing MSP, on 24 October 2018. The lead Committee is the Rural Economy and Connectivity Committee.
4. The Delegated Powers and Law Reform Committee published its Stage 1 Report, [6th Report, 2019 \(Session 5\)](#), on the Bill on 23 January 2019.
5. Stage 2 was completed on 15 May 2019. The Scottish Government has since lodged a [Revised Delegated Powers Memorandum](#) ("Revised DPM") covering the powers in the Bill as amended at Stage 2.

Bill overview

6. The Bill 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 and Highlands and Islands Enterprise.
7. The Bill makes provision about matters such as the aims and powers of SoSE. It also sets out various operational matters. For example, it provides for regulations to identify certain property and liabilities of SE to be transferred to SoSE.
8. No new delegated powers have been created following Stage 2. The amendments relating to two existing delegated powers are each considered below.

Delegated powers provisions

9. The Committee considered each of the delegated powers in the Bill as amended and reports as follows.

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**

Provision

10. Section 5(1) 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 that area.
11. Section 5(3) contains a delegated power allowing Scottish Ministers by regulations to alter the aims of SoSE by modifying section 5. This power is subject to affirmative procedure.
12. Section 5(2) has been amended at Stage 2. Originally, this set out what furthering the economic and social development of the South of Scotland includes. It provided a list of six matters, such as "supporting inclusive economic growth".
13. As amended, section 5(2) now provides that achieving the aims set out in section 5(1) may involve taking action directed towards 14 listed things (amongst other things). For example, reference is now made to "supporting the transition to a net zero carbon economy".

Committee consideration

14. The Revised DPM does not consider the amendments made to section 5 at Stage 2 on the basis that the power itself contained in section 5(3) remains unchanged.
15. In its Stage 1 Report the Committee raised concerns about the power in section 5(3), by stating that the aims of SoSE were already expressed broadly in the Bill. It recommended 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.
16. The Lead Committee called on the Government to provide clarity as to whether the purpose of section 5(3) of the Bill is to allow more detail to be added to the aims set out in sections 5(1) and 5(2), or if it is to allow modifications to section 5 as a whole.
17. In response to the Committee's Stage 1 report, the Government stated that this power "deliberately captures the whole of section 5 to ensure that, for example, any definitions required to interpret amended aims can be inserted as well as the amended aims." It suggested that flexibility was required to respond to any changes in circumstances "effectively and nimbly".

18. As the Committee noted in its Stage 1 report, and as the Scottish Government indicated in its response to the Committee at Stage 1, it is not easy to identify a specific example of when the aims stated in section 5 may need to change. The Committee also observed that there are recent instances where the power to modify the functions of a public body is limited.ⁱ
19. More generally, however, the Committee considers that the addition of further actions in the list in section 5(2) provides further specification about the aims and powers of SoSE. It also notes that the regulations are subject to the affirmative procedure, which affords the Parliament the opportunity to conduct enhanced scrutiny of any regulations changing the aims of SoSE.
- 20. Subject to the observations made at paragraph 18, the Committee is content with the power to make regulations in section 5 of the Bill as amended at Stage 2, and that the power is subject to the affirmative procedure.**

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

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

Provision

21. 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.
22. Subsection (2A) has been added to section 15 at Stage 2. It provides that before issuing any directions under section 15(1) the Scottish Ministers must consult SoSE about it.
23. Subsection (3) originally provided that a direction issued under section 15(1) had to be published. This has been amended at Stage 2 to add an additional requirement to publish the reasons for issuing a direction with the direction itself.

Committee consideration

24. Paragraph 9 of the Revised DPM explains that this is a "last resort power" and that it is similar to existing powers relating to SE and HIE. The DPM also indicates that the duties to consult and publish are now the same.
25. The Committee notes that these amendments address recommendations it made in its Stage 1 Report that section 15 should be amended to require that the

ⁱ Paragraph 19 of the Committee's Stage 1 Report referred to the example of section 4 of the Community Justice (Scotland) Act 2016, which allows regulations to add to or modify the functions of Community Justice Scotland, but only if the added or changed functions relate to community justice.

Government consult SoSE before issuing it with a direction and that written reasons are provided for issuing such a direction and published with the direction.

26. **The Committee is therefore content in principle with the power to give directions in section 15 as amended at Stage 2, and that directions issued under this section are neither laid before the Parliament nor subject to any parliamentary procedure.**
27. **The Committee also welcomes that the Bill as amended at Stage 2 now provides, as the Committee recommended in its Stage 1 Report, that directions under section 15 will now only be issued after consultation with SoSE, and that the reasons for issuing them will be published with the direction.**

