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

Delegated Powers and Law Reform Committee: Session 5 Handover Report



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For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

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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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Bill Bowman
Scottish Conservative
and Unionist Party



Gil Paterson
Scottish National Party



Mary Fee
Scottish Labour



Michelle Ballantyne
Reform UK



Joe FitzPatrick
Scottish National Party

Introduction

1. The Delegated Powers and Law Reform Committee is essential to the Parliament's scrutiny function as it considers almost every piece of primary and secondary legislation. Its overarching role is to scrutinise:
 - whether a statutory instrument works as a matter of law rather than whether it is a good idea as a matter of policy;
 - whether a power being proposed in a Bill is appropriate in principle to delegate to the Scottish Government to be used at a later date, whether the scope of the power is no more than is necessary, and whether the arrangements for future parliamentary scrutiny are appropriate;
 - legislative consent memorandums where a UK Bill confers powers to make subordinate legislation in devolved areas; and
 - Bills stemming from Scottish Law Commission reports.

Scrutiny of instruments

2. The Committee's scrutiny of Scottish Statutory Instruments ('SSIs') is central to its work and appears on almost every agenda. Generally, issues highlighted by the Committee – and often in initial correspondence between its legal advisers and the Government – lead to changes being made. The Committee, through its quarterly and annual reports, has been keen to highlight any recurring issues to the Scottish Government but has also praised its work when appropriate.
3. The quality of drafting of SSIs has been a particular focus of the Committee. This has led to a general reduction of errors that require to be highlighted by the Committee, although the most recent quarterly report highlighted a considerable increase in the percentage of reported instruments.
4. Another theme of the Committee has been in encouraging the Scottish Government to fulfil outstanding commitments to correct errors in SSIs. This has been repeatedly highlighted to the current and previous Ministers for Parliamentary Business and Veterans. The Scottish Government met all but one of its historic commitments by the end of Session 5. While this was Minister for Parliamentary Business and Veterans had previously committed to meeting all such commitments, the Committee welcome the Scottish Government's work in reducing these over the course of Session 5.
5. More recently, the use of subordinate legislation during the pandemic has highlighted the importance of SSIs in daily life. Well over 100 SSIs have been laid in relation to the coronavirus. These have covered a range of hugely important issues such as travel restrictions, 'lockdown' restrictions and tenants' rights.
6. Over 90 of the coronavirus SSIs have been made subject to the made affirmative procedure. This allows the Scottish Government to bring regulations into force immediately but generally requires them to be approved by the parliament within 28 days in order to remain in force. The Committee had only previously considered a small number of these prior to the pandemic.
7. The Committee has continually acknowledged the requirement for made affirmative instruments during the pandemic so as to allow the Government to respond quickly to the many challenges presented by coronavirus. Nevertheless, it has also said that bringing such substantial changes into force immediately, before any parliamentary scrutiny, should only be used when essential and should not become standard practice when time would allow the affirmative procedure to be used.

Scrutiny of SSIs relating to the European Union (Withdrawal) Act 2018

8. An SSI protocol was agreed between the Scottish Parliament and Scottish Government to set out a shared understanding on the process for considering SSIs under the European Union (Withdrawal) Act 2018. This was to ensure that effective and proportionate scrutiny could be applied to the expected high volume of SSIs made under the Act to prepare the statute book for the UK leaving the EU. Over 70 SSIs have been considered using this protocol.
9. The protocol may still be required to be used in Session 6, although perhaps to a lesser extent. It is anticipated that SSIs arising from EU withdrawal will also

continue to be made under alternative enabling Acts, such as the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 and the Fisheries Act 2020. The protocol does not apply to SSIs made under these Acts.

10. The protocol provides the Committee with an opportunity to consider whether the appropriate procedure has been used, where a choice of procedure is available. However, the Committee has never recommended a change in procedure. The Committee recognised that it was not necessary to change the procedure applied to an instrument to enable additional scrutiny. As identified in the protocol, a lead committee can choose to undertake more extensive scrutiny regardless of the procedure.

Scrutiny of primary legislation

11. The Committee has considered the delegated powers provisions in over 80 Bills in Session 5. The Committee has generally taken a tiered approach to its scrutiny. For the majority of Bills it has been content to raise questions with the Scottish Government or Member-in-charge by correspondence. When the provisions were particularly extensive or significant – such as in the Social Security (Scotland) Bill or the Transport (Scotland) Bill - the Committee held evidence sessions with the relevant ministers. The Committee’s recommendations have led to significant changes at Stage 2, such as in the recent Scottish General Election (Coronavirus) Bill.
12. Consideration of Bills as amended at Stage 2 can prove more challenging given the often-tight timescales prior to Stage 3. The Committee has written to the Scottish Government to seek its commitment to ensuring that revised or supplementary Delegated Powers Memorandums are received in good time for the Committee to be able to consider them before Stage 3.
13. The Committee has at times chosen to lodge its own amendments at Stage 3 when changes were not forthcoming. While this approach has only been used on a handful of occasions, it has shown that the Committee is keen to ensure that the Parliament is fully informed when considering delegated powers in a Bill.
14. Recent Bills in relation to the UK leaving the EU and responding to the coronavirus, some of which were considered as Emergency Bills so did not allow for Committee scrutiny, have resulted in particularly significant and wide delegations of power from Parliament to Government.

Scrutiny of legislative consent memorandums

15. Much of the Committee's scrutiny of legislative consent memorandums ('LCMs') has centred on UK Bills in relation to the UK leaving the EU. The Committee has taken evidence from Scottish and UK Government Ministers on the European Union (Withdrawal) Bill and the Trade Bill.
16. While the successor committee will wish to consider future LCMs on a case-by-case basis, two common themes arose during the Committee's scrutiny of some of these LCMs.
17. Firstly, the DPLR Committee considered that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
18. Secondly, in the event that the Bill confers powers on UK Ministers in devolved areas, the DPLR Committee considered it appropriate, as a minimum, that the powers should be exercisable only with the consent of the Scottish Ministers. Moreover, all such consent decisions made by the Scottish Ministers should be subject to the process set out in the new SI Protocol covering powers exercised by UK Ministers in devolved areas arising from EU withdrawal.

Monitoring and feedback

Quarterly and annual reports

19. The Committee's primary vehicle to scrutinise the standard of instruments laid by the Scottish Government and Lord President's Private Office are the quarterly and annual reports. The aim of these reports is to identify trends and issues that allow the Committee to press for consistently high standards across all instruments. They also help to ensure transparency in the Committee's work by highlighting issues that it considers to be particularly important or that occur frequently.

Sessions with the Minister for Parliamentary Business and Veterans

20. The Committee held regular evidence sessions with the Minister for Parliamentary Business and Veterans. These allowed the Committee to cover a range of topics with the Minister. In particular, in the latter half of this parliamentary session the Committee held these sessions more frequently so that it could then help ensure transparency in the Scottish Government's strategy on the high volume of legislation relating to EU exit, and then the volume of legislation relating to coronavirus.
21. These generally proved to be very helpful in highlighting and resolving issues with the Scottish Government.

Scrutiny of Scottish Law Commission Bills

22. The Committee has been designated lead committee in consideration of two Scottish Law Commission ('SLC') Bills in Session 5:
 - Contract (Third Party Rights) (Scotland) Bill; and
 - Prescription (Scotland) Bill.
23. Both of these Bills were considered during the first half of the session.
24. In 2019 the Committee began a review of the process by which Bills are designated as 'SLC Bills' (and, therefore, suitable for the Committee to be designated as lead committee). The Committee subsequently published a report on this Review of the Presiding Officer's determination to identify a Scottish Law Commission Bill. This recommended certain changes to the Presiding Officer's determination that is a central part of defining a Bill as an SLC Bill. The Standards, Procedures and Public Appointments Committee agreed with the recommendations and the Presiding Officer has since issued the revised determination for use in Session 6.
25. The Committee visited the SLC's offices in 2018 and has built up a very positive relationship with the Commission's Chair and her colleagues. The Committee recommends that its successor committee takes the time to learn more about the SLC's work in Session 6 and develop similar links with the Commission.

Media

26. The Committee has sought to publicise its work where appropriate using both traditional and new media. While there is limited data to analyse this work, the Session 6 Committee may wish to provide renewed focus in this area.

