



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 18 September 2018

Session 5



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Pàrlamaid na h-Alba

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DELEGATED POWERS AND LAW REFORM COMMITTEE

27th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Neil Findlay (Lothian) (Lab)

*Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Graeme Dey (Minister for Parliamentary Business and Veterans)

Steven Macgregor (Scottish Government)

Luke McBratney (Scottish Government)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 18 September 2018

[The Convener opened the meeting at 10:30]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome everyone to the 27th meeting in 2018 of the Delegated Powers and Law Reform Committee.

Before we move to the main item of business, the committee must decide whether to take items 5, 6 and 7 in private. Those items are the consideration of delegated powers provisions in bills and of the evidence that we are about to hear from the minister on secondary legislation. Do members agree to take items 5, 6 and 7 in private?

Members *indicated agreement.*

Secondary Legislation Update

10:30

The Convener: I welcome Graeme Dey, the new Minister for Parliamentary Business and Veterans, who will provide us with an update on the Government's secondary legislation programme.

The minister is accompanied by Scottish Government officials Steven Macgregor, from the Parliament and legislation unit; Colin Brown, from the legal directorate; and Luke McBratney, from the constitution and United Kingdom relations division.

Minister, I understand that you wish to make an opening statement.

The Minister for Parliamentary Business and Veterans (Graeme Dey): This is my first time before the committee and I welcome the opportunity to engage with members. I look forward to working with you over the coming months.

The committee has a pivotal role in scrutinising the delegated powers that ministers and others are given through new acts and existing powers. I suspect that, at times, that can be a technical and laborious role, but it is an essential one. I commend the committee on the rigour that it brings to the task. I say that both as a minister and as someone who, until recently, was convener of a committee whose work was greatly aided by that of the Delegated Powers and Law Reform Committee.

In general, the standard of legislation introduced by the Government is high. However, I fully accept that there may be exceptions to that. I offer an assurance that I will always seek improvements in performance in that area and reflect any issues highlighted by the committee and others.

Brexit clearly looms large in the challenges that are coming down the track. Although the full legislative implications remain unclear, we can be certain that Brexit will require even better planning, quality assurance and explanation of the Government's Scottish statutory instrument programme. That is a challenge that Mr Russell and I are tackling jointly with officials.

I will leave it there convener, as I am sure that the committee has several questions for me.

The Convener: Indeed we do, and many of them relate to Brexit, as you can imagine. Thank you for those useful comments, minister.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, minister and welcome to your new role. Can you provide the committee with

an update on any discussions that you are having with the UK Government on areas where a UK-wide approach to secondary legislation might be more appropriate?

Steven Macgregor (Scottish Government): Those discussions are on-going across the Scottish Government. There is a protocol in place for a notification to be sent to the Scottish Parliament if the Scottish Government is considering consenting to the UK Government making provision on a statutory instrument. The first notifications were sent at the end of last week. Discussions are taking place between individual ministerial portfolios and the relevant departments. We are co-ordinating that work from the centre of the Government.

Luke McBratney can talk a little bit about some of the criteria that underpin those discussions. Where there is an opportunity to work with the UK Government to make corrections ahead of Brexit, we are looking at that as a viable option.

Luke McBratney (Scottish Government): The Scottish Government recognises that we are dealing with a programme of legislation arising from EU withdrawal—both in the shape of notifications being issued in relation to UK statutory instruments, and Scottish statutory instruments from the Scottish Government—that will be unprecedented in scale, pace and complexity. We want to protect as much parliamentary and governmental time as possible for non-Brexit-related legislation. Therefore, as Steven Macgregor mentioned, we have agreed an approach with the UK Government so that we can consent to legislation being made in devolved areas by the UK Government.

The minister wrote to the convener of this committee and to the convener of the Finance and Constitution Committee last week, to set out the Government's rationale for that approach.

Stuart McMillan: Mr Macgregor, you mentioned the consent notifications from last week and you also mentioned having dialogue about the potential for change if there is a particular issue. How is that dialogue going? Have there been any problems thus far? It is still early days.

Steven Macgregor: It is still early days, but I can give you a flavour of it. We have regular discussions with colleagues in the Cabinet Office and in the Department for Exiting the European Union about the process. There is a high level of awareness within the UK Government about the need for the Scottish Parliament to be able to scrutinise the notifications, and it builds that into its timescales as best it can. We are certainly trying to get more information about what statutory instruments the UK Government is working on and trying to get as much draft information as we can

in order to provide the Parliament with as much information as possible at the earliest point possible.

The success of that so far is reflected in the fact that we were able to send some notifications at the end of last week, enabling the Scottish Parliament to see what is coming through the pipeline, a whole month ahead of those instruments being laid in the UK Parliament, so the process that we have put in place has given us an early indication of what the UK Government is planning to do. We would like to know more, and we would like to know more earlier, and we just have to continue that dialogue with the UK Government to get as much information as we can.

Graeme Dey: The period between September and November will be when the bulk of the notifications come through. It is a moving feast, but right now we anticipate around 110 Brexit SIs, which will be contained within 30 to 50 notifications. The notifications will go out from September to November—as Steven Macgregor says, some of them have gone out already—and then in November and December the material will start to emerge, running through to March. We are aware of the last laying dates and we will do everything that we can to meet them, but we cannot guarantee that there will not be some last-minute instruments. That is where we are at the moment.

Stuart McMillan: The Cabinet Secretary for Government Business and Constitutional Relations touched on the notifications last week in his statement in the chamber. Your answer has been helpful, but it might be quite useful if you could come back to the committee—or even write to us on a regular basis—to tell us how that is progressing. As you said, it is a moving feast.

Graeme Dey: That is a good point and I am happy to commit to that, because it is essential that we work closely with the committee and with other committees of the Parliament as we go through the process. If members have views on the nature of the notifications and the details contained in them, I am happy to take any suggestions away and to look at them, because we are in the business of trying to provide you with as much advance notice and information as we possibly can to smooth the way for your work to take place.

Stuart McMillan: The question of “heavy legislative lifting” has been discussed. As the consent notifications will be considered by the subject committees, can you commit to providing the relevant committees with a summary of how many consent notifications they might be expected to scrutinise, to help them plan their workload over the course of the next few months?

Graeme Dey: The answer is yes, but not quite yet. We are working our way through the nature of those 110 statutory instruments and where they would sit, and that process has not yet been completed. As soon as we have that information, however, it will be shared with this committee and the other committees.

Alison Harris (Central Scotland) (Con): You have already answered a lot of my questions, to be honest. When does the Scottish Government intend to begin to lay SSIs? Do you have any specific dates, or do they all require to be considered by Brexit day, 29 March?

Steven Macgregor: I will cover the first part of that question and Luke McBratney will cover the second part. Our feeling on the timings is that the first tranche will be SI notifications; that is to say, things where we think that the UK Government might be best placed to make the fix. That is because, as I explained, we are effectively getting notification a month in advance of the instruments being put into the UK Parliament. We think that in September, October and November the bulk of the work will be SI notifications, and as we transition into November, December and January we will get the bulk of the SSIs. As the minister says, we are keenly aware of last laying dates and we want to do everything that we can to get as much work done as early as we possibly can.

Luke McBratney: A process of prioritisation will have to be applied to the instruments. The way to think about it is not to focus on whether it is no deal prioritisation—it is about March 2019 prioritisation. A group of fixes will be essential to deal with a system of laws, a scheme or a field of regulation that would be entirely broken if no preparation was undertaken and no changes to the law were made in anticipation of EU withdrawal. It is obviously proper for the Government to focus on those areas first, given the scale and pace of the legislating that I mentioned.

For example, an important regulatory function might cease to be exercisable. In such cases, the Government will, either by notification to the Parliament that a UK-wide approach is being taken, or through its own SSI, take the steps required to address those deficiencies in legislation by March 2019. There will be other areas where, as a result of Brexit, a function will continue to operate but in a different, perhaps, sub-optimal way. For example—and I caution the committee that this is only an example—certain judicial posts cannot be held by a person who is a judge at the European Court of Justice. Obviously that makes no sense if the UK is no longer a member of the European Union, but it is not exactly a fatal blow to the scheme of judicial appointments. Such a fix might be deprioritised,

and the issue might well have to be addressed after the important date, whether it be March 2019 or later.

Alison Harris: Have you made a rough guess of how many consent notifications might apply to the Parliament's various committees?

Graeme Dey: That follows on from Mr McMillan's question. We do not have that figure at the moment, but we are working through the issue. As soon as we have that information, we will look to share it with you. After all, I recognise that committees have to plan their work programmes. At the risk of repeating myself, we will absolutely share that information ASAP.

The Convener: As Mr McBratney said, there are some pieces of legislation that you will have to do something about. Do you have any numbers in that respect?

Luke McBratney: No, not at the moment. The Government intends to address all the consequences of EU withdrawal. This is not about having some cut-off with regard to which matters will or will not be addressed; it is about establishing the order of priority in which they will be addressed.

Graeme Dey: Following on from the earlier question, we have committed to coming back to the committee with updates, if that is what you would like, and to having a continuing dialogue.

The Convener: I appreciate that.

Neil Findlay (Lothian) (Lab): How is this impacting on the normal work of Government?

Graeme Dey: It would be unrealistic to suggest that this is not having an impact, just as it would be unrealistic to suggest that it will not impact on the work of the committees. However, we are applying as much resource as we can to dealing with the issue and are taking a pragmatic and commonsense approach. We are working with the UK Government where appropriate to make the progress that we need to, and we are introducing SSIs where those are needed. I therefore reassure Mr Findlay that we are coming at this with the best of intentions and with our best efforts to minimise the impact on the Parliament's work.

Neil Findlay: Will we see the same level of non-Brexit-related instruments coming through?

Steven Macgregor: We are working through that information. What we want to give the committee is a picture not just of the notifications and SSIs related to Brexit, but of all the SSIs that are coming through the system. Historically speaking, I think that the figure for domestic SSIs—if I can call them that—coming forward has been about 200 to 300, and very preliminary information that we have suggests that, if we

continue as we plan to do, we will be talking about the same volume again. However, we have not had the chance to work out how those figures fit across individual committees or to go through the process of prioritisation that we are undertaking in our Brexit work. That is a discussion that we need to have with the minister, but we intend to show those projections to the committee when we are able to do so.

Neil Findlay: Do you expect the big dip in workload that has taken place previously?

10:45

Steven Macgregor: There are fluctuations across the SSI programme every year—sometimes there is more activity and sometimes there is less. That is just a product of the work that we bring forward. At the moment, the situation looks similar to that in previous years.

Neil Findlay: The Government was provided with cash to prepare for Brexit. Where has that money gone?

Graeme Dey: The Chancellor of the Exchequer set aside £1.5 billion of additional funding in each of the years 2018-19 and 2019-20. The Scottish Government received £37.3 million of consequential in 2018-19, which is made up of £35.8 million of resource funding and £1.6 million of capital funding. The Cabinet Secretary for Finance, Economy and Fair Work has made initial allocations of £26.6 million of resource funding and £500,000 of capital funding to support the preparation work that we are doing. Further announcements will be linked to the budget.

Neil Findlay: You have given the global figure, but what are we doing with the cash?

Graeme Dey: I ask my officials whether we can give examples.

Steven Macgregor: To be honest, we do not get into that area—our work is more about the delivery of the legislative programme. We will have to come back to the committee with a response, if that is okay.

Graeme Dey: We will write to the committee with as much information as possible.

The Convener: Are Neil Findlay's questions about staffing?

Neil Findlay: Yes. Are we spending £10 million on stamps, lawyers or policy experts? Where is the money going?

Graeme Dey: Once the final details are announced in the budget, we will write to provide the detail. In the meantime, I will respond with any helpful information that I can supply.

Tom Arthur (Renfrewshire South) (SNP): I, too, welcome the minister to his position. There has been much discussion about the instruments that will arise from the European Union (Withdrawal) Act 2018. Will the minister or his officials update the committee on other forthcoming Brexit-related legislative activity, such as activity on the Trade Bill?

Steven Macgregor: The other main area of activity concerns UK primary legislation. A legislative consent memorandum on the Trade Bill is before the Scottish Parliament, and the next bill for consideration will be the Agriculture Bill, which the UK Government has just introduced. We expect more UK primary legislation that relates to Brexit—potentially at the turn of the year. We do not know exactly what that might be or when it will come. The UK Government has said that it is working on a fisheries bill, but we have no timings for that.

Tom Arthur: Do you expect such legislation to include delegated powers that impinge on devolved competencies?

Luke McBratney: From its consideration of the European Union (Withdrawal) Bill, the committee will be familiar with the Scottish Government's position on delegated powers as they relate to preparations for EU withdrawal. The Scottish Government's position, which it has expressed to the UK Government, will be the same—when similar issues arise in Brexit-related legislation, the expectation is that devolved competence will be respected in the allocation of delegated powers.

Tom Arthur: We learned from the withdrawal act that the UK Government is unwilling to respect devolved competences when it does not regard them as being in the UK's interest. Is it understood that, when further legislation is—inevitably—passed at Westminster, the SIs and SSIs that arise will have an impact on the workload of this Parliament and Government in relation to devolved areas?

Luke McBratney: I simply point again to the experience of this committee and other committees with the withdrawal bill and subsequent act as an example of how the Scottish Government is seeking to protect the devolution settlement and respect this Parliament's role, while faced with the undoubtedly large practical challenge of making the necessary preparations for EU withdrawal.

The Convener: You will be relieved to hear that I have a question about a slightly different issue. As a former convener, you will know that there has been frustration among conveners and others about the accessibility of some of the documents relating to SSIs that we receive. Your predecessor

made a commitment to look at the issue, but I do not know how far he got.

You will also appreciate—as former journalists, we are in the same boat here—the need to present things in plain English. Often, that does not happen. Are you committed to pursuing that?

Graeme Dey: Yes. Since my appointment, I have had several conversations with officials about that. As you said, my predecessor made a commitment and did substantial groundwork in that area. I strongly reinforce that.

As a former convener, I share your concerns and those of the other conveners about the nature of some explanatory notes, which, at times, are not overly explanatory, and the lack of plain English. Substantial work is being done to ensure that we make the consideration process as easy as possible for committees. For example, we are considering providing a covering letter for each instrument that would explain in two or three paragraphs specifically what the instrument does. That is not to insult the intelligence of committee members—it is simply to be helpful. All of us will have read explanatory notes that we have had to reread. The committees' complaint is legitimate, and we are looking forward to fixing the situation.

I am not going to claim that we will get everything right in one go. I am not saying that I am quite happy, but I would like to think that, as Mr FitzPatrick previously indicated, we will resolve the issue. I am willing to receive from committees examples of poor practice or poor presentation, because that will allow us to focus on the issue and to improve the way in which instruments are presented. I hear what you say on that.

The Convener: Okay. Given that all instruments come through this committee, I am sure that we will be able to provide examples. I am just trying to be helpful, because we need to work together.

Graeme Dey: In the spirit of constructive engagement, I commit to working with the committee on the issue. If you have examples to draw to my attention, please do so.

The Convener: That is useful.

I have a final question. I am afraid that I must take you back to Brexit. Given the number of additional Brexit-related instruments that the Government will have to deal with, are you concerned that officials might be forced to speed up drafting to get things through and that, as a result, mistakes could be made?

Graeme Dey: I certainly hope not. A lot of work is being done to ensure that the high workload does not result in a dropping of standards. Human nature being what it is, people will make mistakes. It happens—we all do it. We are acutely aware of

the stresses on the system in producing good-quality drafting.

I cannot say that there will be no problems; I would not do that. However, we are committed to getting things right, and we are putting as much resource and effort into that as we can.

Luke McBratney: I have previously given evidence to the committee about improvements in the quality assurance mechanisms that are applied inside Government to the process of drafting. I reassure the committee that there is no intention to compromise on any of them simply because of the Brexit workload. The same quality assurance processes that the committee has taken evidence on previously will apply to every Brexit instrument that comes before the committee. However, as the minister said, we are dealing with an unprecedented workload, which will inevitably have some consequences for the instruments that the committee deals with.

Graeme Dey: Clearly, the approach is to get things right first time, so that we do not tie up the committee's time, and ours, having to revisit instruments.

The Convener: Members have no further questions.

It has been a short but useful getting-to-know-you session, if I can call it that. I thank the minister and his officials for their time.

10:54

Meeting suspended.

10:55

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 3, no points have been raised on the following instruments.

Renewables Obligation (Scotland) Amendment Order 2018 [Draft]

Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instrument subject to Negative Procedure

Licensing Register (Scotland) Amendment Regulations 2018 (SSI 2018/267)

The Convener: No points have been raised on the instrument. Is the committee content with it?

Members *indicated agreement.*

10:55

Meeting continued in private until 11:13.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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