



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **57th Report, 2013 (Session 4)**

### **Scottish Independence Referendum Bill as amended at stage 2**

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## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (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; and
  - (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.

#### **Membership:**

Christian Allard  
Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
Margaret McCulloch  
John Scott  
Stewart Stevenson (Deputy Convener)

**Committee Clerking Team:**

**Clerk to the Committee**

Euan Donald

**Assistant Clerk**

Elizabeth White

**Support Manager**

Daren Pratt



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## Delegated Powers and Law Reform Committee

### 57th Report, 2013 (Session 4)

#### Scottish Independence Referendum Bill as amended at stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 5 November 2013, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Scottish Independence Referendum Bill as amended at Stage 2 (“the Bill”)<sup>1</sup>. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. The Scottish Independence Referendum Bill was introduced in the Scottish Parliament by the Scottish Government on 21 March 2013.
3. The Bill is the second of the two Bills which will provide for a referendum to be held on the independence of Scotland from the rest of the United Kingdom. The first Bill (already considered by the Committee) provides the rules for who will be entitled to vote in the independence referendum. This Bill sets out the practical arrangements for the holding of the referendum.
4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its [29<sup>th</sup> report of 2013](#).
5. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”)<sup>2</sup>.

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<sup>1</sup> Scottish Independence Referendum Bill (as amended at stage 2) available here: [http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Independence%20Referendum%20Bill/b25as4-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25as4-amend.pdf)

<sup>2</sup> Scottish Independence Referendum Bill Supplementary Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4\\_Bills/Ref\\_Supplementary\\_DPM\\_-\\_final.pdf](http://www.scottish.parliament.uk/S4_Bills/Ref_Supplementary_DPM_-_final.pdf)

## DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers provisions which had been removed, amended or added at stage 2. The Committee's comments and recommendations on these delegated powers are considered below.

### **Delegated powers which have been removed or altered**

#### **Schedule 6 paragraph 16: Supplementary orders: general**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercised by:</b>	<b>Order</b>
<b>Parliamentary procedure:</b>	<b>Affirmative or negative depending on type of order</b>

#### *Amendment*

7. Schedule 6 contains a civil sanction regime which allows the Electoral Commission to impose certain sanctions in connection with its role in monitoring and securing compliance with the campaign rules set out in the Bill. As introduced, paragraph 16 of schedule 6 of the Bill provided for Scottish Ministers to make supplementary orders in relation to the civil sanction regime.

8. Following amendments at stage 2, the power to make supplementary orders has been removed and the detailed arrangements for the civil sanction regime are now set out on the face of the Bill. In particular there are now limits set on the financial penalties which can be imposed.

#### *Comment*

9. By setting out the details of the civil sanction regime on the face of the Bill, and by setting a maximum non-compliance penalty, the Scottish Government has addressed the points raised by the Committee in its stage 1 report. The Committee is therefore content with the removal of the power to make supplementary orders.

10. The Committee observes, however, that there is a typographical error in paragraph 28A(3) of schedule 6 which makes provision for appeals to the sheriff. The reference to paragraph 8A(3) should be a reference to paragraph 8A(8). It is obviously important that rights of appeal are conferred in relation to the correct matters and the Government has undertaken to bring forward an amendment at stage 3 which would correct this if agreed to.

**11. The Committee therefore reports that it is content with the removal of the power to make supplementary orders subject to the correction of the typographical error in paragraph 28A(3) where "paragraph 8A(3)" should read "paragraph 8A(8)". The Committee recommends that the Government lodges an appropriate amendment to correct this error.**

## **Schedule 5, paragraph 13A: Guidance by Commission**

<b>Power conferred on:</b>	<b>the Commission</b>
<b>Power exercised by:</b>	<b>Guidance</b>
<b>Parliamentary procedure:</b>	<b>None</b>

### *Amendments*

12. Paragraph 13 of schedule 5 to the Bill conferred power on the Commission to issue guidance on the exercise of its investigatory powers in relation to the campaign rules. The Commission must then have regard to that guidance when exercising their functions under the schedule.

13. The guidance was not to be made in the form of subordinate legislation and was not subject to parliamentary scrutiny. It was, however, required to be published and the Commission was required to consult with appropriate persons prior to issuing any guidance or revised guidance. This provision was modelled closely on the requirements of paragraph 14 of Schedule 19B to the Political Parties, Elections and Referendums Act 2000 (“PPERA”) which apply to the conduct of UK elections and referendums. In terms of Schedule 19B guidance issued by the Commission is subject to a statutory consultation requirement and must be published.

14. The Commission suggested to the Scottish Government that its existing guidance published under PERA was adequate to cover the Scottish Independence Referendum subject to any necessary modifications to adapt to the precise terms of the Bill. Paragraph 13 was therefore removed from the Bill at stage 2 and replaced by paragraph 13A. This new paragraph provides that guidance (and revised guidance) published by the Commission under paragraph 14 of Schedule 19B of PERA has effect, with any necessary modifications, for the purposes of schedule 5 as it has effect for the purposes of Schedule 19B.

### *Comment*

15. In addition to the changes made to adopt the guidance issued under PERA the Commission is given a new power in paragraph 13A(2) of the Bill to publish additional guidance in relation to the application of schedule 5 and must, where appropriate, revise that guidance. The guidance made under paragraph 13A(2) (and any revised guidance) must be published. However, there is no requirement for the Commission to consult appropriate persons in the course of the preparation of the additional guidance (or its revision) under paragraph 13A(2). This is in contrast to the requirements for consultation under Schedule 19B of PERA and the requirements of the original paragraph 13.

16. The power as originally introduced in paragraph 13 required the Commission to consult appropriate persons before the issue of any guidance or revised guidance. The same requirements apply to the guidance which will be applied under PERA. So if the Commission revises its general guidance under PERA to take into account any particular aspect of the independence referendum it will be required to consult. But by contrast if the Commission issues guidance that relates only to the independence referendum the Commission will not be required to consult in terms of the Bill.

17. The Committee understands that the change in approach is intended by the Scottish Government to allow for flexibility in producing additional guidance. Nevertheless, were the Commission to exercise the power in paragraph 13A the Committee understands that the Government *expects* that the Commission would consult interested stakeholders. It is therefore not clear why this expectation was not enforced through a statutory requirement in the same way as in PPERA.

**18. The Committee reports that it is content with the revised powers to issue guidance conferred on the Commission by paragraph 13A of schedule 5 subject to drawing the above change in approach to the attention of the Parliament for the information of members.**

### **Additional power inserted at stage 2**

#### **Section 20A – Code of practice on attendance of observers**

<b>Power conferred on:</b>	<b>the Commission</b>
<b>Power exercised by:</b>	<b>Code of Practice</b>
<b>Parliamentary procedure:</b>	<b>laid before the Scottish Parliament</b>

#### *Provision*

19. This section requires the Commission to prepare and publish a code of practice on the attendance of observers at the referendum. Observers include: representatives of the Commission, accredited observers and nominated members of accredited organisations. The matters which the code must contain are set out in section 20A(2). Before preparing the code the Commission must consult the Scottish Ministers. The issued code must be laid before the Parliament as well as published. The Commission, its representatives, the presiding officer at a polling station, counting officers and the Chief Counting Officer must have regard to the code in exercising their functions or rights under sections 17 to 20 of the Bill.

20. The provision has been inserted on the recommendation of the Commission which is required to issue a statutory code of practice on the attendance of observers at specified elections and referendums under sections 6F and 6G of PPERA. The Commission advised that the codes issued previously under PPERA have been well received and found to be useful by the Commission and observers.

#### *Comment*

21. Section 20A is similar to sections 6F and 6G of PPERA including the requirements for consultation, publication and laying before the Parliament. The Committee is content that these requirements are appropriate and deliver a suitable level of parliamentary oversight of what is a matter of practice for an independent body.

**22. The Committee therefore reports that it is content in principle with the power to issue codes of practice set out in section 20A of the Bill and that the codes require to be laid before the Parliament but are not subject to any further parliamentary procedure.**

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