



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

29th Report, 2013 (Session 4)

Scottish Independence Referendum Bill

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Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

- (a)
 - (i) subordinate legislation laid before the Parliament;
 - (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of 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;

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Nigel Don (Convener)
Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
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The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 16 April and 14 May 2013 the Subordinate Legislation Committee considered the delegated powers provisions in the Scottish Independence Referendum Bill at Stage 1 (“the Bill”)¹. The Committee submits this report to the Referendum (Scotland) Bill Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF THE BILL

3. The Scottish Independence Referendum Bill was introduced in the Scottish Parliament by the Scottish Government on 21 March 2013.
4. This 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.
5. In the consideration of the DPM at its meeting on 16 April, the Committee agreed to write to Scottish Government officials to raise a question on the delegated powers. This correspondence is reproduced at the Annex.

¹ Scottish Independence Referendum Bill available here:
http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25s4-introd.pdf

² Scottish Independence Referendum Bill Delegated Powers Memorandum available here:
[http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/Scottish Independence Referendum Bill - Delegated Powers Memorandum.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/Scottish%20Independence%20Referendum%20Bill%20-%20Delegated%20Powers%20Memorandum.pdf)

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers in the Bill.
7. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:
- Section 1: Referendum on Scottish Independence
 - Section 8: Expenses of Counting Officers
 - Section 30: Power to make supplementary etc. provision and modifications
8. The Committee's comments and, where appropriate, recommendations on the other delegated power in the Bill is detailed below.

Schedule 6 paragraph 16: Supplementary orders: general

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

9. 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. Paragraph 16 provides that the Scottish Ministers may make "supplementary orders" in relation to this regime. The provision of such orders may make transitional, consequential or incidental provision. In addition various matters throughout the schedule may be "prescribed" by the Scottish Ministers in a supplementary order. The scope of such provision and its significance in the context of the overall scheme varies.

10. Supplementary orders may also modify legislation. The procedure which would apply to an order depends on its content. Any order which amends primary legislation would be subject to the affirmative procedure as would any order which prescribes the offences to which fixed penalties, discretionary requirements, stop notices or enforcement undertakings apply or the amount of fixed penalties. Other supplementary orders are subject to the negative procedure. The DPM advises that the scheme is directly replicated from that which is applied in relation to UK elections under Schedule 19C to the Political Parties, Elections and Referendums Act 2000.

11. No justification was given in the DPM for taking these delegated powers beyond the statement that this is the practice in relation to UK elections. That said the Committee does not consider this is to be an unusual or unreasonable use of delegated powers. Since the independence referendum is a one off event it could perhaps have been possible to fix the remaining details of the civil sanction regime at this point based on current practice in UK elections. However, the Committee considers that it is also reasonable to take the view that these matters are not of

sufficient priority that would require them to be worked through at this point, or to require the detailed parliamentary scrutiny that placing them in the Bill would engage. The Committee recognises that it would also be sensible to have a means of fine tuning these requirements should the need arise without having to resort to further primary legislation.

12. The Committee is therefore content with the delegation of the powers set out in schedule 6 in principle.

13. The Committee agrees that orders which amend primary legislation or those which specify relevant offences to which the various elements of the scheme apply should be subject to the affirmative procedure. The same reasoning applies to orders which set the amount of the fixed monetary penalty since this is an issue of substance.

14. The Committee queried whether the correct level of scrutiny was to be applied to two matters which could be made by supplementary order. The DPM simply states that “other uses of the power *are likely to be* administrative or technical in nature” and therefore the negative procedure is appropriate.

15. Under paragraph 2 of the schedule a supplementary order may prescribe the amount of the payment which a person may pay in order to discharge their liability under a notice of intention to impose a penalty. Similarly in paragraph 9 there is a power to prescribe the maximum and minimum amounts of a non-compliance penalty. Both are subject to the negative procedure.

16. The Committee also notes that if no maximum or minimum amounts are specified using the power in paragraph 9 then the Commission will have a complete discretion over the amount of the non-compliance penalty to be charged in any individual case. The Committee does not consider it appropriate for the Commission to be delegated such discretion, considering that control over the range of such penalties a matter which the Parliament should be able to scrutinise.

17. The Committee sought clarification from the Scottish Government as to why the negative procedure was appropriate in each case. The Government repeats that it has mirrored the approach taken to elections and referendums under the Political Parties, Elections and Referendums Act 2000. It also advises that the amount payable to discharge a penalty is less significant than a fixed monetary penalty since it cannot be a greater sum. The power to set the minimum and maximum amounts of the non-compliance penalty which can be imposed by the Commission under paragraph 9 were also considered to be less significant than identifying the circumstances in which the penalty may be payable.

18. The Committee welcomes this clarification and is content with the scrutiny procedures applied in the light of it.

19. The Committee is content with the powers to make supplementary orders in schedule 6 with the following exception. The Committee considers that the delegation of the non-compliance penalty powers to the Commission should be subject to a maximum amount. It therefore recommends that the setting of the maximum amount should be mandatory rather than discretionary.

ANNEX

Correspondence with the Scottish Government

Thank you for the Committee's letter of 16 April 2013. The Committee asks the Scottish Government:

“ 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. Paragraph 16 provides that the Scottish Ministers may make “supplementary orders” in relation to this regime. The provision of such orders may make transitional, consequential or incidental provision. In addition various matters throughout the schedule may be “prescribed” by the Scottish Ministers in a supplementary order.

The Committee asks the Scottish Government:

- to explain why the negative procedure is a suitable level of scrutiny for prescribing the amount payable under an offer to discharge liability for a fixed monetary penalty under paragraph 2 or the minimum and maximum amounts of a non-compliance penalty under paragraph 9 when the affirmative procedure is considered appropriate for the scrutiny of fixing the amount of a fixed monetary penalty.”*

As the Committee are aware, the intention behind schedule 6 to the Bill is to replicate insofar as appropriate the civil sanctions regime in and under Schedule 19C to the Political Parties, Elections and Referendums Act 2000.

The Scottish Government considers that negative procedure is appropriate for the two powers the Committee mentions for the following reasons.

- Setting the amount payable to discharge liability for a fixed monetary penalty under paragraph 2 of schedule 6 against fixing that penalty under paragraph 1(3), fixing the penalty is considered more significant as it prescribes the overall penalty which can be imposed. The amount which can be paid to discharge the liability as part of the procedure by contrast must be less than or equal to the penalty. Negative procedure is thought suitable for the discharge amount as a result.
- On maximum or minimum limits on the penalty under paragraph 9 for non-compliance with a non-monetary discretionary requirement, the offence or restriction or requirement in the campaign rules for which such a penalty can be imposed is subject to affirmative procedure under paragraph 5. The Commission could not impose a non-compliance penalty without such affirmative provision by Order having been made. Where Parliament approves the use of discretionary requirements, it is considered important that the Commission has robust sanctions to underpin compliance with the

enforcement regime, by allowing the Commission to set (an open) amount payable in paragraph 9(2) itself – the schedule would operate in the absence of any supplementary order setting maximum and minimum limits. In addition, there is a power to appeal a notice served under paragraph 9 if the amount is thought to be unreasonable. In this context the negative procedure is considered appropriate for setting or changing the financial value of the range of that penalty.

The equivalent powers under the 2000 Act take the same procedures, affirmative and negative, at Westminster. However, in practice, each of the powers under the 2000 Act were exercised in a single instrument (S.I. 2010/2860) combining affirmative and negative procedures; the Scottish Government at present proposes to take a similar approach, subject to consultation with the Electoral Commission as required by paragraph 17 of schedule 6. It was however considered appropriate to set the procedures for making provision under the powers the Committee mentions for the reasons noted.

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