



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 17 December 2019

Session 5



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DELEGATED POWERS AND LAW REFORM COMMITTEE

34th Meeting 2019, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Jeremy Balfour (Lothian) (Con)

*Mary Fee (West Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alison Coull (Scottish Government)

Graeme Dey (Minister for Parliamentary Business and Veterans)

Susan Herbert (Scottish Government)

Brian Peddie (Scottish Government)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law Reform Committee

Tuesday 17 December 2019

[The Convener opened the meeting at 10:45]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome everyone to the 34th meeting in 2019 of the Delegated Powers and Law Reform Committee. The first item of business is to propose that we take items 7 and 8 in private, as they involve consideration of draft reports, which will be published once they are agreed. It is also proposed to take item 9 in private to consider the evidence that is heard today and to agree any further action. Do we agree to that?

Members indicated agreement.

Consideration of the Committee's Work in Parliamentary Year 2018-19

10:45

The Convener: Before us is Graeme Dey, Minister for Parliamentary Business and Veterans, to give evidence relating to the work of the committee during the parliamentary year 2018-19. Mr Dey has a number of officials with him: Gerald Byrne from the constitution and United Kingdom relations division; Alison Coull from the legal directorate; Susan Herbert, the legislation delivery manager at the Parliament and legislation unit; and Brian Peddie, European Union exit legislation delivery manager at the Parliament and legislation unit. I welcome you all, with your various long titles, to the meeting. We will go straight to questions.

Minister, you have spoken to the committee previously about the reduction in domestic Scottish statutory instruments due to the impact of EU exit instruments. Has that delay caused any problems in implementing Scottish legislation?

The Minister for Parliamentary Business and Veterans (Graeme Dey): I do not think that it has caused any problems in implementing Scottish legislation. We have had to be sensible and pragmatic in the approach that we have taken. I will ask Steven MacGregor to explain. In fact, I see that he is one of my officials who is not sitting at the table.

The Convener: Does Steven want to join you?

Graeme Dey: I think that we are fine. We can get you some detail about the nuts and bolts of the matter. Like the committees of the Parliament, we have simply had to knuckle down and do the best job we can, given the pressures that we have been under. We have progressed the legislative programme substantially. We delayed five bills and 38 SSIs at one point, but those bills are all back on track, and they have progressed as we would have looked for them to do. We can get into detail, if you like, about where we have got to with the 38 SSIs.

The Convener: Where are we with those?

Graeme Dey: Please bear with me for a second.

I can give you some detail. Of the 38 SSIs, most will be laid by the end of April 2020. Seventeen of them will have been laid by the end of 2019, and 22 of them will have been laid by the end of April 2020. We came to the conclusion that one of the instruments that was originally on the list of 38 was no longer to be considered a deferral; it was

actually styled and laid earlier than expected. We have abandoned five instruments on the ground that we do not now believe them to be necessary. The overwhelming majority of the instruments will be done by April 2020.

We liaise closely with the committee, so we look at the committee's workload regarding the timings for the introduction of anything. I am content that we are progressing with the SSIs as we are required to do, without suddenly presenting a burden to committees.

The Convener: Is any further prioritisation expected?

Susan Herbert (Scottish Government): No, not at the moment. We are managing the volumes proactively across the whole legislative programme and specifically for SSIs. We have no plans at the moment to do any reprioritisation. However, if it came to pass that we needed to, we would do so in consultation with portfolio ministers across the Scottish Government.

Graeme Dey: I am thinking about two unknowns—well, one is obviously a known now, and that is the implications of Brexit still moving forward. There is also the impact of the budget situation and how committees will feel that their workload is impacted by that, leading to any reprioritisation that they may wish to do. As usual, we always try to engage with the committees as best we can to manage that.

The Convener: I guess that we might get some clarity on that this week.

Graeme Dey: Indeed. There will then be an on-going dialogue to clarify the situation. As ever, I will be happy to write to you and the committee to keep you updated on any of the matters that we discuss.

The Convener: That is lovely.

Committee members have some questions, starting with Stuart McMillan.

Stuart McMillan (Greenock and Inverclyde) (SNP): Please excuse my croaky throat.

The committee appreciates the improvement in the quality of secondary legislation. In particular, it welcomes the decrease in the number of SSIs that have been reported under the three most significant reporting grounds. What action was taken to deliver that improvement? How does the Government plan to ensure that the high standard continues in the future? I should perhaps make you aware that there has been a slight increase in the number of instruments that have been reported under the three most significant grounds over the past few weeks.

Graeme Dey: I was not aware of that. We will look into that, because we would never want to

step back from the improvement that has been made.

As you know, a considerable effort has been made at a time when Government officials have faced a very intense workload as a consequence of Brexit. It is quite an achievement that the number of instruments that have been reported this year remains at 11.5 per cent. I think that that is still too high but, given the workload and other pressures that people have faced, it represents a significant achievement.

We have a number of measures in place in an effort to ensure that the instruments that we produce are in the right space. As is noted in the committee's report, a number of affirmative instruments have been withdrawn for a variety of reasons—in one case, if I remember rightly, it was simply that there had been a misspelling; in another case, there was some stakeholder concern. The beauty of an affirmative instrument is that it is possible for it to be withdrawn and then brought back. We try to be as responsive as we can be at the time instead of—as sometimes happens with negative instruments—dealing with very minor concerns at some point in the future.

We are absolutely not complacent. The officials will tell you that I am forever asking, "Why has that happened? Wasn't there a way of avoiding that?" Despite the additional pressures that we face, there is a drive to get instruments right as best we can. However, I am happy to hear from the committee directly about any recent upsurge in instruments having to be reported, and we will have a look at that.

Stuart McMillan: That would be helpful.

Several committees have experienced an increase in the number of instruments that have come to them. One of those is the Social Security Committee, which experienced an increase from six to 29 in the number of instruments that it received for consideration. That is because it falls to that committee to consider the impact of the Social Security (Scotland) Act 2018. Given the significant delegated powers in that act, what is the Scottish Government doing to ensure that the Social Security Committee has all the information that it needs when it scrutinises those SSIs?

Graeme Dey: Do you have examples of cases in which that committee has felt that it has not had all the necessary information?

Stuart McMillan: I do not have any examples in front of me, but the sheer increase in the numbers is something that came up as part of our work.

Jeremy Balfour (Lothian) (Con): I sit on the Social Security Committee, and I have raised a concern about timings. For example, on Thursday, the Cabinet Secretary for Social Security and

Older People will appear before that committee to give evidence on two statutory instruments, the motion on one of which we will be asked to vote on on the same day. I think that the instruments in question are fairly uncontroversial, but if the committee wanted to take more evidence or do more work on them, there is no time lag to allow for that. I would be keen for the cabinet secretary to give evidence on instruments and then to allow at least a week's delay before the committee was asked to approve them. If, under scrutiny, an issue came up, how could that be addressed?

Graeme Dey: I find that question difficult to answer, because it is not a concern that has been raised with me before now. As I said, all our cabinet secretaries make a concerted effort to be as helpful as possible to committees. It is for the committee to decide when it will vote on evidence that is taken—it is an internal matter of committee management. I am happy to take the question away and consider it further, and to talk to the Cabinet Secretary for Social Security and Older People, before coming back to the committee. However, I emphasise that the matter has not been raised with me before. If the convener is content for me to do so, I will take it away, look into it and come back to the committee.

The Convener: Yes—absolutely. We could perhaps also reach out to the Social Security Committee to find out whether it has any specific concerns.

Graeme Dey: As I said, it is not an issue that has previously been brought to me. Conveners are usually quick to raise any issues that they have.

The Convener: Yes, that is true. Is Stuart McMillan okay with that?

Stuart McMillan: I am fine, thank you.

The Convener: Not exactly fine, but we will move on.

Mary Fee (West Scotland) (Lab): I want to ask the minister about historical commitments. As he will know, both the current committee and the predecessor committee in the previous session of Parliament pursued the issue of outstanding historical commitments. At the start of the current reporting year, there were 12 outstanding commitments, and there are now seven. Can the minister update the committee on his plans to meet those commitments, and tell us when they are liable to be met?

Graeme Dey: We discussed that question during my previous appearance before the committee, when I gave an update. On 11 December last year, there were 16 historical commitments outstanding. We have made good progress with 10 of those commitments—they have already been met. Another six will be met by

March 2021, which is the deadline; the majority of them will be met before then. They will be dealt with.

There are, of course, some new outstanding commitments. As we understand it, there are 10 in total, and we would expect seven of those to be met by spring of the coming year—I can provide details. We are very much alive to the need to address those commitments, as the committee has asked us to do, and I am happy to continue to write to the committee with updates as we make progress on them.

Mary Fee: It would be helpful if you could give us a bit more detail on the commitments.

Graeme Dey: Do you want the detail on the seven commitments among the 10 new ones?

Mary Fee: Yes.

Graeme Dey: We anticipate that, by spring 2020, we will have addressed the commitments around the Felling (Scotland) Regulations 2019; the Forestry and Land Management (Scotland) Act 2018; the Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019; the proposed draft deposit and return scheme for Scotland regulations 2020; the Fishing Boats Designation (EU Exit) (Scotland) Order 2019; the various Planning (Scotland) Act 2019 commencement provisions; and the Environment (EU Exit) (Scotland) (Amendment etc) (No 2) Regulations 2019. We expect that those seven commitments will be dealt with by spring of the coming year. That leaves three commitments, which we are working through. I am happy to write to the committee to advise you on those.

Mary Fee: That would be helpful. Given the number of Scottish statutory instruments that will be needed as we progress through Brexit in the coming year, will that have any knock-on impact on the Government's ability to deal with those historical commitments?

Graeme Dey: Do you mean in terms of workload?

Mary Fee: Yes.

Graeme Dey: Yes and no. Any additional workload obviously creates difficulty, but our officials have risen to the challenge, as the committees have done, and we do not anticipate that we will not fulfil those commitments because of what is coming down the track. However, I caveat everything by saying that Brexit, however it works out, could have an impact, as could the budget situation. Our position today is that we fully anticipate being able to do what I have described, but that could change.

Mary Fee: I want to ask about the delay—I use that word with caution, as you have explained the deadline for meeting those commitments. Will the length of time that it will take to meet those commitments have any further detrimental impact on the legislation that needs to be passed, or on changes that need to be made in order to meet them?

Graeme Dey: No—we do not see it that way at all.

Mary Fee: That is fine—thank you.

The Convener: I will take a step back. You said that there are 10 new commitments.

Graeme Dey: There are 10 new commitments, the way that we read it.

The Convener: We think that there might be 11. I am not saying that we are right, but perhaps we could get a response on that point.

Graeme Dey: Let us compare notes, and then I will correspond with the committee and pin that down. Our understanding is that there are 10 new commitments, but I am happy to be corrected on that. I will come back to you after looking into the matter.

11:00

Tom Arthur (Renfrewshire South) (SNP): I have two questions. The first concerns the documentation that is published alongside SSIs and provides background and explanatory information. The committee has been very happy with the quality of that documentation in assisting readers to understand the intent of the SSI. Will the minister give the committee an idea of what work has been undertaken to ensure that that quality is maintained?

Graeme Dey: Essentially, we have done that by first of all listening to committees' concerns. Those concerns were probably legitimate—I say that as a former convener. My predecessor, Joe FitzPatrick, began that process and I have continued it. We have reached a point where we provide a couple of explanatory paragraphs to outline at the outset in simple terms what the instrument sets out to do.

I am heartened that I have not heard any further concerns from conveners. The Conveners Group may have a different view but, if it does, that has not reached me. In general terms, it seems to me as though we have got into a good space. We will continue to provide that information. As ever, if this or another committee notes anything or considers that we could do something differently, I am more than happy to hear those thoughts and take them on board.

Tom Arthur: Thank you. My second question concerns affirmative instruments that are

withdrawn. In your previous answer, you referred to the importance of dialogue and listening. Clearly, it is welcome that, where defects are spotted in an affirmative instrument, the Government seeks to withdraw and reintroduce it. The committee wants to be in a position where instruments do not have to be withdrawn, because they are of the required quality when introduced. What work is being undertaken to reduce the number of instruments that need to be withdrawn?

Graeme Dey: Clearly, I would prefer that that was the situation, too. However, in defence of our officials, I say that they are human beings and human error can occur, especially when there is an intense workload.

The honest answer to your question is that that is a bit of a work in progress. I have asked questions about some of the numbers to do with affirmative instruments and I am drilling down into them. I have given a couple of examples of the circumstances in which affirmative instruments were withdrawn. One was because of a simple error; the other was to take account of stakeholder concerns. Sometimes, we will not be aware of such issues until we get into the instrument.

We are currently looking at the situation, because there has been a slight increase in the numbers of instruments that have been withdrawn. We do not want that to happen and we will continue the work to get things as right as we can. However, I stress—I hope that I am not being defensive in saying this—that I think it remarkable that we have driven down the number of concerns that are raised about instruments in the light of the workload that the Government carries.

Tom Arthur: I appreciate that. Thank you very much. I have no further questions.

The Convener: You will be aware that the committee and the Government have been in dialogue for what seems like years about the council tax reduction regulations. We have been calling for the consolidation of the legislation. Do you have an update on that?

Graeme Dey: That remains one of those issues on which we will have to agree to disagree—with respect, because we agree on many things. Some work has been done in that regard. We have published online versions of the regulations showing the effect of the amending regulations. We believe that that provides the clarity that is needed. None of the key stakeholders has suggested that the regulations need formal consolidation, although I know that the committee holds that view. I understand that at least one local authority has welcomed the version that we have published. We think that we have gone some of the way to address the concerns, but we do not

have plans to satisfy the committee's ask at this stage, I am afraid.

The Convener: I thought that I had heard a rumour that there might have been movement on that.

Graeme Dey: If you have heard a rumour, it is not one that I am aware of.

The Convener: Which council was it?

Graeme Dey: We do not know.

The Convener: Can you let us know?

Graeme Dey: Yes. I hope that you are not going to take it to task.

The Convener: No—we might write to it and see what its views are.

Jeremy Balfour: I want to pick up on Mary Fee's questions. Following the result of last week's election, we will withdraw from the European Union at the end of next month. Are you satisfied that the Scottish statute book is adequately updated to take into account the United Kingdom leaving the EU? If not, what work needs to be done over the next six or seven weeks?

Graeme Dey: As you know, we—by which I mean the Parliament as well as the Government—have done a considerable amount of work to get the statute book in as good a shape as we can. As things stand, there remain a number of pieces of work that we still have to do.

Brian Peddie (Scottish Government): First, it is important to say that a number of fixes have been identified as needing to be done by exit day; there are others that could be done over a longer period, after exit day. Of course, there were previous exercises for previous exit days, the most recent being 31 October. I think that we were satisfied that all the fixes that needed to be done for 31 October were done. There have since been further fixes to work towards the subsequent exit day of 31 January. That work is continuing. It may now be less likely that the UK will leave without a deal on 31 January, but we have yet to see the withdrawal agreement bill. We do not have a guarantee that we will leave without a deal, and those fixes would still need to be made in any case.

On the number of instruments that we expect still to make, at the moment we are expecting to notify another 10 UK SIs before 31 January and 12 after 31 January. We expect to have nine Scottish SIs by 31 January and 20 afterwards. As ever, those numbers are subject to change, but that is our current estimate and the current programme.

Graeme Dey: We are conscious of Parliament's desire to have as much time as possible to

scrutinise the instruments. We may lay some of them but, depending on the events of the next few weeks, it might be possible to give Parliament more time. It is a bit up in the air at the moment.

Jeremy Balfour: I appreciate that it is a big if, but let us presume that the withdrawal bill is passed at Westminster in the next few weeks, once Parliament returns after Christmas recess. How much work does this Parliament have to do in that three to four-week period?

Alison Coull (Scottish Government): It might be worth saying that, if the withdrawal agreement bill is going through, we are in a new scenario, if you like. We have been very focused on the no-deal planning and the instruments that are required for that, and Brian Peddie has outlined what we would need to do. We may get to a point where we can move towards the new scenario but, at the moment, we are not at that point, so we are working on both scenarios. If it is clear that the withdrawal agreement bill is going through—we are not quite at that point yet—as Brian Peddie says, the Parliament will not need to consider some of the deficiency instruments that we would have been bringing forward in time for 31 January, because exit day would effectively be shifted until the end of December 2020. We still have a rump of instruments that we were planning to do for the end of 2020 that were not critical for exit day.

There may also be other instruments that have to be brought forward to take account of changes to EU law during the implementation period. That has been a continually moving target that we have been working with.

Jeremy Balfour: Do you expect any more consent notifications from Westminster in January?

Brian Peddie: At the moment, our current plans expect 10 notifications. If we had sufficient certainty—or, probably more accurately, if the UK Government had sufficient certainty and communicated its intentions to us—that we would not need to notify some or all of them by 31 January because we did not expect to leave on 31 January, the notifications might take place over a longer time. We will be having a discussion with UK Government officials tomorrow, when I hope that we will learn more about their plans.

Graeme Dey: Again, the situation is fluid. I will be happy to keep the committee updated as we become clearer on what is happening.

Tom Arthur: I have a supplementary to Mr Balfour's questioning. I appreciate that officials are not in a position to offer political interpretation, but it seems fairly likely that the withdrawal agreement bill will now go through by the end of January, given the political arithmetic at Westminster.

Reports today suggest that the UK Government will seek to legislate to prevent the transition period from being extended beyond the end of December. That is of course subject to parliamentary sovereignty and could be amended, but the UK Government's clear policy intent is that there will be no transition period beyond the end of December next year. That would mean that a future relationship would have to be agreed and signed off by the end of June. I think that, by common consent, that is an incredibly demanding timetable.

In the event that no future relationship had been agreed by the end of June, we would in effect be heading for a no-deal cliff edge at the end of next year. If that were to be the case, what would be the implications for Parliament's work programme when it returned in September after the summer recess? Would a significant number of instruments and pieces of legislation be required to address the new no-deal scenario at the end of December 2020? I am conscious that there will also be legislative pressures as we approach the dissolution of Parliament. I want to understand what planning has gone into the possibility of facing that new no-deal scenario at the end of December and what implications it would have.

Alison Coull: Without commenting on the political aspect, with regard to the withdrawal agreement, I clarify that what needs to happen at the end of June is a decision on whether or not to have an extension. The free trade agreement does not have to be in place until the end of December, so that would be the point at which it would be clear whether we were effectively in a no-deal scenario. The broad answer to your question is that all the deficiency work that we have done to date would then kick in and would be relevant, subject to any changes that we may have had to make over the year to take account of changes to EU law during 2020.

Tom Arthur: I appreciate that there is the time up until the end of December next year. I am asking about a scenario in which, when we return in September after the summer recess, the UK Government has not requested an extension and it seems—I appreciate that this would be a political interpretation—that insufficient progress has been made, raising the stakes. Would that have an impact on the workloads of Parliament and this and other committees at that time, or has most of the work to address deficiencies already been done in anticipation of a 31 October or 31 January no deal?

Graeme Dey: The overwhelming majority of the work has been done to get us into that position, if it were necessary. There is a lot of speculation at the moment as to what will be; I have today read speculation about workers' rights, but that is media

speculation. Until we see the WAB, it is difficult to know exactly what we will face. Once we see it, a number of questions may arise and we will have to reflect on them.

The Convener: As there are no more questions from members, I thank the minister and his officials for their time. That exhausts the session.

Graeme Dey: I thank the committee for all its efforts over the past year.

The Convener: I thank you for working with the committee; we look forward to hearing from you on an on-going basis.

11:14

Meeting suspended.

11:15

On resuming—

European Union (Withdrawal) Act 2018: Instrument Procedure and Category

Public Procurement etc (Scotland) (Amendment) (EU Exit) Amendment (No 2) Regulations 2019 (SSI 2019/414)

The Convener: Agenda item 3 is consideration of two Scottish statutory instruments that have been laid under the European Union (Withdrawal) Act 2018. We are considering the scrutiny procedure under which they have been laid and the categorisation that the Scottish Government has applied.

SSI 2019/414 has been laid under the negative procedure and has been categorised as being of low significance. It makes minor and technical amendments to the Public Procurement etc (Scotland) (Amendment) (EU Exit) Regulations 2019 (SSI 2019/112) that do not amount to a policy change. Our advisers indicate that the scrutiny procedure and categorisation could be appropriate. Are members content with that?

Members *indicated agreement.*

Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)

The Convener: SSI 2019/415 has been laid under the negative procedure and has been categorised as being of low significance. It makes minor and technical amendments to provisions on environmental impact assessments that, on exit day, will become retained EU law.

Again, our advisers indicate that the scrutiny procedure and categorisation could be appropriate. Are members content with that?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

Relevant Adjustments to Common Parts (Disabled Persons) (Scotland) Regulations 2020 [Draft]

11:16

The Convener: Agenda item 4 is consideration of an affirmative instrument, on which no points have been raised. Is the committee content with it?

Members *indicated agreement.*

Instrument subject to Negative Procedure

Public Procurement etc (Scotland) (Amendment) (EU Exit) Amendment (No 2) Regulations 2019 (SSI 2019/414)

11:17

The Convener: Agenda item 5 is consideration of a negative instrument, on which no points have been raised. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:17

The Convener: Agenda item 6 is consideration of three instruments that are not subject to any parliamentary procedure, on which no points have been raised.

Social Security (Scotland) Act 2018 (Commencement No 2, Transitory and Saving Provision and Commencement No 4 and Saving Provision) Amendment Regulations 2019 (SSI 2019/406)

Management of Offenders (Scotland) Act 2019 (Commencement No 2) Regulations 2019 (SSI 2019/413 (C 22))

Management of Offenders (Scotland) Act 2019 (Commencement No 3 and Transitory Provision) Regulations 2019 (SSI 2019/417 (C 23))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

11:17

Meeting continued in private until 11:36.

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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