Standards, Procedures and Public Appointments Committee

2nd Report, 2013 (Session 4)

Implementing Scottish Law Commission reports

Published by the Scottish Parliament on 18 April 2013
Standards, Procedures and Public Appointments Committee

Remit and membership

Remit:

1. The remit of the Standards, Procedures and Public Appointments Committee is to consider and report on—

(a) the practice and procedures of the Parliament in relation to its business;

(b) whether a member’s conduct is in accordance with these Rules and any Code of Conduct for members, matters relating to members’ interests, and any other matters relating to the conduct of members in carrying out their Parliamentary duties;

(c) the adoption, amendment and application of any Code of Conduct for members; and

(d) matters relating to public appointments in Scotland.

2. Where the Committee considers it appropriate, it may by motion recommend that a member's rights and privileges be withdrawn to such extent and for such period as are specified in the motion.

*(Standing Orders of the Scottish Parliament, Rule 6.4)*

Membership:

Brian Adam
Helen Eadie (Deputy Convener)
John Lamont
Richard Lyle
Margaret McCulloch
Fiona McLeod
Dave Thompson (Convener)
Committee Clerking Team:

Clerk to the Committee
Alison Walker
Gillian Baxendine

Senior Assistant Clerk
Roz Thomson
Alastair Macfie

Support Manager
Sam Currie
Implementing Scottish Law Commission reports

The Committee reports to the Parliament as follows—

1. The Scottish Law Commission (“the Commission”) carries out an invaluable role, recommending reforms to improve, simplify and update the law of Scotland. The Scottish Government and the Scottish Parliament are responsible for deciding when and how to translate the Commission’s reports into law. This can be challenging, given the many competing pressures on parliamentary time.

2. The Committee has therefore been considering whether the Parliament’s procedures can be amended to carve out a little more space for certain Scottish Law Commission bills. These would be bills where the need for reform and the approach suggested are widely agreed but which do not raise major or contentious political or financial issues.

3. In developing its proposals, the Committee drew heavily on the report of the Law Reform Working Group,¹ a working group consisting of officials from the Scottish Parliament, the Scottish Government and the Commission, which was set up in November 2011 to consider the rate of implementation of Commission reports.

4. The Committee is grateful for the oral evidence given by the Convener to the Justice Committee, Christine Grahame, and the Convener to the Subordinate Legislation Committee (“the SLC”), Nigel Don, and also for the written evidence provided by several other parliamentary committees.²

Defining Scottish Law Commission bills

5. The Committee agrees with the working group that most bills arising from Commission reports will raise issues of political or other significance which will require scrutiny by the relevant subject committee. There will, however, be a


smaller number of proposals whose nature and scope means that they could be scrutinised effectively at Stages 1 and 2 of the legislative process by the SLC. That committee’s convener, Nigel Don, confirmed to us that his committee had the expertise, and a certain amount of capacity, to take on this role.

6. The proposed Standing Orders therefore define a new kind of bill, referred to as a Scottish Law Commission bill, which may be referred to the SLC for scrutiny rather than to the relevant subject committee. These bills may be government bills, members’ bills or committee bills although the Committee recognises that the first option is likely to be the most practical. They cannot be Consolidation Bills, Codification Bills, Statute Law Repeals Bills or Statute Law Revisions Bills, since special procedures already exist for these bills.

7. The Committee gave careful thought to the criteria that should be used to define such bills. The officials’ working group suggested that the criteria should be—

“A Bill implementing the recommendations of a Scottish Law Commission report within the legislative competence of the Scottish Parliament—

(a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;

(b) which does not relate directly to criminal law reform;

(c) which does not have significant financial implications;

(d) which does not have significant ECHR implications; and

(e) where the Scottish Government is not planning wider work in that particular subject area.”

8. The Committee broadly agrees with these criteria while noting that all of them require an element of interpretation. Nigel Don commented—

“What concerns me about the criteria is the need for a sensible interpretation of the terms and I suggest that the committee reflect on whether these are the right words or whether we can find better ones. Given all the work that has gone into this, I would not want to finish up in a position where those interpreting the criteria can never find a bill that the Subordinate Legislation Committee can scrutinise.”

9. Equally, he emphasised that the SLC should not become “the committee that picks up the legislation that other committees cannot find time for. We have to

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3 Similar arrangements will apply to proposals for members’ bills which, if introduced, would be Scottish Law Commission bills.
understand the criteria and be fairly strict, so that we deal only with things that are essentially not policy issues.”

10. The Committee is clear that some bills should be referred under the new procedure but that only a minority of Scottish Law Commission bills are likely to be suitable for the kind of scrutiny that the SLC can provide. To give some flexibility, the proposed Standing Orders do not themselves set out the referral criteria. Instead they require the Presiding Officer to issue a determination specifying what the criteria should be. We anticipate that this determination will be based on the proposals in the working group report. A determination can more easily be adjusted in the light of experience, if the initial criteria prove to be overly restrictive or too broad.

Referral of Scottish Law Commission bills

11. The working group report suggested three possible procedures for referring Scottish Law Commission bills:

Option 1: referral by the Parliamentary Bureau (“the Bureau”) after introduction – in line with the usual practice for bills;  

Option 2: referral by the Bureau after introduction but only after consultation with the relevant subject committee; or

Option 3: consideration by the relevant subject committee and the Bureau before introduction.

12. The Committee received written views on these options from a number of subject committees and also discussed them with the conveners to the Justice Committee and the Subordinate Legislation Committee. Opinion was evenly divided between option 1 and option 2. Christine Grahame made the case for option 2, commenting that prior consideration by the subject committee “would be helpful to the bureau and the Subordinate Legislation Committee, which would not find itself with a bill that had been referred to it which it would have to stop if the bureau had made a mistake.” In contrast, Nigel Don felt that there was sufficient flexibility for the Bureau to seek subject committee views if it needed to, without this having to be written into the Standing Orders.

13. The Committee decided to recommend option 1, a straightforward referral from the Bureau in line with existing practice for bills. We felt that this would avoid adding an unnecessary extra hurdle in straightforward cases and would not prevent the Bureau from taking informal soundings from committees where this was necessary to inform its decisions.

14. It is possible that, once a bill has been referred, new issues will arise which make it clear that the bill does not after all meet the criteria for a Scottish Law Commission bill (because, for example, it is more contentious or more expensive

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15. Nigel Don raised a further issue: should the SLC be able to seek a policy view from a subject committee to inform its scrutiny? We wondered whether it would be helpful to specify a timescale for such consultation to ensure a timely response from the subject committee. After consulting the SLC further, we concluded that this did not need to be in Standing Orders. Nigel Don commented that his committee considered that “informal negotiations between committees are commonplace” and saw “no reason to impose an arbitrary timescale which may not be practicable.” He did however stress that there should be no unnecessary delay to these bills and this is something that the Committee can keep a watch on once some bills have been introduced under the new procedure.

16. The Committee also noted a suggestion from the Welfare Reform Committee that the name of the SLC should be changed to reflect its new responsibility. Nigel Don reported that his committee felt it would be appropriate for them to be renamed as the “Delegated Powers and Law Reform Committee” as this “more accurately reflects the range of the Committee’s responsibilities under its amended remit.”

17. The Committee was made aware of concerns that making these changes may lead to a de facto second justice committee being set up. The Committee reaffirms its position that there is no intention to move towards a second justice committee. We consider that the criteria will operate to limit the number and nature of bills that can be referred to the SLC. We are clear that there is no intention, and should be no scope, to extend the remit of the SLC beyond the specific proposals in this report. If it emerges that this is not how the new procedures are operating in practice, it would be necessary to tighten up the criteria or the way they were applied. This is something that the Committee can include in the review proposed below.

18. On that basis, the Committee is content to recommend a rule change to amend the name of the Subordinate Legislation Committee to the Delegated Powers and Law Reform Committee. The required changes are included at Annexe A.

**Reviewing these procedures**

19. The Committee recognises that the proposed new procedures offer only a partial answer to the problem of finding parliamentary time to implement Commission reports. We will review the new procedures later in this session, either after the first two Scottish Law Commission bills have completed their parliamentary stages or, in any case, after two years. At that stage we will consider whether the new procedures are working as intended and whether any further steps are needed.

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7 Letter from Nigel Don MSP to Dave Thompson MSP, 7 March 2013
8 Letter from Nigel Don MSP to Dave Thompson MSP, 7 March 2013
Conclusion

20. The Parliament is asked to agree the Standing Order rule changes in Annexe A.
ANNEXE A: PROPOSED STANDING ORDER RULE CHANGES

SCOTTISH LAW COMMISSION BILLS

CHAPTER 6
COMMITTEES

Rule 6.11 Subordinate Legislation Committee

In Rule 6.11.1(e), omit “and”.

After Rule 6.11.1(f) insert-

“(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.”.

[This provision extends the remit of Subordinate Legislation Committee to include Scottish Law Commission Bills and draft proposals for such Bills, enabling these to be referred to the Committee under Rules 9.6.1 and 9.14.5 respectively.]

CHAPTER 9
PUBLIC BILL PROCEDURES

Rule 9.1 General Rules and Special Rules


[This is a consequential amendment to ensure that the special provisions on Scottish Law Commission Bills take precedence over general rules on Public Bills, in line with other special Bill procedures.]

After Rule 9.17 insert-

“Rule 9.17A Scottish Law Commission Bills

1. A “Scottish Law Commission Bill” is a Bill which-

(a) implements all or part of a report of the Scottish Law Commission

(including a joint report with the Law Commission);
(b) complies with such criteria as shall be determined by the Presiding Officer; and
(c) is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revision Bill.

2. The Clerk shall arrange for the determinations of the Presiding Officer under paragraph 1(b) to be notified to the Parliament.

3. Where the Subordinate Legislation Committee has commenced consideration of, but has not yet reported on, the general principles of a Scottish Law Commission Bill under Rule 6.11.1(g) and that Committee considers that on the basis of the evidence gathered by it the Bill does not comply with the criteria determined by the Presiding Officer under paragraph 1(b), that Committee shall inform the Parliamentary Bureau. The Parliament may, on a motion of the Parliamentary Bureau, designate another committee as the new lead committee. The new lead committee shall consider the general principles of the Bill afresh, but may take into account any evidence gathered and views submitted to it by the Subordinate Legislation Committee.

4. Where a Scottish Law Commission Bill which has been referred to the Subordinate Legislation Committee at Stage 2 has been amended at that Stage so as to insert or substantially alter provisions conferring powers to make subordinate legislation, Rule 9.7.9 does not apply, but in the case of a Government Bill a revised or supplementary memorandum shall be lodged and published as if Rule 9.7.10 applied.”.

[This Rule defines a “Scottish Law Commission Bill”, in part by reference to criteria to be determined by the Presiding Officer and notified to the Parliament. Rule 9.17A.3 puts in place a procedure which may be used to refer a Bill back from the Subordinate Legislation Committee at Stage 1 where there is new evidence to suggest that it does not meet the criteria determined by the Presiding Officer. Rule 9.17A.4 provides that, where Stage 2 of a Scottish Law Commission Bill has been taken by the Subordinate Legislation Committee and provisions conferring power to make subordinate legislation have been inserted or substantially altered at that Stage, the Committee does not require to report to the Parliament on those provisions (as it would if scrutinising their insertion or amendment where Stage 2 had been taken by another committee). However, where the Bill is a Government Bill then a revised or supplementary Delegated Powers Memorandum will still require to be lodged.]
FURTHER DRAFT STANDING ORDER RULE CHANGES

CHAPTER 6

COMMITTEES

In the title of Rule 6.11 and in Rules 6.1.5(h) and 6.11.1, for “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

CHAPTER 8

MOTIONS AND POINTS OF ORDER

In Rules 8.11A.6, 8.11A.7, 8.11A.8, 8.11B.2, 8.11B.3, 8.11B.4 and 8.11B.5, for all occurrences of “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

CHAPTER 9

PUBLIC BILL PROCEDURES

In Rules 9.6.2, 9.7.9, 9.7.10, 9.15.8, 9.16.3, 9.21.5 and 9.21.6, for all occurrences of “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

CHAPTER 9B

CONSENT IN RELATION TO UK PARLIAMENT BILLS

In Rule 9B.3.6, for “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

CHAPTER 9BA

CONSENT IN RELATION TO ORDERS UNDER THE PUBLIC BODIES ACT 2011

In Rule 9BA.3.6 and 9BA.3.7, for “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

CHAPTER 9C

HYBRID BILL PROCEDURES

In Rules 9C.10.9, 9C.11.17 and 9C.11.18, for all occurrences of “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.
CHAPTER 10

SUBORDINATE LEGISLATION PROCEDURE

In the title of Rule 10.3 and in Rules 10.1.3(a), 10.3.1, 10.3.2 and 10.3.3, for all occurrences of “Subordinate Legislation Committee” substitute “Delegated Powers and Law Reform Committee”.

[These amendments change references to the Subordinate Legislation Committee wherever they appear in Standing Orders so that they become references to the Delegated Powers and Law Reform Committee.]
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