



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

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Dear Christina

Thank you for your letter of 26 January 2018 inviting information from the Delegated Powers and Law Reform Committee (the “DPLRC”) about how we interact with human rights issues, with a particular focus on the benefits of using human rights to scrutinise matters, best practice examples, and potential barriers to consideration of human rights issues.

The core functions of the DPLRC are set out at Rule 6.11 of the Standing Orders of the Scottish Parliament.¹ This is reproduced in the attached Annexe.

We consider that the areas of most interest to the Equalities and Human Rights Committee will be our functions of scrutinising subordinate legislation and Public Bills. We have supplied examples of best practice in each area. We have, however, not included detailed information on, for example, our role in relation to Scottish Law Commission Bills (Rule 9.17A of Standing Orders). If the Equalities and Human Rights Committee would like further information on our other functions, however, we would be happy to provide it.

¹ 5th edition, 5th revision, May 2017,
<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

Scrutiny of Subordinate Legislation

Role of the DPLRC in relation to Subordinate Legislation

In accordance with Rule 6.11, the remit of the DPLRC includes considering and reporting on subordinate legislation, and determining whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1.

The DPLRC's scrutiny function applies to any subordinate legislation laid before the Parliament, or requiring the Parliament's consent under section 9 of the Public Bodies Act 2011, and pension or grants motions.

It is not the role of the DPLRC to scrutinise the policy merits of subordinate legislation (that is a function of the lead committee within whose remit the subject matter of the instrument falls), nor is it the role of the DPLRC to declare subordinate legislation invalid (that is a function of the courts).

The DPLRC reports to the lead committee and the Parliament in order to inform decisions as to approval or rejection of subordinate legislation.

Convention Rights scrutiny of Subordinate Legislation

As mentioned above, the functions of the DPLRC include determining whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1 of the Standing Orders.

The Convention rights assessment is carried out under Rule 10.3.1(f):

“In considering the instrument or draft instrument, the [DPLRC] shall determine whether the attention of the Parliament should be drawn to the instrument on the grounds-

...(f) that it raises a devolution issue...”

The content of subordinate legislation is limited –

- by the terms of the primary legislation which authorises their use; and
- by the general rules on the legislative competence of the Scottish Parliament set out in section 29 of the Scotland Act 1998.

This latter point is what is described as a devolution issue.

In scrutinising subordinate legislation, the DPLRC must therefore, in addition to considering the vires, form, drafting and other grounds set out in Rule 10.3.1, review

an instrument for legislative competence, including compatibility with any of the Convention rights² (section 29(2)(d) of the Scotland Act 1998).

We would observe that this review on the basis of compatibility with “Convention rights”, linked to the Scotland Act 1998 test for legislative competence, may be narrower in concept than the interpretation given to the term “human rights” by the Equalities and Human Rights Committee.

As part of our consideration, questions may be put to the Scottish Government (or other authority responsible for the particular subordinate legislation) regarding compatibility of the provisions of an instrument with the incorporated Articles of the Convention. Issues might arise, for example, in relation to Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 14 (prohibition of discrimination) or Article 1 Protocol 1 (protection of property).

An example of our consideration of Convention rights in subordinate legislation arose in Autumn 2017, in connection with a proposed draft Order prepared by the Scottish Government in response to issues of ECHR incompatibility identified by the court in the case of P v the Scottish Ministers.³ The Committee considered whether the proposed changes were capable of being operated compatibly with Convention rights, and particularly with Article 8. Further details of our consideration, which included oral evidence sessions from officials from the Scottish Government and from Disclosure Scotland, may be accessed via this link:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/106337.aspx>

Where the DPLRC has a concern as to an instrument’s compatibility with Convention rights, it must determine whether to draw the attention of the Parliament to the instrument on the basis that it raises a devolution issue. In practice, it would report to the lead committee that a devolution issue has been raised, and the lead committee in turn would report to the Parliament on the instrument setting out its recommendations. In cases of concern, and depending on the particular procedure applying to the relevant instrument, a motion may be laid annulling the instrument, or proposing that it not be made, or – as the case may be – not be submitted to Her Majesty in Council.

Scrutiny of Bills

Role of the DPLRC in relation to Bills

In relation to Bills, the DPLRC scrutinises delegated powers contained within Bills, and reports on these to the Parliament. Bills are normally accompanied by a

² The term “Convention rights” has the same meaning as section 1 of the Human Rights Act 1998:

“the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.”

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=70d42ba7-8980-69d2-b500-ff0000d74aa7>

Memorandum on Delegated Powers, lodged by the member in charge (Rule 9.4A of Standing Orders).

Rule 9.6.2 of Standing Orders provides that,

“[w]here a Bill contains provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice, the [DPLRC]... shall consider and report to the lead committee on those provisions. The [DPLRC]... may also consider and report to the lead committee on any provision in such a Bill conferring other delegated powers.”

As part of the scrutiny of the delegated powers contained in a Bill, the DPLRC will consider Convention rights compliance.

A notable example of detailed consideration by the DPLRC of Convention rights arose in Session 4 during the passage of the Land Reform (Scotland) Bill (now the Land Reform (Scotland) Act 2016). At Stage 1, the DPLRC raised a number of concerns in relation to the proposed delegated powers, particularly in connection with access to information about persons in control of land. The DPLRC explored whether the Scottish Government was justified in restricting the rights of an individual in control of land protected by Article 8 (right to respect for private and family life).

The DPLRC took oral evidence from officials on the necessity of taking these powers, the manner in which they were to be exercised, and the sufficiency of evidence of the existence of a legitimate public interest aim in enabling such access. The DPLRC also considered whether what the Bill proposed was proportionate to that legitimate aim, in line with the tests set down by the UK Supreme Court:

- the measure proposed (i.e. the scheme under which information may be disclosed) must be rationally connected to the legitimate aim;
- the measure must go no further than necessary to achieve the legitimate aim;
- on a fair balance, the benefits of achieving the aim by the measure must outweigh the disadvantages resulting from the restriction of the relevant protected right.

Ultimately the DPLRC concluded that while the particular power was capable of being exercised compatibly with the ECHR, it was highly unsatisfactory that the Parliament was being asked to confer such a wide and significant power in these circumstances without further information as to how the power was to be exercised or how that exercise was likely to impact on individuals. Further details can be accessed via this link:

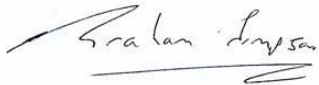
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/92952.aspx>

The lead committee on the Bill must take the views of the DPLRC into account in considering the general principles of the Bill and preparing its report on them (Rule 9.6(3)). In turn the Parliament then considers the general principles of the Bill in light of the lead committee's report, and considers whether to agree, by motion, to those general principles.

If a Bill is amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice, the DPLRC considers them, with the assistance of a revised or supplementary Memorandum on Delegated Powers, and reports to the Parliament on them (per Rule 9.7(9) and (10)).

We trust this is of assistance, and would be happy to provide you with further information if required.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Graham Lyson". The signature is written in a cursive style with a long horizontal stroke at the end.

Convener of the Delegated Powers and Law Reform Committee

Standing Orders of the Scottish Parliament

Rule 6.11 Delegated Powers and Law Reform

1. There shall be a committee, the remit of which is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.