



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 5 December 2017

Session 5



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DELEGATED POWERS AND LAW REFORM COMMITTEE
34th Meeting 2017, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Alison Harris (Central Scotland) (Con)

Monica Lennon (Central Scotland) (Lab)

*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Fiona Burnet (Scottish Government)

Alun Ellis (Scottish Government)

Joe FitzPatrick (Minister for Parliamentary Business)

Luke McBratney (Scottish Government)

Pauline McNeill (Glasgow) (Lab) (Committee Substitute)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament
Delegated Powers and Law
Reform Committee

Tuesday 5 December 2017

[The Convener opened the meeting at 10:30]

Decision on Taking Business in
Private

The Convener (Graham Simpson): I welcome members to the 34th meeting in 2017 of the Delegated Powers and Law Reform Committee. I have received apologies from Monica Lennon, and I again welcome Pauline McNeill as a substitute.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take in private item 6, which is consideration of the evidence from the Minister for Parliamentary Business on the committee's work during the parliamentary year 2016-17?

Members *indicated agreement.*

Consideration of the Work of the
Committee during the
Parliamentary Year 2016-17

10:30

The Convener: Agenda item 2 is consideration of the committee's work in 2016-17. I welcome to the meeting Joe FitzPatrick, Minister for Parliamentary Business, and the following Scottish Government officials: Alun Ellis, head of legislation team, Parliament and legislation team; Fiona Burnet, solicitor and deputy head of business division, legal directorate; and our old friend Luke McBratney, head of legislative consequences of European Union withdrawal team. That is quite a mouthful, Mr McBratney.

Minister, do you wish to make any opening remarks?

The Minister for Parliamentary Business (Joe FitzPatrick): I will be very brief, convener. As this is my first appearance before the committee since you took over as convener, I want to say that I look forward to working with you and the committee over the coming months.

Convener, I thank you and the committee for your letter of 30 November on our progress on amending instruments. It is always good to receive positive feedback. I also want to record my thanks to the former convener, because there is no question but that his tenacity had a role in the progress that we have made in reducing our outstanding commitments. A priority for me is to reduce those commitments further, and my officials and I are working with colleagues on that matter.

As for the challenges ahead, Brexit clearly looms large. Although its legislative implications remain unclear, I am certain that it will require even better planning, quality assurance and explanation of the Government's Scottish statutory instrument programme, and Mr Russell and I are jointly tackling that challenge. Moreover, the committee's recent report on the European Union (Withdrawal) Bill raises some interesting points that I and Mr Russell are reflecting on.

I am happy to take questions.

The Convener: Thank you, minister, and I will pass on your thanks to John Scott when I see him. With regard to the letter that we sent you, the committee felt very strongly that it is easy to criticise and that, therefore, we should also give praise when that is worth doing.

We have split our questions into a number of sections; I will take the first section, which is on the quality of instruments. The committee notes

that for the most part the quality of instruments has continued to improve over the course of the last parliamentary year and welcomes the Government's progress in that area. However, what is the Government doing to maintain the quality of instruments being presented to the Parliament?

Joe FitzPatrick: We are pleased that quality is at a historical high and that the number of times that the committee has had to report on an instrument is at a historical low. However, we recognise that in one or two areas, particularly with regard to tribunals, the quality has not met our high expectations, and we have put in place a number of measures so that we can keep on top of things and continue to improve quality.

Fiona Burnet might want to talk about some of the things that we have done to maintain our progress in improving quality.

Fiona Burnet (Scottish Government): The Scottish Government legal directorate takes quality control very seriously. It is invidious to use terms such as perfection, but that is honestly what we strive to provide when we bring forward subordinate legislation. We have a whole suite of tools to ensure that that is the case, and checks are done at every level of the hierarchy as instruments go through divisions, the unit and then to the Parliament.

One of the most important measures that we have put in place in the most recent reporting year has been an increase in the size of the pool of stylists. Those are the solicitors who perform a double-check—a second-pair-of-eyes check—on the instruments. In previous years, there have perhaps not been enough of them. We perceived there to be a slight gap, so we have increased their number. We have also increased the length of time that the stylists have to perform the checks, and we feel that that has had a benefit.

The other important aspect of what we do is good communications. We are fortunate to enjoy good relationships with the Parliament legislation unit, with the clerks and with the committee's legal advisers. As a group of stylists, we look at the quarterly reports and take points that are made in those as training points. That information is then disseminated to the drafters.

We feel that the processes are robust but, unfortunately, given the high levels of work that people are dealing with, small elements of human error will occasionally creep in. We feel that that happens only very occasionally. Although we strive to reduce those to an absolute minimum, they will, unfortunately, creep in to some extent.

Would you like me to speak specifically about the instruments on tribunals?

The Convener: We will come on to that subject.

Could you explain the checking process that you go through?

Fiona Burnet: No problem. The drafter works alongside their policy colleague to provide a draft, which is then checked by a senior lawyer and a further senior lawyer—in other words, by a C2 lawyer and a divisional solicitor. Those checks are compulsory rather than optional. It is one of the minister's commitments to the committee that all those checks will happen, and they do.

After the divisional solicitor's check, there is the check by a stylist. We have a team of solicitors who perform that role over and above their drafting role. An instrument from one area is always checked by a solicitor from a different area, so it is truly the case that it is checked by a fresh pair of eyes. Nine times out of 10, that person will pick up any little defects.

The instruments are also checked in a mechanical way through formatting validation with the typing pool, so there are two strands to that process.

The Convener: There are three people involved: the drafter, the senior lawyer and the stylist.

Fiona Burnet: There is a check by a divisional solicitor after the check by the senior lawyer.

The Convener: So there are four stages.

Fiona Burnet: Yes. Given that the process involves a lot of pairs of eyes looking at the instruments, in the majority of cases most errors should be picked up.

Joe FitzPatrick: The robustness of the process that we have put in place is partly why we are at a historical low with regard to the number of instruments that the committee is having to report to Parliament but, clearly, 12 per cent is not 0 per cent, so there is still progress to be made. We are not complacent at all.

The Convener: The fact that 10 instruments have been withdrawn or revoked over the past parliamentary year suggests that instruments were laid that were not up to the required standard. What measures are in place to ensure that that does not happen?

Joe FitzPatrick: The number of instruments that have been withdrawn is down in comparison with previous years. I think that the majority of the instruments that you are referring to were part of a single package of instruments on tribunals. We recognise that the quality of those instruments was not up to the standard that we expect.

It is very important that the instruments that the Parliament agrees to do what we expect them to

do and are understandable. We really appreciate the work that the committee does in helping with that process, but we understand that it is our responsibility to ensure that the instruments that come before the committee are of the required quality.

As I said, compared with previous years, the number of instruments that have had to be withdrawn this year has reduced, but we still aim to improve our performance. At least half the instruments that you referred to were part of the same package.

The Convener: The committee was exercised over the package of instruments under the Tribunals (Scotland) Act 2014, which followed on from serious concerns about a package of instruments under the same act last year. What consideration has the Government given to the way in which it lays packages of instruments? In particular, what consideration has been given to the way in which it programmes the laying of such instruments and the quality control processes that are applied to them?

Joe FitzPatrick: It is our intention to do everything that we can to lay packages of instruments at the same time and, when that is not done, to provide an explanation for why that is the case. We take an active interest in packages, and we know that that issue exercises the committee, and rightly so. Fiona Burnet has laid out some of the things that we are doing to try to improve. We understand the committee's concerns and it is a high priority for us.

The Convener: Despite the checks and balances, mistakes still come through and filter down to us. Over the reporting period, 62 instruments contained minor mistakes and it looks as though that number has been increasing recently. In the current reporting period, 38 per cent of instruments laid by the Scottish Government contained minor mistakes. They are small drafting errors, but they should not be getting to us. Do you plan to put in any extra checks?

Joe FitzPatrick: The big thing that Fiona Burnet talked about was us looking to have extra resource, because people are doing substantial amounts of work. We have the correct steps in place and we have improved our procedures, but we need to improve our resource to do the work. Hopefully, that will trickle through and there will be a continued improvement. There has been an improvement over the years in the quality of the work that comes out of the Government and we are determined to continue that improvement.

The Convener: I accept what you say, but last week, for example, we considered the Alcohol (Minimum Pricing) (Scotland) Act 2012

(Commencement) Order 2017, which was only two pages long but had four minor points in it. That is not good enough.

Joe FitzPatrick: Yes. Obviously, our aim is to strive for perfection and we have put in additional steps to continue to improve. It is useful for the committee to flag up mistakes so that we can see whether there is a pattern. If there is a particular area in which we have a problem, Fiona Burnet and the team will look at how to address that so that, as often as possible, the committee gets instruments that do what they say they should do and do not have major or minor errors.

The Convener: None of us wants to be in this position.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, minister. Is the four-layer procedure that Fiona Burnet spoke about new, or has it been in place for a number of months? When did that process come in?

Joe FitzPatrick: We have continued to try to improve the process and to make it more robust. Perhaps Fiona Burnet can talk more about the changes that we have made.

Fiona Burnet: That system has been in place for a number of years, so it is just a case of tightening up and making sure that the checks now happen every time. Increasing the length of time that the stylists have to perform the checks has been an important improvement, too. It has honed the pre-existing system.

Alison Harris (Central Scotland) (Con): Good morning, minister. The committee noted that there has been a reduction in the number of instruments laid this year. Will you comment on the way in which the secondary legislation programme is managed? What are the reasons for the drop in the number of instruments that are laid?

Joe FitzPatrick: The number of instruments fluctuates depending on the legislation and the requirements, and there is no aim to hold back instruments. As much as possible, we try to manage the programme so that instruments are laid over the year.

I know that it is of particular concern to the committee if there are peaks in the number of instruments—there are troughs, too—so we try to manage the programme over the year. That is not always possible; sometimes, there will be peaks, but there is nothing untoward about that, because the number of instruments that are required varies from year to year depending on the legislation.

10:45

Alison Harris: Am I right in thinking that you said that you are giving people more time to

scrutinise, to ensure that we get the legislation correct?

Fiona Burnet: Yes. One of the tools that we are using is an increase in the time for scrutiny.

Alison Harris: How will that work in relation to the UK's withdrawal from the EU? How will you factor in more time for scrutiny and an increase in the number of bills?

Fiona Burnet: We are looking at the issue. We are all operating in an information vacuum. We would all like a little bit more information about how Brexit will progress. We have plans in place for varying scenarios, and we are ready to implement those plans once we know what the final picture looks like.

Joe FitzPatrick: A way to manage time is to increase resources. If there is a set amount of work to do, perhaps we will need more people to do that work. We are looking into that.

The Convener: Stuart McMillan has questions in this area.

Stuart McMillan: Yes, although they have partly been dealt with.

Alison Harris: I am sorry for nicking your questions. [*Laughter.*]

Stuart McMillan: That is okay, Alison. As you will be aware, minister, I also sit on the Culture, Tourism, Europe and External Relations Committee. You mentioned the European Union (Withdrawal) Bill in your opening comments. As well as the additional resource implications that you are looking at, what other action will the Scottish Government take to deal with the potential increase in the number of bills and statutory instruments that will need to be laid?

Joe FitzPatrick: Our biggest challenge is that we still do not know what the situation will look like—I do not know whether even the Government in Westminster knows what it will look like.

Our proposed approach is to work with the Parliament to look at how we can deal with an increase in the number of instruments. We certainly do not approve of how the Westminster Government plans to take things forward. There needs to be a partnership with the Parliament, and we are keen to work with the Parliament to find ways that will allow us to do the scrutiny that is required in an appropriate way.

Stuart McMillan: An aspect that has been considered in the past is the working relationship between the Scottish Government and the Scottish Parliament and the sharing of information. Is there any indication of the time that will be needed to deal with the legislation? If the Parliament can have information at an early stage, we can work on the matter.

Joe FitzPatrick: We cannot share information that we do not have. A bit of thinking is going on to look across Government at what is likely to happen. Luke McBratney might want to comment. Unfortunately, he has a sore throat.

Luke McBratney (Scottish Government): There is an on-going project—

The Convener: It was so unfair of you to ask him to speak, minister.

Stuart McMillan: Do you want some Strepils? [*Laughter.*]

The Convener: Start again.

Luke McBratney: There is an on-going project to identify the range and scale of deficiencies that might be caused in devolved Scottish legislation. That project must be neutral to a number of different things, including the scenario for the UK exiting the EU, which is uncertain, and the state of the European Union (Withdrawal) Bill when it is passed. As members will be aware, the House of Commons is considering that bill and the Scottish and Welsh Governments have tabled amendments to it. We hope to have the first results of the project early in the new year and we have committed to sharing that at an official level first, with the parliamentary authorities.

Stuart McMillan: Another aspect that has been discussed is this committee's potentially increased role in considering instruments resulting from the European Union (Withdrawal) Bill. Would there be merit in increasing the number of members on this committee to deal with that?

Joe FitzPatrick: We will need to consider that and I will have to discuss it with other business managers. When the committees were set up, it was agreed unanimously across the parties that each committee's makeup should be roughly equivalent to that of the chamber, so the Government should always be one member short of a majority. If we want to expand this committee, it would have implications for resources across the Parliament. We should consider the suggestion, but we will need to see exactly what it will look like and how we can move forward jointly to deal with the workload, whatever it will be.

Stuart McMillan: You spoke about looking for additional resources. As well as what comes out of the European Union (Withdrawal) Bill, the everyday processes will still need to take place. Your answer to this will probably be yes, but will you make sure that you will be able to deal with existing responsibilities as well as those that might come down the line as a result of the EU withdrawal bill?

Joe FitzPatrick: In 2016, the people of Scotland voted in an election and did not vote for

Brexit, so it is important that we manage to deliver on their aspirations through domestic policy.

David Torrance (Kirkcaldy) (SNP): The committee is pleased to note that relatively few commitments are outstanding for the period covered by the committee's report. However, there are a number of historical commitments outstanding from previous parliamentary years. What action is the Government proposing to take to meet each of those commitments? Are those commitments to correct legislation still necessary?

Joe FitzPatrick: This was an absolute priority for the committee's previous convener and he helped us to get to the point at which there are now 14 commitments remaining to be completed. It is a priority for us to continue to reduce that list.

We have asked officials across the Government to look at the remaining commitments to see where we think that we can meet them, and to check whether there are some that do not require further action and regarding which we should accept that what is in place is working and that the commitment is no longer required. We hope to come back to the committee early in the new year to expand on how we will manage that. It is a reasonable point to make. We made those commitments and we should be able to say what we will do.

The Convener: We just need to clear it up—clear the decks.

Joe FitzPatrick: Yes.

Alison Harris: Can you update the committee on what action you propose to take to consolidate the Council Tax Reduction (Scotland) Regulations 2012 and the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012?

Joe FitzPatrick: The cabinet secretary has said that we accept that the regulations should be consolidated, but it is a significant amount of work, so at this stage I do not think that I can commit to saying when it will happen. We recognise that it is something that we want to do, but we would be asking people to undertake a major piece of work and we have other priorities. The cabinet secretary has committed to coming back to expand further on the timescale, so we will let him to do that. He is looking at how much work it will entail.

Consolidation is generally a good thing, particularly when the legislation is being used on a day-to-day basis.

The Convener: Have you any idea when the cabinet secretary might come back to us?

Joe FitzPatrick: I do not, but we can chase it up.

Pauline McNeill (Glasgow) (Lab): I want to ask about framework bills. When there is a framework

bill, policy is developed later and we do not see the detail of any regulations until much later. The role of this committee is often underestimated. People seem to think that when we pass legislation at stage 3 and it gets royal assent, that is the law; they do not appreciate that there is still detail to come.

In many ways, parliamentarians do not really have control over that—the Government has control. I am interested in much closer scrutiny and understanding of that process. You will be aware that we are looking at the Social Security (Scotland) Bill, which is a framework bill, and that the Minister for Social Security has said that that approach is necessary because of the nature of what we are doing. Is there an intention to use framework bills more often, or will they be used only for specific purposes?

Joe FitzPatrick: Your example is a good one. There is no trend towards framework bills but, as you say, there are circumstances where that approach is more appropriate in order to have ongoing flexibility. The Social Security (Scotland) Bill is a good example of a bill that is a framework bill for good reason. I hope that the approach that we took on that, in which the minister came to the committee and shared information prior to introduction, was helpful. In future, if there are reasons for us to have framework bills, I will try to encourage early engagement with the committee. We understand that that is important to you, as a framework bill means more work for you down the line in the scrutiny of instruments.

Pauline McNeill: We often pass legislation under which the Government can draw down a power. I am thinking of the rent pressure zones, which come in this week. We legislated on that, and the Government then had to decide at what point it would bring forward the details. Should the Parliament have more say in when that happens? I suppose that the Government could just not draw down such a power for a whole session of Parliament, could it not?

Joe FitzPatrick: With any powers that we have to do something, there is always scrutiny of how they are used. People always have the opportunity to put pressure on the Government if they think that we are not using a power soon enough. Generally, the process is about consultation on the detail of the use of a particular power, which is the appropriate approach for just about any legislation.

Pauline McNeill: That is kind of my point. We cannot consult until you decide that you are going to use the power.

Joe FitzPatrick: Sorry, I was talking about the Government consulting on how it would use a power. There is engagement, and there is an

opportunity for the Parliament to engage at that time.

Pauline McNeill: How could more information be provided to the committee to allow it to perform its scrutiny functions in relation to framework bills?

Joe FitzPatrick: Jeane Freeman has shown a model of good practice in the way that she engaged at an early stage with the committee, and I am trying to encourage other ministers to follow that. She understood that, although the Social Security Committee was the main committee for that bill, other committees, and particularly this one, have interests. I am trying to encourage colleagues to follow that good practice.

Pauline McNeill: I have a final question, while I happen to be here and while we have mentioned the Social Security (Scotland) Bill. As you will be aware, I am a member of the Social Security Committee. With framework bills, where we do not know what the policy will be until much further down the line and we are trying to decide whether the Government has got the balance right, it is important that the parliamentary timetable does not stress the committee too much. With the Social Security (Scotland) Bill, we will probably just make it, but the timetable is very tight. I make the observation that, as the Minister for Parliamentary Business, if you really believe in proper scrutiny, it is worth ensuring that committees have enough time to consider framework bills. At present, the timetable is the same as for any other bill, so you might want to consider having a wee bit of slack in the system in relation to framework bills.

Joe FitzPatrick: That is a reasonable point. We always spend time discussing with the clerk of the committee and the convener the timetables that we expect. Ultimately, the Parliamentary Bureau agrees the timetable. There is a balance between giving time and wanting the legislation to be used to, we hope, improve the lives of people in Scotland, which is what we are aiming to do. However, your point is well made.

11:00

The Convener: That was a reasonable point. There is another framework bill, which is the Planning (Scotland) Bill.

Stuart McMillan: In the past, the committee and I have raised the issue of potentially bringing more topics together in Scottish Law Commission bills so that the bills might be larger and we can get more through the process, given the time that it takes to get such a bill through the Parliament. Have you considered that?

Joe FitzPatrick: One of our challenges is that in order to bring a commission bill through the

committee, a number of criteria have to be met, and the bigger the bill, the more difficult it would be for us to meet them. If we feel that we want to deal with more topics, it might be worth looking at the criteria because they are the stumbling block to bringing more commission bills through the committee. The committee might want to consider whether we should look at relaxing them a little so that there can be some degree of controversy because, right now, a bill has to be entirely uncontroversial for it to come to the committee. While that is done on the basis that the committee has particular technical experience, there has been enough experience of commission bills coming through that members might feel that they have the ability to process something a little more controversial or complex, but the key is to look at the criteria.

Stuart McMillan: That is helpful. We have all appreciated the experience and some of the processes that we have gone through but, as you said, the fact that the bills have been non-contentious has aided the process. We could probably have a discussion about that later.

The Convener: That exhausts our line of questioning. On a personal note, I welcome the dialogue that I have had with the minister and I hope that that continues. I thank him for his time and I hope that Mr McBratney's voice improves.

11:02

Meeting suspended.

11:03

On resuming—

Instrument subject to Affirmative Procedure

Police Investigations and Review Commissioner (Application and Modification of the Criminal Justice (Scotland) Act 2016) (Scotland) Order 2017 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instrument subject to Negative Procedure

Novel Foods (Scotland) Regulations 2017 (SSI 2017/415)

11:03

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Sittings of the Court) 2017 (SSI 2017/414)

11:04

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

11:04

Meeting continued in private until 11:16.

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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