



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Delegated Powers and Law Reform Committee

**Tuesday 11 September 2018**

**Session 5**



The Scottish Parliament  
Pàrlamaid na h-Alba



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**CONTENTS**

	<b>Col.</b>
<b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>	<b>1</b>
<b>TRADE BILL.....</b>	<b>2</b>
<b>INSTRUMENTS NOT SUBJECT TO PARLIAMENTARY PROCEDURE.....</b>	<b>12</b>
Social Security (Scotland) Act 2018 (Commencement No 1) Regulations 2018 (SSI 2018/250 (C 17))...	12
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Jury Trials) 2018 (SSI 2018/266) ....	12

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**

**26<sup>th</sup> Meeting 2018, Session 5**

**CONVENER**

\*Graham Simpson (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Stuart McMillan (Greenock and Inverclyde) (SNP)

**COMMITTEE MEMBERS**

\*Tom Arthur (Renfrewshire South) (SNP)

\*Neil Findlay (Lothian) (Lab)

\*Alison Harris (Central Scotland) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

Stephen Sadler (Scottish Government)

**CLERK TO THE COMMITTEE**

Andrew Proudfoot

**LOCATION**

The Adam Smith Room (CR5)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 11 September 2018*

*[The Convener opened the meeting in private at 11:46]*

12:02

*Meeting suspended until 12:30 and continued in public thereafter.*

### Decision on Taking Business in Private

**The Convener (Graham Simpson):** I welcome everyone to the 26th meeting in 2018 of the Delegated Powers and Law Reform Committee. Under agenda item 4 it is proposed that the committee takes items 7 and 8 in private. Those items will be on the evidence that we are about to hear from the cabinet secretary on the Trade Bill and on further evidence received on the Prescription (Scotland) Bill. Does the committee agree to take those items in private?

**Members indicated agreement.**

## Trade Bill

12:30

**The Convener:** We come to agenda item 5, which is our second evidence session on the legislative consent memorandum on the United Kingdom Trade Bill. We have before us Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations. Welcome once again, Mr Russell. He is accompanied by Graham Fisher, who is a solicitor for the Scottish Government, and Stephen Sadler, head of the trade policy team at the Scottish Government. Welcome to you.

One of this committee's roles is to look at legislative consent memoranda that include delegated powers and report to the relevant lead committee. Our questions are therefore focused on the delegated powers in the Trade Bill. Cabinet secretary, I think that you may have an opening statement before we move to questions.

**Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations):** Thank you very much, convener. I want to say a word or two about the Trade Bill, which requires the consent of the Scottish Parliament. However, as I said last week to the Finance and Constitution Committee, the events around legislative consent for the European Union (Withdrawal) Act 2018 have in effect overturned 19 years of constitutional convention and practice. The UK Government sought the Parliament's consent on that occasion; it was refused, but the UK Government proceeded with its legislation.

We are therefore seeking urgent discussions with the UK Government on how to strengthen and protect the Sewel convention, and will be looking again at how we can embed the requirement for the Scottish Parliament's consent in law, and strengthen intergovernmental processes.

In the meantime, we have made it clear that we will not introduce further legislative consent motions on Brexit bills. We will work with the UK Government to develop the Trade Bill to ensure, as far as we can, that Scottish interests are protected, but we will not invite the Parliament to consider consent legislation if the UK Government reserves the right to set aside our view on all bills for Brexit.

The Trade Bill is designed to operate alongside the withdrawal act to help ensure continuity in the UK's existing trade and investment arrangements. Clause 1 provides powers for UK and Scottish ministers to make regulations. Clause 2 provides powers for UK and Scottish ministers to make regulations to implement qualifying international trade agreements. The UK Government has said

that, in most cases, the implementation of any obligations within existing international trade agreements will be dealt with through the EU withdrawal act, but it has identified certain circumstances where that will not be possible and the provisions in clause 2 of the Trade Bill are intended to bridge that gap.

The legislative consent memorandum that we submitted last December set out our concerns about the bill as introduced. Since then, I am pleased to say that some changes have been made and the bill that will be considered in the House of Lords later today is better than the one that was introduced.

However, we still have significant concerns in two areas that were set out in correspondence between Derek Mackay and Liam Fox before recess; I think that you have had access to that letter. The first is a direct read-across to section 12 and schedules 2 and 3 of the withdrawal act that, among other things, gives the Scottish ministers powers to fix retained EU law. As things currently stand in the Trade Bill, as with the withdrawal act, the Scottish ministers will have the power to amend direct retained EU legislation in areas that are otherwise devolved, but not where section 12 framework regulations have been made by the UK Government.

Our other concern is in relation to the trade remedies authority. The TRA will have an important role in the development of UK trade policy. It will undertake trade remedy investigations across the UK, which will inevitably touch on devolved areas or areas of significance to Scotland. Its decisions could have a substantial impact on businesses and consumers, yet despite repeated representations from us and from the Welsh Government, the Trade Bill still does not provide a role for the devolved Administrations, for example in relation to the appointment of board members. We will therefore continue to press for the bill to be amended to address those points.

**The Convener:** I will go slightly off the script, but you did mention intergovernmental relations. As you know, myself and some other conveners sit on an inter-parliamentary Brexit forum. The next meeting of that forum will be in Wales. I expect that we may come up with recommendations on how the Government should proceed in future. I guess that you are amenable to having a meeting with conveners after that?

**Michael Russell:** Of course I am. This is a very live discussion. Last year, the Welsh Government published proposals for discussion. Last week, we published some proposals in our trade paper. Our original "Scotland's Place in Europe" paper in December 2016 outlined areas of devolution where we thought there needed to be changes. Bernard Jenkin's Public Administration and

Constitutional Affairs Committee report—with which you are familiar; I think Bernard Jenkin sits on or is involved with your group—is germane in this regard and looks at the difficulties.

The last joint ministerial committee plenary accepted that intergovernmental relations should be reviewed, but nothing has happened as yet. This week, I will make proposals to David Lidington about the Sewel convention. This is a very live discussion. I was also at the British Irish Association's annual meeting in Oxford this weekend, where again this issue caused a lot of discussion. I think that most people, from whatever part of the spectrum, accept that Brexit has been too heavy a burden for the current devolved settlement to bear—there are things that do not work and are not working. How can that work again? It is no secret that I believe in independence, but I also believe in functioning systems between Governments while they exist, and that needs to be addressed. The urgency in this is coming from the Welsh and the Scottish Governments. It would be good to see urgency from the UK Government too.

**The Convener:** That is very useful. We will have further discussions about that, but now we will go on to the matter that we are here for.

**Neil Findlay (Lothian) (Lab):** At last week's meeting, the UK minister of state said that the intention under the Agreement on Government Procurement is to introduce arrangements that will in effect duplicate what is in place now. Do you foresee there being an opportunity for substantial changes to be made in Scotland that diverge from what we have at the moment, given that procurement is devolved?

**Michael Russell:** That depends on the GPA rather than the devolved Administrations. We can indicate what we believe to be desirable changes. Indeed, I think that some of that was presaged in our own European Union (Legal Continuity) (Scotland) Bill. More of it is indicated in our trade paper where, for example, we look at issues such as human rights, trade union rights, environmental, climate and justice rights and say that they should be part of the process. It is interesting to note that the House of Commons Foreign Affairs Select Committee today has a report saying that it believes that negotiation on trade should be rights-based. However, that will depend upon the GPA itself.

Of course, the EU conditions in that can be altered by the will of the EU members changing EU regulations that expand and build upon the GPA regulations and I would be keen to see such change. The difficulty for us will be in getting our voice heard, because I think that the UK Government is not very keen that we are a part of

this and I think that they will try to ensure that we are not.

**Neil Findlay:** You have written extensively about your support for free market and neoliberal economics and how there should not be barriers to that type of economic approach. Could we see changes in procurement in Scotland that, for example, would mean that we were no longer unable to pay public contractors the living wage and that we did not need to go down the whole charade of tendering for ferry or other services?

**Michael Russell:** I am, as ever, delighted that you continue to be a fan of my writing, although I keep having to refer you to the opening chapter of that book, which indicates that the book was not about that. Never mind, we will not dispute those matters here.

**Neil Findlay:** It is the subsequent chapters.

**Michael Russell:** Indeed, but there is no point in having this conversation again. It is on the record in many, many places. I have to say that I look forward to reviewing some of your books.

**Neil Findlay:** Please do.

**The Convener:** They are not worth it.

**Michael Russell:** Indeed. I think that I will contract out the reading of them in these circumstances.

**Neil Findlay:** You will love it.

**Michael Russell:** I am sure that I will. I think that we could probably go too far on this, convener. Let us move on, shall we?

I am keen to see the best possible systems in place. You refer to ferry tendering. My position on that, as the member of the Scottish Parliament who represents more ferry routes in his constituency than any other, was absolutely clear and consistent from the beginning. I would rather that there had not been a tender process. I think that the tender process was a distraction. I would like not to see a tender process in future. However, during the tender process I was foursquare behind not just CalMac itself, but the trade unions. Indeed, I spoke at events to say that.

As far as I am concerned, we want a progressive and modern approach that involves all those issues. I know that you and I do not often agree on things—I think perhaps that you enjoy that—but on this occasion I want to be on the same side as you, to make sure that it is within our ability to influence those things in public sector procurement and in public sector contracts and tenders. I want to make sure that that happens. Anything that we can do, we should do. It would be better if we could legislate for all those things ourselves. I would like to be able to do so.

**Neil Findlay:** When we pursued some of these issues through the Procurement Reform (Scotland) Act 2014, they were rejected by the Government. With this change, will there be more opportunity for us not to have that situation?

**Michael Russell:** I doubt whether this change will produce that because it appears that the UK Government is trying to replicate the structures. In the case in which Scotland was negotiating in its own interests, then we would be endeavouring to do so.

**Neil Findlay:** In terms of parliamentary scrutiny, there was an indication that negative procedure would be used for much of this. Is that adequate?

**Michael Russell:** No. I would want to see very substantial scrutiny on these matters. One of the difficulties with the Trade Bill has been trying to push these issues forward, but I would want to see substantial scrutiny on these matters.

**The Convener:** Clauses 1(1)(e) and (f) in the bill provide that UK ministers or the devolved authorities have a power to “make such provision as” is considered appropriate

“in consequence of a modification to the list of central government entities in”

the GPA, once the UK has acceded to the agreement. It appears that modifications could be needed due to machinery of government changes, which is mentioned at paragraph 50 of the delegated powers memorandum. Could you give us any further information as to how the Scottish ministers might use that power?

**Michael Russell:** I could not, but I hope that one of the people with me can give me that information. If they cannot, we will have to write to you about it.

**Stephen Sadler (Scottish Government):** We may have to do a combination of both. I think when you took evidence from UK ministers and officials last week they put on record the fact that they would want to work closely with Scottish Government officials on matters like this, particularly on the entities provision. We are continuing to discuss that with them. We have not reached a position yet where we have been swapping lists or anything as detailed as that, but it is something that we would want to consider with them and obviously bring that back to the Parliament.

**The Convener:** Feel free to write to us, obviously.

**Michael Russell:** We will write to you on the detail of that question. It is clearly important.

**The Convener:** That is fine.

**Stuart McMillan (Greenock and Inverclyde) (SNP):** Good afternoon, cabinet secretary. I have questions regarding clause 2 of the Trade Bill. In the Finance and Constitution Committee's discussion of the bill on 21 February, the academic experts who were in attendance raised concerns about the clarity and potential width of clause 2. It applies not only to international trade agreements that are free trade agreements but, under clause 8(1), to international agreements that mainly relate to trade. An official appearing with the Minister of State for Trade Policy last week explained that the expression will cover an agreement that

"has trade as the majority of its content."—[*Official Report, Delegated Powers and Law Reform Committee*, 5 September 2018; c 15.]

Does the Scottish Government consider that that expression is appropriate without further definition in the bill or do you have concerns on the matter?

**Michael Russell:** We do not think that it is appropriate without further definition. The matter has had some discussion. Again with your permission, convener, I will write to the committee with a full exposition of why we do not think that it is appropriate, because there is a substantial technical issue in there.

12:45

**Stuart McMillan:** Also regarding clause 2, last week, the minister of state said:

"In each case in which we negotiate with partners to roll over agreements, we will look for just that—as few changes as possible, to provide certainty."—[*Official Report, Delegated Powers and Law Reform Committee*, 5 September 2018; c 12.]

That touches on some of Neil Findlay's questions. Does the Scottish Government agree with that or do you consider that regulation under clause 2 might make significant and different arrangements for Scotland?

**Michael Russell:** The minister's view is very much the view that the UK Government takes on every single one of these issues, which is that there is an existing set of arrangements and they will simply be continued forward. However, anybody who has any cursory involvement with trade knows that that does not happen. The moment that something is up for grabs, it is up for grabs. An example lies in that other Geneva-based organisation—not the GPA, but the World Trade Organization. At the beginning of the process of the UK seeking independent membership of the WTO, the EU and the UK approached the WTO with a joint letter saying that they were looking to roll over the arrangement. Almost immediately, that produced a negative reaction from a group of key players, some of

whom are old trading partners of the UK, saying, "Hang on a minute—it can't work like that." The moment that things are on the table, they are on the table. Under the GPA, there has been a fear that that would be the case.

The House of Commons committee has also said that it expects substantive changes to be necessary. Therefore, I think that the minister was expressing his policy intention; he was not expressing what is actually going to take place. Of course, an optimist would think that the best changes will take place and we could go in and bat for everything that we want. The reality is that every country and organisation will be doing that. If something has niggled with a country for 10 or 15 years, because it did not quite get the quota on something that it wanted, this is a good opportunity to change it. Also, the balance of trade has changed over the years.

It is significant that not a single rollover of a trade arrangement has yet taken place. In other words, there has been no indication that there will be a seamless rollover. There are some big questions there. In the best of all possible worlds and in the Panglossian world view, everything just gets rolled over. I think that that is unlikely.

**Stuart McMillan:** Finally on clause 2, does the Scottish Government agree with the UK Government's position that, in relation to trade agreements, it is more appropriate that regulations should be introduced, or would you prefer any changes to take place via primary legislation?

**Michael Russell:** That issue is about scrutiny rather than anything else. The issue is to ensure that if there is debate and discussion, there should be that scrutiny. Transparency is important.

There is also a wider issue, which I know the Finance and Constitution Committee has considered, about what scrutiny should be applied to trade arrangements at every level. There has been very little democratic scrutiny at Westminster. In our new paper, we have argued for much stronger democratic scrutiny, and the bill is perhaps an opportunity to ensure that that takes place.

**Tom Arthur (Renfrewshire South) (SNP):** In your preceding remarks, you stated that you think it unlikely that there would be a seamless rollover. The period that is allowed for with regard to implementation of clause 2 through regulations is three years. Is it likely that that can be achieved within three years?

**Michael Russell:** No.

**Tom Arthur:** Therefore, is it likely that the extension of the sunset period would have to be invoked?



**Michael Russell:** It is almost impossible presently to know how long things will take, but three years is a very optimistic view of what is possible.

Let us remember where we are on the wider Brexit issue. We are 198 days from requiring the exit agreement to be found. We are not there. The exit agreement is the start of a process, not the end of a process. It is the start of the withdrawal negotiations and consideration of the detail of the future framework. That is scheduled for the transition period, if that happens, which is 21 months, but nobody believes that that huge task can be undertaken in 21 months. Given all the associated activities, that raises a question about whether the transition period will be extended, and if that happens there will be big implications. All the timescales appear to be completely out of kilter.

**Tom Arthur:** I will move on before we get into too many hypotheticals. The Department for International Trade, or the UK Government, has given a political commitment to consult with the Scottish Government on the use of an extension. However, I understand that the Scottish Government would like the bill to contain a requirement to consult with the Scottish Government on an extension. Can you update the committee as to the Scottish Government's position?

**Michael Russell:** That remains our position. There needs to be a recognition of reality.

**Tom Arthur:** Can you envisage any circumstances in which the Scottish Government would require an extension of the powers but the UK Government would not? Are there any specific devolved circumstances in which an extension would be required? As things stand, the provision to extend lies with the UK Government and not the devolved Government. Could situations arise whereby the Scottish Government but not the UK Government would be required to seek an extension?

**Michael Russell:** We are now going into arcane areas of possibility. I do not want to go into them. Officials need to keep up regular liaison on the issue. On the general issue of how long things take, there is an optimistic view—as there has been on the rollover and other issues—which I do not share. The officials will have to keep close contact on those things.

**Tom Arthur:** Arcane is obviously what this committee is all about.

**Michael Russell:** Indeed.

**The Convener:** Shocking. Mr Findlay wants to come back in.

**Neil Findlay:** I have been reflecting on what the cabinet secretary has just said. The complexity of the issue is enormous, and we are attempting to unravel something that has been going on for only 40 or so years. Does that offer any reflection on the 18-month period that was assumed for extraction from another political entity?

**Michael Russell:** What it shows is that preparation is all. If at any stage during the Brexit process those proposing it had brought forward a 600-page white paper full of detail, that would have been helpful and useful. As that did not happen, the consequences are clearly now showing.

**Neil Findlay:** You do not think, given what you have witnessed, that the 18-month period was just as unrealistic as a three-year period.

**Michael Russell:** No. My serious point is that preparation is all. The work that was being done was comprehensive and I like to think that the competence of those involved was unquestionable, unlike in the present circumstances, but there you are, Mr Findlay.

**Neil Findlay:** Of course.

**Alison Harris (Central Scotland) (Con):** Good afternoon, cabinet secretary. Could the bill usefully include any further provisions to improve the scrutiny process for the Scottish statutory instruments that are to be laid under it and for any instruments that would be subject to joint scrutiny at Westminster and the Scottish Parliament? In particular, clause 5 provides for a report to be issued by the UK Government that would give details of significant changes to the UK free trade agreement with another state, as compared to the EU's pre-exit day agreement, in advance of laying any regulations under the clause. Would it be useful for the scrutiny process if such a report, where relevant, was similarly required in advance of any regulations being laid by the Scottish ministers under clause 2, or would there be reasons not to require that?

**Michael Russell:** There is the specific point of whether the Trade Bill can do that. Improvements can be made to any bill—we saw with the continuity bill that improvements can be brought in. Therefore, I would expect officials to be involved in those discussions and to involve ministers in discussions as required.

On the wider point of scrutiny, particularly of trade, there is a very strong argument for saying that the new arrangements should be very different from the arrangements that existed in the UK before EU accession. There was a tradition that there was no great parliamentary scrutiny, and there is still a view that there should not be great parliamentary scrutiny. Given the nature of international trade and its relation to some of the

issues that Mr Findlay raised of rights, environmentalism and climate change, there needs to be greater scrutiny, including ethical scrutiny, of trade. In those circumstances, I envisage a much more transparent system.

The judgment then is about whether what is in the bill is transparent enough. It does not meet the standards that we have set out and therefore we want to continue to develop and change those. I believe that those parts have changed during the initial process of the bill and that they can change further. However, on the general point, I am keen to see greater scrutiny of all legislation, and particularly trade legislation.

**Alison Harris:** Would it be useful for the scrutiny of regulations that are laid by the Scottish ministers under the bill if the SSI protocol that the Scottish Government has developed with the Parliament for SSIs under the withdrawal act could be extended to such regulations?

**Michael Russell:** Why on earth not?

**Alison Harris:** The bill provides for concurrent powers to be available to the UK ministers and the Scottish ministers to make regulations under clauses 1 and 2. Do you anticipate that the UK statutory instruments that have or include a devolved subject matter would be laid under the bill? If so, can you give an indication of how many there might be?

**Michael Russell:** I cannot give an indication of that, because that matter will take some time to develop. As I will say in my statement to Parliament this afternoon, it has taken many months to get to the stage where we have an estimate of the total amount of mitigation that we require on existing SSIs. Clearly, we would want to co-operate with Westminster on the issue, provided our policy intentions were the same and we believed that it was in our interests to do so. If we did not believe that, we would not want to do so.

**Alison Harris:** Can you give any indication of how many SSIs could be laid under the bill?

**Michael Russell:** I am sorry, but I just cannot do that. It is almost impossible to make that estimate. In fact, I will drop the word “almost”—it is impossible to make that estimate. We do not have enough information to allow us to do so.

**Tom Arthur:** Has the UK Government given you any indication of when it will be in a position to start providing such information?

**Michael Russell:** No.

**The Convener:** We have raced through that session, Mr Russell, which will help you to prepare for your statement later on. We will write to you as a result.

**Michael Russell:** On a number of points, we said that we will provide something in writing. If the officials can ensure that we know about any commitments that we have made, we will honour those commitments.

**The Convener:** Thank you. I suspend the meeting to allow the cabinet secretary to leave.

12:56

*Meeting suspended.*

12:58

*On resuming—*

## **Instruments not subject to Parliamentary Procedure**

**The Convener:** Under agenda item 6, no points have been raised on the following instruments.

### **Social Security (Scotland) Act 2018 (Commencement No 1) Regulations 2018 (SSI 2018/250 (C 17))**

### **Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Jury Trials) 2018 (SSI 2018/266)**

**The Convener:** Is the committee content with the instruments?

**Members indicated agreement.**

**Tom Arthur:** I just want to confirm that the bill received royal assent in 2018.

**The Convener:** Thank you. I will move the meeting into private session.

12:58

*Meeting continued in private until 13:02.*

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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