



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Delegated Powers and Law Reform Committee

**Tuesday 7 May 2019**

**Session 5**



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Pàrlamaid na h-Alba

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**Tuesday 7 May 2019**

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**  
**15<sup>th</sup> 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)

Mary Fee (West Scotland) (Lab)

\*Alison Harris (Central Scotland) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Neil Bibby (West Scotland) (Lab) (Committee Substitute)

Paul Cackette (Scottish Government)

Graeme Dey (Minister for Parliamentary Business and Veterans)

Steven MacGregor (Scottish Government)

Luke McBratney (Scottish Government)

**CLERK TO THE COMMITTEE**

Andrew Proudfoot

**LOCATION**

The Adam Smith Room (CR5)



## Scottish Parliament

### Delegated Powers and Law Reform Committee

*Tuesday 7 May 2019*

*[The Convener opened the meeting at 10:45]*

### Decision on Taking Business in Private

**The Convener (Graham Simpson):** Welcome to the 15th meeting in 2019 of the Delegated Powers and Law Reform Committee. Before we move to the main item of business, we must decide whether to take in private item 5, which is consideration of the evidence that we are about to hear from the Minister for Parliamentary Business and Veterans. Do members agree to take item 5 in private?

**Members indicated agreement.**

## Secondary Legislation Update

10:45

**The Convener:** The next item of business is an update on secondary legislation from the Government. We have before us Graeme Dey, the Minister for Parliamentary Business and Veterans—welcome, minister. The minister is accompanied by not as many officials as we thought that there would be originally, but we have Paul Cackette, acting solicitor to the Scottish Government, Steven MacGregor, head of Parliament and legislation unit, and Luke McBratney, team leader with the constitution and United Kingdom relations division. Welcome, gentlemen.

We will move straight to questions, the first of which is from me. How many consent notifications have been sent to the Parliament up to this point, and how many UK statutory instruments have the consent notifications covered?

**The Minister for Parliamentary Business and Veterans (Graeme Dey):** To date, there have been 90 notifications, covering 133 SIs. The Parliament has agreed 90 notifications, covering 133 SIs. There are 18 remaining notifications to the Parliament, covering 19 SIs.

**The Convener:** Is the Government satisfied that the UK SIs that it has consented to have been agreed by the UK Parliament?

**Graeme Dey:** I think that 124 SIs have completed their parliamentary passage at Westminster.

A further four SIs were expected to be laid using the urgent procedure to ensure that they were in force for exit day. However, since the article 50 extension, the SIs have been deferred, and the UK Government is currently rethinking the laying schedule. In any event, those would be in place by exit day.

We also had 31 Scottish statutory instruments that were critical for a no-deal scenario and which have also completed their parliamentary passage.

**The Convener:** Is the Scottish Government satisfied that those UK SIs have ensured that the Scottish statute book is now adequately updated to take account of the UK leaving the European Union?

**Graeme Dey:** The programme for no-deal fixes—the essential ones—is complete and the statute book is in the kind of shape that we would want it to be in. We have addressed the significant bulk of the deficiencies programme. As I have said before, I recognise the role that the Parliament and its committees have played. It is fair to say

that this institution has stepped up to the mark and coped with whatever was thrown at it, which reflects well on the members of the Parliament.

**The Convener:** Thank you for that—I certainly agree.

**Stuart McMillan (Greenock and Inverclyde) (SNP):** Minister, you mentioned 31 SSIs and 19 remaining instruments. Can you provide further information regarding the expectation for those remaining ones? You mentioned that they are to be deferred. When do you expect them to be laid?

**Graeme Dey:** Four of the less essential SSIs have been laid, and our current assessment is that around 10 will be laid ahead of the summer recess and further SSIs will be laid from September 2019. We are doing a full assessment of the remaining deficiencies that require to be corrected. Of course, that will include any corrections in relation to new emerging EU law between now and exit day.

**Stuart McMillan:** So the instruments that are to come before the summer are to be prioritised as a consequence of the fixing of any deficiencies.

**Graeme Dey:** I bring in Steven MacGregor, who can give you a bit more detail.

**Steven MacGregor (Scottish Government):** The remaining number is still to be determined, but it will be much smaller than the number in the programme that has gone through already. The bulk of the instruments in question will be brought forward before the summer recess. If we identify any that look significant or more important than others, they will be prioritised. A small number are likely to be required as we go into the autumn, but the intention is that we will complete all the deficiency fixes as soon as is reasonably possible.

**Luke McBratney (Scottish Government):** I will expand on one of the points that the minister made. One of the effects of the extension of the article 50 period to October 2019 is that, in certain circumstances, the deficiencies that need to be addressed will relate to EU law as it exists on the expected exit day. Some changes will be required to reflect the fact that EU law will have developed between the expected exit day and the new exit day in October 2019. The Scottish Government is scoping that.

**Stuart McMillan:** As things stand—bearing in mind that the initial exit date was 29 March—can you give an indication of when the final notification might be sent, notwithstanding the scoping work that is under way?

**Graeme Dey:** When it comes to understanding the laying schedule, we are still in dialogue with the UK Government and others. I would not want to mislead you today, but I could commit to write to

the committee as soon as we have further detail. We will do that as soon as it is possible to do so.

**Luke McBratney:** The committee might be interested to know that, under the European Union (Withdrawal) Act 2018, the power to address deficiencies in legislation is available to the UK Government and to the Scottish ministers until two years after exit day, whenever that happens to be. That was done deliberately in anticipation of the fact that, even with the best will in the world, there might require to be some mopping up and correcting. Two years after exit day will be the point at which we lose the power to make such instruments. Until then, we will not be able to say for sure that the final deficiencies have been addressed.

**The Convener:** I would like to pick up on something that you said. Is the fact that exit day has been delayed—it might never happen, but let us assume that it will—creating extra work?

**Luke McBratney:** As I said, we are investigating that. Obviously, there will be some changes to EU law between the first anticipated exit day of 29 March and the current anticipated exit day of the end of October. In certain cases, the deficiencies relating to EU law as of 29 March will have been addressed. The work that we are currently doing is to scope out whether additional changes need to be made in the event of our leaving the EU on 31 October instead. The process is on-going.

**The Convener:** So it is a work in progress.

**Luke McBratney:** It is.

**Graeme Dey:** Hence the commitment to continue to engage with the committee and to keep it updated as much as we can.

**The Convener:** That is very useful.

**Alison Harris (Central Scotland) (Con):** We understand that the SSIs that are considered essential for a no-deal Brexit have all completed their parliamentary passage. Are you satisfied that, because of that, the Scottish statute book has been adequately updated?

**Graeme Dey:** Yes is the answer.

**The Convener:** You can leave it at that.

**Alison Harris:** Excellent—thank you for that quick answer.

Will further SSIs be required to correct the remaining legislative deficiencies? If so, what volume of such instruments is expected? What is the timescale for those instruments? How will they be prioritised?

**Graeme Dey:** As I said earlier, four of the less essential SSIs have been laid. Our current

assessment is that there will be another 10 or so, although the situation continues to develop.

Overall, we anticipate that a further 17 SIs will be notified to Parliament ahead of the summer recess. As and when anything arises, we will deal with it but, to summarise, we think that we are on top of the situation.

**Alison Harris:** If a transition period or implementation period were to be agreed as part of any withdrawal agreement with the EU, what would the effect be on the no-deal instruments that the Parliament has already scrutinised? Would they have to be looked at again?

**Graeme Dey:** I will get you a technical answer from Luke McBratney.

**Luke McBratney:** The UK Government has published a white paper called "Legislating for the Withdrawal Agreement between the United Kingdom and the European Union", which sets out proposals for dealing with the issue that you raise. The instruments that have already been made and laid are designed to come into force on exit day in the event of a no-deal scenario. The paper describes a lifting and shifting of all those instruments so that, instead of coming into force on exit day, they would come into force at the end of an implementation period. That would be delivered by the much-anticipated withdrawal agreement bill, which, as yet, has not been introduced in the UK Parliament. When the withdrawal agreement bill is introduced, the Scottish ministers will lodge their legislative consent memorandum that sets out their response to the proposals in that bill.

In essence, the answer is that in the event of a withdrawal agreement with an implementation period being agreed, the entirety of the programme of no-deal SIs and SSIs will require to be deferred until the end of the implementation period.

**Alison Harris:** Would a transition period create a further tranche of EU exit instruments?

**Luke McBratney:** Under the programme that is described in the UK Government white paper, we do not anticipate a significant or immediate tranche of EU exit statutory instruments. The reason is that the substance of the implementation period is that EU law will continue to apply and update in the UK during the entirety of that period.

We are currently a jurisdiction that complies with EU law, so there should not be much immediate legislative change required. There would be some exceptions, the most prominent of which would be to address the fact that the UK would no longer participate in European Parliament elections. Aside from that, we do not anticipate anything significant.

**Neil Bibby (West Scotland) (Lab):** You will be aware that a number of Brexit bills and statutory instruments that were made under powers in the European Union (Withdrawal) Act 2018 confer further powers on UK ministers from exit day to make regulations in devolved areas that are currently subject to EU law.

In relation to where the Scottish Government has given its consent to those powers, why has it been considered appropriate for such powers to be conferred on UK ministers in devolved areas?

**Graeme Dey:** That is an interesting question. We have had to take a pragmatic approach to the situation in which we have found ourselves, which has informed the way in which we have taken it forward.

Could you repeat your question and give more detail?

**Neil Bibby:** Under the powers of the withdrawal act, further powers are conferred on UK ministers from exit day to make regulations in devolved areas that are currently subject to EU law, and the Scottish Government can consent to those powers being used in devolved areas. The committee is concerned that the Scottish Parliament will not be able to scrutinise areas in which the Scottish ministers are granting those powers to be used. We would welcome the opportunity to scrutinise the Scottish ministers' proposals to consent in those areas.

**Graeme Dey:** It is not just your committee, as concerns have been expressed by other committees about the process that we have been going through. Unfortunately, there have been instances in which the ability to scrutinise has not been what we would have wanted. We are mindful of that and, wherever possible, we have sought to ensure that committees have had the opportunities that they require for scrutiny. There have been a few instances when that has not been possible, but that has not been through any fault of the Scottish Government. We continue to have dialogue with the UK Government about improving that situation, which is how we will proceed.

11:00

**Neil Bibby:** Obviously, the Scottish ministers are accountable to the Scottish Parliament, so it is regrettable if scrutiny is not possible. I am not sure whether you are saying that there will be occasions when it will not be possible to scrutinise the consent that has been given by ministers. Are there any other ways in which Parliament can do that?

**Steven MacGregor:** For the first phase of deficiency fixes, a protocol was in place that was agreed between the Government and Parliament

so that the Parliament could scrutinise ministers' intention to consent. We are now working with parliamentary officials on what a revised protocol to cover other forms of Brexit legislation might look like. We obviously have to work with the UK Government, as well, to understand how it intends to use those powers. We have a meeting in London this week with the Cabinet Office to discuss the issue. We envisage that a revised protocol will be developed and put in place to cover such scenarios.

**Graeme Dey:** We continue to hold the view that the Scottish Parliament should, of course, have a role in scrutinising the regulations in those areas. Because we will be dealing with a more complicated legislative landscape, what we are working through at the moment is making sure that we have in place robust scrutiny procedures that are also flexible and proportionate, so that we can respond to the circumstances in which we find ourselves.

**The Convener:** Have you finished your questioning?

**Neil Bibby:** Yes.

**The Convener:** Can the minister give the committee any examples of the Scottish Government having agreed to UK ministers legislating in devolved areas?

**Graeme Dey:** The best response to that question is probably to commit to writing to you with a list and some detail, if that would be helpful. That would allow the committee to see clear examples of where that has occurred.

**The Convener:** Okay. Perhaps there can be a brief explanation under each example.

**Graeme Dey:** Yes. I can commit to providing that.

**The Convener:** It would be useful to get that on the record.

**Tom Arthur (Renfrewshire South) (SNP):** When we last met, in December, I believe you anticipated that approximately 150 non-Brexit-related SSIs would be laid before the summer recess. Can you update the committee on how many SSIs you expect to be laid between now and the end of June?

**Graeme Dey:** I will see whether we can get the precise figure for you. That is a very detailed and interesting question. We think that there will be somewhere between 50 and 60 such SSIs.

**Tom Arthur:** Are any SSIs currently being delayed due to resource being allocated to Brexit-related instruments, or was a backlog created by the necessity to prepare the statute book ahead of the original exit day?

**Graeme Dey:** Some SSIs that were considered non-urgent were paused—we did that in conjunction with the relevant committees—and that has created a backlog. At the moment, we are looking at when, and whether, we need to reintroduce some of those SSIs to the process. Things will have moved on, and some may not be necessary.

We proactively deferred 38 domestic SSIs across the whole of Government at that time. That was partly because of the need to free up legal styling resource because of Brexit, but there were occasionally other reasons. The deferred SSIs will be reintroduced as and when it is possible to do that. Some will not need to be reintroduced urgently, so there will be time to space them out.

More than anything, I am acutely aware of the pressure on committees. As with anything that we do, we engage directly with the clerks and conveners to work out the time that is most suitable for everybody, if it is possible to control that process, and those conversations will continue to take place. For example, an instrument that was deferred—the Justice of the Peace Courts (Sheriffdom of South Strathclyde, Dumfries and Galloway) etc Amendment Order—was brought back in March and is going through the processes as we speak.

A number of other SSIs will be laid in the coming month. I am not in a position to go into that in great detail, but we can provide more of an update in due course. We will tackle the issue as we require to.

**Paul Cackette (Scottish Government):** Having had the pause in some of the domestic SSIs in the first quarter of 2019 up to the end of March, now that we are able to work on that list of outstanding instruments, we are, of course, moving towards another pinchpoint at the end of June and the start of the summer recess. In other words, in moving into the second quarter, we will have to deal with other time pressures. Those are some of the balancing exercises that will have to be carried out so that we can decide, as the minister has said, which are the crucial instruments that cannot wait. We need to make judgments to balance what we do with the remaining Brexit instruments and ensure that many that have been delayed can be in place as soon as possible. Again, though, we quite quickly run into the summer recess, and that will have an impact on committees and the Government's own resource and time.

**Tom Arthur:** Thank you. In the light of recent developments in the Brexit process since you were last before the committee, minister, do you have any general comments on the implications for the SSI process and the Government's legislative agenda of any Brexit-related workload that might come about?



**Graeme Dey:** It is self-evident that Brexit has created legislative difficulties with secondary and, indeed, primary legislation. As the committee is aware, we paused six bills for a period, in agreement with the committees in question, to allow us to cope with the workload that had been generated by Brexit. Where are we now? We have just dealt with the issue of the SSIs. As far as the wider legislative programme is concerned, I can tell the committee that all the bills that have been planned for year 3 will be introduced, with a timetable unfolding over the next few months for those that remain. We are getting on with the job, as we did—and as, indeed, the Parliament did—throughout the Brexit process.

Clearly, when we have to pause bills and when, in addition, committees have to ask for additional time for the bill process—we have tried to be as accommodating as we can be as part of that working relationship—we can end up in the current situation of having three stage 3s in the space of about six days. However, we now know what primary and secondary legislation is coming down the track, and I am more than confident that we are back on track. To put it in perspective, I expect the number of bills that will receive royal assent in 2019 to be one more than was the case in 2018, which is a remarkable achievement for the Parliament, given the pressures that it has found itself under.

**The Convener:** We have rattled through our questions, minister. I appreciate your short answers, but I think that they were thorough enough and properly answered what we asked. I welcome your on-going engagement with the committee and the communication that we have had with you. I know that that approach will continue, because that is how you work.

I suspend the meeting to allow the minister and his officials to leave.

11:08

*Meeting suspended.*

11:09

*On resuming—*

## **Instruments subject to Negative Procedure**

**The Convener:** Agenda item 3 is consideration of two negative instruments, on which no points have been raised.

### **National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2019 (SSI 2019/145)**

### **International Joint Investigation Teams (International Agreements) (EU Exit) (Scotland) Order 2019 (SSI 2019/149)**

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

**Members** *indicated agreement.*

## Instruments not subject to Parliamentary Procedure

11:09

**The Convener:** Agenda item 4 is consideration of instruments not subject to parliamentary procedure.

### Act of Sederunt (Rules of the Court of Session 1994 and Summary Applications, Statutory Applications and Appeals etc Rules 1999 Amendment) (Proceeds of Crime) 2019 (SSI 2019/146)

**The Convener:** The first instrument is required as a consequence of amendments to the Anti-terrorism, Crime and Security Act 2001 and the Proceeds of Crime Act 2002 that were made by the Criminal Finances Act 2017. A couple of drafting errors in the instrument, one of which amounts to defective drafting, concern a substituted rule 3.19.1 of the Summary Application Rules 1999. Full information relating to these matters is available in our published papers. The Lord President's private office has undertaken to rectify the errors at the first available opportunity.

Does the committee wish to draw the instrument to the attention of the Parliament on the general reporting ground, in so far as the substituted provision makes reference to part 3A of the Proceeds of Crime Act 2002, which does not exist, and on reporting ground (i) in so far as subparagraph (e) of the substituted provision refers to a "seized property investigation", which is not defined in the 2002 act?

**Members indicated agreement.**

**The Convener:** Does the committee also wish to call on the Lord President's private office to lay an amending instrument to rectify the errors at the earliest opportunity?

**Members indicated agreement.**

### Act of Sederunt (Rules of the Court of Session 1994 and Child Care and Maintenance Rules 1997 Amendment) (Parental Orders) 2019 (SSI 2019/147)

**The Convener:** As no points have been raised on the instrument, is the committee content with it?

**Members indicated agreement.**

11:11

*Meeting continued in private until 11:11.*

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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