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Delegated Powers and Law Reform Committee
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Lagh

Referendums (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee 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; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. The Referendums (Scotland) Bill ("the Bill")ⁱ was introduced by the Cabinet Secretary for Government Business and Constitutional Relations ("the Cabinet Secretary"), Michael Russell MSP, on 28 May 2019. The remit of the Delegated Powers and Law Reform Committee ("the Committee") is to consider whether proposed delegated powers in the Bill are appropriate and report to the lead committee on those provisions.
2. The Scottish Government has provided the Scottish Parliament with a Delegated Powers Memorandum ("the DPM") for the Bill.ⁱⁱ
3. The Committee submits this report to the Finance and Constitution Committee as the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ Referendums (Scotland) Bill, as introduced (SP Bill 46, Session 5 (2019)).

ⁱⁱ Referendums (Scotland) Bill. Delegated Powers Memorandum (SP Bill 46-DPM, Session 5 (2019)).

Scrutiny of the Delegated Powers

4. The Bill provides a framework for the holding of referendums on matters that are within the competence of the Scottish Parliament, such as the rules for voting and how the poll should be conducted. The Bill also includes a number of delegated powers, including provisions to allow the Scottish Ministers ("Ministers"), by regulations, to trigger a referendum to be held throughout Scotland.
5. The Committee focused its scrutiny on the delegated powers contained within the first three sections of the Bill. It was content with the delegated powers provisions in sections 11, 34, 37, and 38 and in the Schedule.
6. Section 1 provides that Ministers may by regulations provide for a referendum to be held throughout Scotland. Regulations made under section 1(1) must specify the date of the referendum, the form of the ballot paper (including the question to be asked) and the period of the referendum. The Scottish Ministers must consult the Electoral Commission before laying such regulations before the Parliament. The regulations will be subject to the affirmative procedure.
7. Section 2 applies the provisions of the Bill to a referendum which is proposed in regulations under section 1(1). Ministers can also make further regulations under section 2 to modify the Act (when enacted) as necessary for running the referendum.
8. Section 3 requires the Scottish Ministers to consult the Electoral Commission on the question to be put in any referendum.
9. For its scrutiny of these sections, the Committee wrote to the Scottish Government with a number of questions on the Billⁱⁱⁱ and, after receiving a response^{iv}, took evidence from the Cabinet Secretary at its meeting on Tuesday 10 September 2019.^v The Committee issued a call for written evidence on the Bill and received a response from the Law Society of Scotland. The Finance and Constitution Committee also issued a call for evidence to aid its scrutiny which included a question on the regulation-making powers in the Bill. A number of its responses addressed this issue.

iii [Delegated Powers and Law Reform Committee. Questions to the Scottish Government on the delegated powers in the Bill at Stage 1.](#)

iv [Scottish Government. Response to the Delegated Powers and Law Reform Committee's questions on the delegated powers in the Bill at Stage 1.](#)

v [Delegated Powers and Law Reform Committee. *Official Report*, 10 September 2019.](#)

Section 1 - Power to provide for referendums

10. Section 1(1) of the Bill provides that Ministers may provide for a referendum to be held throughout Scotland on one or more questions. Provision for a referendum is to be provided for in regulations.
11. Section 1(2) sets out specific matters which any regulations under section 1(1) must specify. Those matters are:
 1. the date on which the poll of a referendum is to be held;
 2. the form of the ballot paper to be used in the referendum; and
 3. the referendum period.
12. The form of the ballot paper which must be specified in regulations must also include any question to be asked and any possible answers (section 1(2)(b)).
13. Section 1(4) of the Bill requires the Scottish Ministers to consult the Electoral Commission before laying draft regulations under this section.
14. The power to make regulations in section 1 is subject to the affirmative procedure (section 1(3)).

Committee scrutiny

15. The Committee focused its scrutiny of section 1 on two principle questions:
 1. the appropriateness of the delegation of the power; and
 2. the choice of procedure.

The appropriateness of the delegation of power

16. The Committee first considered whether the holding of a referendum should be established in subordinate legislation rather than in primary legislation. The Bill's Policy Memorandum gave an initial explanation of the Scottish Government's reasoning for its choice:

” The Bill provides an opportunity for the Scottish Parliament to scrutinise, debate and approve the rules and procedures for Scottish referendums to ensure that the framework commands public confidence that referendums will be fair and open in line with established best practice. Having a standing legal framework in place will enable legislation for any future referendum to be taken forward in a timely manner and allow parliamentary scrutiny to focus on the merits of that particular proposal, the question or questions to be asked and the timing of the referendum.

17. In its questioning of the Cabinet Secretary, the Committee highlighted its role to balance the wish of the government to have a degree of legislative flexibility while at the same time ensuring appropriate accountability. It therefore asked Mr Russell why the Scottish Government considered the use of subordinate legislation to strike the appropriate balance in this Bill.
18. The Cabinet Secretary outlined the difference in approach taken with the Bill as compared to the UK Parliament's [Political Parties, Elections and Referendums Act 2000](#), which requires the establishment of a referendum by primary legislation. Mr Russell said that the 2000 Act is a "much smaller" and "more vague" piece of legislation which requires much more detail on the framework for an individual referendum to be provided in any subsequent primary legislation. The Cabinet Secretary believed that the Bill was taking the opposite approach, in that the Scottish Government was "providing a detailed framework for each and every referendum" with individual referendums linking to that framework. The detail required for future referenda, believed Mr Russell, would therefore be "comparatively simple."
19. The Committee pointed to a number of written submissions to both itself and the Finance and Constitution Committee which raised concerns on the use of delegated powers in the Bill. For example, the Law Society of Scotland said:

” We have reservations about the use of subordinate legislation for the most important questions relating to the Constitution. Such issues require full and proper scrutiny which subordinate legislation does not provide.^{vi}
20. Meanwhile, Dr Alan Renwick said that "a power to call a referendum on any subject by regulations would be highly unusual." Dr Renwick added that he could find "no well-functioning parliamentary democracy that gives Ministers blanket authority to call a referendum by secondary legislation."^{vii}
21. In general terms, the Cabinet Secretary said that he was "not precious about the detail" of the Bill but "wanted to come up with the best solutions available." On the use of different scrutiny procedures than those currently set out in the Bill, Mr Russell added:

” I am entirely open to discussion as to whether the affirmative procedure, the super-affirmative procedure or primary legislation is required. However, that is on the understanding that we are trying to ensure that there is a standing set of arrangements or a framework for referenda, which will necessarily be detailed.
22. In response to the particular concerns from the Law Society of Scotland and Dr Alan Renwick, the Cabinet Secretary suggested that there need not be a "blanket level of scrutiny that applies in every circumstance." Instead, Mr Russell proposed that the Bill could be amended so that there might be different levels of scrutiny for different types of referenda. For example, the Cabinet Secretary asked:

vi [The Law Society of Scotland. Written submission to the Finance and Constitution Committee.](#)

vii [Dr Alan Renwick. Written submission to the Finance and Constitution Committee.](#)

” Would the approach to scrutiny for a referendum under a section 30— such referenda can be on any subject—be of a different order from that for a referendum on the selling off of state assets?

23. Mr Russell highlighted the previous referendum in Ireland on abortion. The Cabinet Secretary said that "in such circumstances, one might say that it is important to have primary legislation, because the very act of asking such questions would be controversial."
24. The Committee also asked the Cabinet Secretary to elaborate on the Scottish Government's response to the Committee's written questions on the Bill which said subordinate legislation provided a certainty of timing on a referendum over primary legislation. Mr Russell said that the advantage of the approach taken in the Bill is that the framework for any future referendum would already be in place so only the "arrangements and circumstances for a specific question or referendum" would alter.

Conclusions

25. The Committee acknowledges the Scottish Government's approach to the Bill as the means to create a detailed framework for each and every referendum. It recognises that this would allow the scrutiny of individual referenda to focus on the subject of the referendum itself rather than be potentially clouded by the detailed legal rules required for any plebiscite.
26. The Committee also welcomes the Cabinet Secretary's openness to alternative approaches to the scrutiny of future referenda. It appreciates that there may be times where using delegated powers is appropriate but that different referendums may require a different level of parliamentary scrutiny - either primary or secondary legislation. The one-size-fits-all approach currently found in the Bill does not therefore provide sufficient flexibility to cater for issues of such national significance such as constitutional or moral questions which might be asked in a referendum.

Recommendations

27. The Committee considers that the Bill should be amended at Stage 2 to provide clear criteria for whether future referenda should be provided for by either primary or secondary legislation. While the formation of this criteria will require further discussion, the Committee recommends that a question put in a referendum which requires an Order made under the delegated power in section 30 of the Scotland Act 1998, as well as questions about significant moral issues, should require primary legislation.

The choice of procedure

28. Section 1 of the Bill provides that regulations to provide for a referendum to be held throughout Scotland would be subject to the affirmative procedure. The Committee wished to consider which level of procedure might be suitable if secondary legislation was at all appropriate.

Background to different types of procedure

29. The affirmative procedure requires an instrument to obtain parliamentary approval before it becomes law. A 40 day scrutiny period would operate in which the instrument must be considered by this Committee and the designated lead committee within that time-frame before a final motion recommending approval of the instrument is put in the Chamber.
30. The enhanced, or 'super-affirmative' procedure, is less common and provides for additional parliamentary scrutiny by adding in requirements that must be met by the Government. There is not a single set of rules for enhanced procedure, rather, any additional requirements are specified on the face of the enabling act.
31. Generally, an enhanced procedure would provide that draft regulations are to go through a consideration period in Parliament before the regulations are formally laid. A 60 or 90 day consideration period might be considered typical. During this consideration period, this Committee and the lead Committee for the instrument would consider the draft and could make representations to the Scottish Government. It would also be open for any Member to make representations during this period.
32. The enabling Act would typically specify that Ministers must have regard to any observations made during the consideration period and use this to inform the drafting of the regulations that they formally lay before Parliament. It might also be specified that the Scottish Government lay a statement before Parliament setting out the representations they received and what changes have been made to the regulations as a result.
33. The usual 40 day period for the affirmative procedure would then begin.

Evidence on the choice of procedure

34. As highlighted earlier in this report, the Cabinet Secretary said in evidence to the Committee that while the Bill currently proposes the affirmative procedure, he would be "very open to discussion" on the use of the super-affirmative procedure.
35. In its written submission to the Committee, the Law Society of Scotland said that under the affirmative procedure there is:
 - ” no requirement for parliamentary or public consultation and the draft regulations would not be amendable or be subject to the level of scrutiny and accountability which should be applied to important questions which may affect the whole of Scotland.^{viii}
36. The Law Society of Scotland recommended that at a minimum the level of scrutiny should be subject to the super-affirmative procedure which can be amended during the scrutiny process. Of those who submitted evidence to the Finance and Constitution Committee, the Institute for Government also highlighted that under the current affirmative procedure the Scottish Parliament will have no opportunity to amend the regulations, "only to accept or reject them." This, it foresees, would restrict MSPs from amending a question they consider "suboptimal", even if they believe that it is right that such a referendum is held. The Institute for Government

viii [The Law Society of Scotland. Written submission.](#)

conclude that primary legislation should provide the basis for any future referendums in Scotland.^{ix}

Timings

37. In its written questions on the Bill to the Scottish Government, the Committee asked why the Bill proposes to proceed by way of future referendums being established in subordinate legislation and not primary legislation. In its response, the Scottish Government said:
- ” Two key objectives of the Bill are to allow referendums to be held on a timely basis, and to allow proper parliamentary scrutiny of the proposed question and timing of a referendum. Section 1 which provides for making regulations through the affirmative procedure is intended to fulfil both of these objectives.
38. The Scottish Government's response added that certainty around the timing of secondary legislation using the affirmative procedure would allow a Government to have "greater certainty over whether or not it would be able to implement the outcome of any referendum."
39. In evidence before the Committee, the Cabinet Secretary said that because the Bill provides the legal framework for all referendums then that provides much more flexibility for the timescale of an individual referendum.

Role of the Electoral Commission

40. The Bill currently provides that the Electoral Commission should be consulted before regulations are laid under section 1, but it does not provide that a draft of the regulations proposed should be shared with the Electoral Commission to inform this consultation. Separately, section 3 makes provision for the Electoral Commission to input on the intelligibility of a proposed referendum question. However, section 3(7) excludes consideration of a question by the Electoral Commission where they have previously published a report on this question or have previously recommended the wording of a question.
41. In its evidence to the Finance and Constitution Committee on the Bill, the Electoral Commission, in its evidence, said that it "plays an important role in providing expert advice to parliaments about the intelligibility of any proposed referendum question in order to inform scrutiny of legislation introduced by governments." The Commission outlined that it takes approximately 12 weeks to come to a view on any proposed question and considers that the Scottish Parliament will want to ensure that there is sufficient time to receive and consider its views "in order to ensure effective scrutiny of the legislation, whether the question is specified in primary legislation or regulations." It concluded that:
- ” The Commission firmly recommends that it must be required to provide views and advice to the Scottish Parliament on the wording of any referendum question included in legislation under this proposed framework, regardless of whether we have previously published our views on the proposed wording.^x

^{ix} [The Institute for Government. Written submission to the Finance and Constitution Committee.](#)

42. The Law Society of Scotland supported the Electoral Commission's stance that it should be able to provide views on the proposed question or statement when they have done so in the past. The Law Society said "the assumption in the Bill is that, once approved, the wording of the question is suitable for ever. In other words that there are right and wrong answers to questions of intelligibility rather than judgements to be made in context."^{xi}
43. The Committee questioned the Cabinet Secretary on the expected role of the Electoral Commission in the formulating of questions to be asked on the ballot paper. Mr Russell outlined the close consultation between the Scottish Government and Electoral Commission in the drafting of electoral law. The Cabinet Secretary nevertheless acknowledged the need for a formal process with the Electoral Commission to ensure a transparent "belt-and-braces approach". However, Mr Russell said that the final decision on whether to act on the Electoral Commission's recommendations, even though they should be "carefully listened to" and "treated with the greatest respect", should be taken by the Government and Parliament.
44. The Committee also asked the Cabinet Secretary about the exclusion of the Electoral Commission's consideration on the intelligibility of any proposed referendum question under section 3(7) where they have previously published a report on that question. In response, Mr Russell said that while he wanted to make it very clear that he was not against the testing of questions, he referenced the 2014 Scottish independence referendum as an example of a category of question that was a current question. The Cabinet Secretary said that "if a question is both current and in current usage, why would we change it? Doing so would be very confusing."

Conclusions

45. The Committee was grateful for the input of those who submitted written evidence on the choice of procedure. It was also thankful for the Cabinet Secretary's commitment to attempt to "find a way to provide the Bill with the right delegated powers and the right level of scrutiny."
46. The Committee, in considering the appropriateness of the affirmative procedure, noted that while the timing provides some certainty, there is no opportunity to amend the regulations. However, it does feel that the use of the super-affirmative procedure offered a number of potential advantages:
 1. it allows a statutory consultation requirement on the draft regulations which would provide a greater likelihood of a more formal scrutiny process of the draft regulations;
 2. it allows for the Electoral Commission to be formally consulted on the draft regulations, including the intelligibility of any proposed referendum question, even where they have previously published a report on that question; and
 3. the Scottish Government can consider any comments and make any changes to the draft regulations prior to laying them under the affirmative procedure.

x The Electoral Commission. Written submission to the Finance and Constitution Committee.

xi The Law Society of Scotland. Written submission.

Recommendations

47. For referenda meeting the criteria for being provided by subordinate legislation rather than primary legislation (as discussed earlier in this report), the Committee recommends that in all instances the super-affirmative procedure is used. The consideration period for any draft regulations should be set at 60 or 90 days to allow the Electoral Commission to come to a view on the proposed question.

Section 2 - Application of this Act

48. Section 2 of the Bill provides the power to make modifications to the Act in respect of a particular referendum. Such changes would only operate in relation to the referendum specified so they would not modify the Act for all referendums. Section 2 is also only required if the provision for a referendum to be held in Scotland is to be made by secondary rather than primary legislation.
49. Changes to the Bill made under the delegated powers in section 2 could include incidental, supplementary, consequential, transitional, transitory or saving provisions.
50. In relation to this power, the Committee wrote to the Scottish Government with similar questions as to section 1, such as the consultation requirements before draft regulations are laid and the role of the electoral Commission in the process.

Conclusions

51. As with regulations under section 1, there is no statutory requirement to consult Parliament on draft regulations covered by section 2. The power in section 2 is also not limited to only making modifications recommended by the Electoral Commission. It is therefore a significant power. As much of the evidence set out in section 1 of the Bill can also be made for the power in section 2, the Committee considers that a similar level of parliamentary scrutiny should apply. This has the added benefit of providing a consistent approach to the use of these powers.

Recommendations

52. The Committee therefore recommends that the power in section 2 to make modifications to the Act in respect of a particular referendum should, in all instances, use the super-affirmative procedure. The consideration period for any draft regulations should be set at 60 or 90 days.

Section 3 - Referendum questions

53. Section 3 requires Ministers to consult the Electoral Commission on the question to be put in any referendum. As outlined earlier in this report, concerns have been raised in written evidence about section 3(7), which excludes consideration of a question by the Electoral Commission where they have previously published a report on this question or have previously recommended the wording of a question.
54. The Committee was concerned about the Electoral Commission potentially being excluded from consideration of a referendum question. However, as outlined above, using the super-affirmative procedure would allow the Electoral Commission to be formally consulted on the intelligibility of *any* proposed referendum question.

Recommendations

55. The Committee considers that the use of the super-affirmative procedure in section 1 will allow the Electoral Commission to be consulted on the intelligibility of any proposed referendum question, even where they have previously published a report on that question.

