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Standards, Procedures and Public Appointments Committee

Comataidh Inbhean, Dòighean-obrach is Cur-an-dreuchd Poblach

Standing Order Rule changes - Delegated Powers Memorandum and Emergency Bills



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Standards, Procedures and Public Appointments Committee

The remit of the Standards, Procedures and Public Appointments Committee is to consider and report on—

- (a) the practice and procedures of the Parliament in relation to its business;
- (ab) a proposal for a Bill relating to the arrangements for financial assistance to non-Government political parties represented in the Parliament;
- (b) whether a member's conduct is in accordance with these Rules and any Code of Conduct for members, matters relating to members interests, and any other matters relating to the conduct of members in carrying out their Parliamentary duties;
- (c) the adoption, amendment and application of any Code of Conduct for members; and
- (d) matters relating to public appointments in Scotland;
- (e) matters relating to the regulation of lobbying; and
- (f) matters relating to Scottish general elections falling within the responsibility of the Cabinet Secretary for Government Business and Constitutional Relations.



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Introduction

1. The Standards, Procedures and Public Appointments Committee (the Committee) is responsible for recommending that changes are made to Standing Orders. If the Parliament agrees these changes, they come into force.
2. This report proposes Standing Order rule changes to Chapters 9 and 9C of Standing Orders to:
 - make the delegated powers memorandum an accompanying document required on introduction of a Bill for Public and Hybrid Bills; and
 - remove the requirement to produce revised or supplementary accompanying documents for a Bill that is designated an Emergency Bill.
3. The proposed rule changes were prepared by the Scottish Parliament's legislation team. In preparation of this proposal, the Scottish Government, the Non-Government Bills Unit, the clerks to the Delegated Powers and Law Reform Committee (DPLRC) and the Parliament's legal services office (which acts as legal advisers to the DPLRC) were all consulted and indicated that they were content with the proposals.
4. The Committee considered these proposed rule changes at its meetings on 25 February and 11 March 2021. This report provides an explanation for both of these rule changes in turn.

Requirement to produce a memorandum on delegated powers

Existing rules

5. Currently, where a Bill is introduced that contains delegated powers, the member in charge must lodge a delegated powers memorandum (DPM) immediately after introducing the Bill.
6. Rule 9.4A sets out the requirements in relation to a DPM, which must be lodged "immediately after" introducing the Bill. The current rule was introduced following a report of the Session 2 Procedures Committee (7th Report, 2004). The then Subordinate Legislation Committee (SLC) of Session 2 requested that provision should be made to require a DPM to be lodged. Previously there was no provision for such a document.
7. Rule 9.3 makes provision for accompanying documents (statements on legislative competence, Financial Memorandum, Explanatory Notes and Policy Memorandum). In contrast to the DPM, these documents are required on introduction, rather than immediately after.
8. The requirement for these documents to be provided on introduction ensures that they are available with the Bill when it is first introduced and makes clear the importance of these documents. However, the requirement for the DPM to be provided "immediately after introduction" leaves some room for interpretation on when exactly it should be provided.
9. As delegated powers can be used to make significant provision, the Committee considers that it is important that these are fully scrutinised, which can only be done effectively through production of a DPM. As the Bill cannot be introduced without the other documents, but the DPM is not required until after the Bill is already introduced, the consequences for not producing the DPM are less significant than in relation to the other documents.
10. The Scottish Government now always prepares the DPM in advance of introduction, suggesting that changing the rule would be unlikely to hold up introduction given current practices. In addition, consideration of delegated powers is central to the lead committee consideration of many Bills, as well as the technical consideration given by the Delegated Powers and Law Reform Committee

Proposal

11. It is proposed that the existing provisions on the DPM be incorporated into Rule 9.3 rather than existing separately within Rule 9.4A. This provides clarity about when a DPM is required and gives it the same status as the other accompanying documents.
12. It should be noted that this change would also mean that the DPM was now

required to be printed and published, rather than just published. This would mean it was available in hard copy alongside other accompanying documents, rather than just online.

13. A further small change is proposed in relation to Rule 9.3.6 alongside this to clarify that the Parliament cannot waive the requirement to provide statements on legislative competence at introduction, as these are requirements of the Scotland Act 1998. A redraft is therefore proposed to specify that the Parliament can only waive the requirement in relation to paragraphs 2 to 4 of Rule 9.3.
14. In conjunction with this proposed change, it is suggested that Rules 9.7.9 and 9.7.10 are redrafted so that the requirement to lodge a revised or supplementary DPM after Stage 2 is 'freestanding' – and does not flow from whether or not the Delegated Powers and Law Reform Committee is considering the Memorandum. This brings these rules in line with the rules for other revised or supplementary documents, and in line with the way the requirement to lodge the DPM at introduction is expressed.
15. Making this change would simplify Rules 9.7.9 and 9.7.10 and not alter the requirement on the Delegated Powers and Law Reform Committee to scrutinise delegated powers provisions in Bills after Stage 2.

Rule changes

16. After Rule 9.3.3A, add:

3B. A Bill which contains any provision conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, shall on introduction be accompanied by a Delegated Powers Memorandum setting out, in relation to each such provision of the Bill—

(a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;

(b) why it is considered appropriate to delegate the power; and

(c) the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

17. In addition, in Rule 9.3.6, after "under", it is proposed to add "paragraphs 2 to 4 of".
18. As a consequence of these changes, it is proposed to delete Rule 9.4A Memorandum on delegated powers.

Corresponding provision for Hybrid Bills

19. In order to ensure consistency, it is also proposed that corresponding changes be made to rules on Hybrid Bills. The proposed changes to Chapter 9C ensure that the rules in chapters 9 and 9C are drafted in the same terms. Notably, the rule in

chapter 9C does not currently require a DPM to make provision in relation to guidance, directions or codes of conduct, whereas the rule in chapter 9 does. As there is no obvious reason for this distinction, it is proposed that equivalent drafting is used for the rule change in chapter 9 and chapter 9C.

20. The proposed changes to Hybrid Bills, which reflect the changes made to Rule in Chapter 9 of Standing Orders are set out in Annexe A.

Requirement to produce revised or supplementary accompanying documents for a Bill

Existing rules

21. Currently, where a Bill has been amended at Stage 2 to insert a section or schedule, or substantially alter any existing provision, Rule 9.7.8A requires the member in charge to lodge revised or supplementary Explanatory Notes. This is to be done no later than the fourth sitting day before the day on which Stage 3 is due to start.
22. Where a Bill has been amended at Stage 2 in a way that substantially alters any of the costs set out in the Financial Memorandum produced when the Bill was introduced, Rule 9.7.8B requires the member in charge to lodge a revised or supplementary Financial Memorandum. This has to be done no later than whichever is the earlier of—
 - the tenth sitting day after the day on which Stage 2 ends;
 - the end of the second week before the week on which Stage 3 is due to start.
23. Where a Bill has been amended at Stage 2 so as to insert or substantially alter any delegated powers provisions, Rule 9.7.9 requires the Delegated Powers and Law Reform Committee to consider and report to the Parliament on those provisions. Where this obligation arises for the Committee, Rule 9.7.10 requires the member in charge to lodge a revised or supplementary Delegated Powers Memorandum. This has to be done by the same deadline as applies to the revised or supplementary Financial Memorandum above.
24. Rule 9.21 sets out how a Government Bill can be designated as an Emergency Bill, and the rules that then apply to scrutiny of such a Bill. Rule 9.21.2 provides that all 3 stages of an Emergency Bill are taken on the same day – unless the Parliament decides (on a motion of the Bureau) to agree to an alternative timetable.
25. The Committee noted that the Parliament has considered Emergency Bills in one day on several occasions in the past and there have also been a number of occasions where an alternative timetable for an Emergency Bill has been agreed. An alternative timetable is usually still highly expedited, but may allow some time for committee scrutiny of the Bill. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill in 2018, and the Coronavirus (Scotland) Bill and Coronavirus (Scotland) (No.2) Bill in 2020, were all designated as Emergency Bills but scrutinised over a slightly longer period than a single day.
26. The rules requiring accompanying documents (Explanatory Notes, Financial Memorandum and Policy Memorandum) and a Delegated Powers Memorandum to be provided by the member in charge at introduction apply to Emergency Bills as they do to other Government Bills (on introduction, the Bill is a Government Bill - it only becomes an Emergency Bill when the Parliament subsequently agrees to

designate it as such.) The usual documents are, therefore, available as normal to inform Members and the public about the effects of the Bill.

27. Rule 9.21.5, however, disapplies the requirement on the lead committee (if there is one in an Emergency Bill situation) to consider and report on the Financial Memorandum and Policy Memorandum. That rule also disapplies the requirement on the Delegated Powers and Law Reform Committee (DPLRC) to consider and report on the delegated powers provisions in the Bill.
28. Rule 9.21.6 also disapplies the requirement on the DPLRC to consider and report on any delegated powers provisions inserted in the Bill or substantially altered at Stage 2. While not required to, the DPLRC could still choose to do so if the timetable for consideration of the Bill allowed. The way that Rules 9.7.9 and 9.7.10 are expressed could then be read as requiring the member in charge to lodge a revised or supplementary Delegated Powers Memorandum.
29. Rule 9.21 does not disapply the requirements set out above for the member in charge to lodge revised or supplementary Explanatory Notes or Financial Memorandum.
30. The purpose of requiring revised or supplementary documents is to inform Members and the public about the effect of changes made to a Bill at Stage 2. The deadlines for lodging those documents are intended to allow committee scrutiny of them before Stage 3 proceedings.
31. In the context of a Bill being designated as an Emergency Bill, there is no or very little time between Stages 2 and 3 to allow for the production of the revised or supplementary documents or for committee scrutiny of them. This is the case whether the default one-day procedure is applied to an Emergency Bill or a slightly longer but still expedited procedure.
32. In two cases where Emergency Bills were considered under a non-default procedure in Session 5, there was insufficient time for revised or supplementary documents to be produced. In agreeing the timetable, the Parliament has therefore had to be asked to suspend the relevant rules about revised and supplementary documents.
33. The Committee considered this proposed rule change and decided to write to the Parliamentary Bureau to seek its view on the proposal to remove the requirement for revised or supplementary accompanying documents to be provided in respect of emergency Bills.
34. The Presiding Officer's response (attached at Annexe B) stated that:
 - ” The Bureau notes that the rules in question have been routinely suspended where a Bill has been treated as an emergency bill, due to expedited timescales under which such Bills are scrutinised. Therefore, the Bureau considers that a rule change to remove this requirement would be appropriate.

Proposal

35. The Committee considers that it is unlikely that there would be any circumstances in

which there will be sufficient time in the process for production and committee scrutiny of revised or supplementary documents for a Bill designated as an Emergency Bill.

36. It is, therefore, proposed that Rule 9.21 be revised to disapply the requirements to lodge revised or supplementary documents after Stage 2. The rules requiring the documents to be produced at introduction of the Bill would be unchanged.

37. The following rule changes are proposed to Rule 9.21 Emergency Bills:

In Rule 9.21.6:

Delete the last sentence of Rule 9.21.6: "An Emergency Bill which has been amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice, is not required to be considered by the committee mentioned in Rule 6.11.2."

[This is a minor change as this becomes unnecessary due to the disapplication of Rule 9.7.9 in relation to Emergency Bills made by the rule change below.]

After Rule 9.21.6, add:

"6A. Rules 9.7.8A, 9.7.8B and 9.7.9 do not apply in the case of an Emergency Bill."

Recommendation

38. **The Standards, Procedures and Public Appointments Committee recommends to the Parliament the changes to Standing Orders set out at Annexe A of this report.**

Annexe A: Standing Order rule changes

Chapter 9 (Public Bill procedures)

Rule 9.3

After Rule 9.3.3A, add:

3B. A Bill which contains any provision conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, shall on introduction be accompanied by a Delegated Powers Memorandum setting out, in relation to each such provision of the Bill—

- (a) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;
- (b) why it is considered appropriate to delegate the power; and
- (c) the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

In Rule 9.3.6, after "under", add "paragraphs 2 to 4 of".

Rule 9.4

Delete Rule 9.4A

Rule 9.7.8C, 9 and 10

For Rules 9.7.8C, 9 and 10, substitute:

9. If the Bill has been amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice—

(a) the member in charge shall lodge with the Clerk, not later than

whichever is the earlier of—

- (i) the tenth sitting day after the day on which Stage 2 ends;
- (ii) the end of the second week before the week on which Stage 3 is due to start,

a revised or supplementary Delegated Powers Memorandum.

(b) the committee mentioned in Rule 6.11 shall consider and report to the Parliament on those provisions.

9A. The Clerk shall arrange for any revised or supplementary accompanying documents to be printed and published.

Rule 9.21

In Rule 9.21.6:

Delete the last sentence of Rule 9.21.6: "An Emergency Bill which has been amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice, is not required to be considered by the committee mentioned in Rule 6.11.2."

After Rule 9.21.6, add:

"6A. Rules 9.7.8A, 9.7.8B and 9.7.9 do not apply in the case of an Emergency Bill."

Chapter 9C (Hybrid Bill procedures)

Rule 9C.3

After 9C.3.2(g), add:

(ga) in the case of a Bill which contains any provision conferring power to make subordinate legislation, or conferring power on the Scottish Ministers to issue any directions, guidance or code of practice, a Delegated Powers Memorandum setting out, in relation to each such provision of the Bill—

- (i) the person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;
- (ii) why it is considered appropriate to delegate the power; and
- (iii) the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

Rule 9C.5

Delete Rule 9C.5.

Rule 9C.11

For Rules 9C.11.16, 17 and 18, substitute:

17. If the Bill has been amended at Stage 2 so as to insert or substantially alter provisions conferring powers to make subordinate legislation--

(a) the member in charge shall lodge with the Clerk, not later than

whichever is the earlier of—

- (i) the tenth sitting day after the day on which Stage 2 ends;
- (ii) the end of the second week before the week on which Stage 3 is due to start,

(b) the committee mentioned in Rule 6.11 shall consider and report to the Parliament on those provisions.

17A. The Clerk shall arrange for any revised or supplementary accompanying documents to be printed and published.

Annexe B – response from the Presiding Officer to the Committee's letter to the Bureau on proposed rule changes relating to the suspension of Standing Orders to remove the requirement for revised or supplementary accompanying documents to be provided in respect of emergency Bills.

Bill Kidd MSP, Convener, Standards Procedures and Public Appointments Committee

By email

8 March 2021

Dear Bill

Thank you for your letter of 25 February 2021 regarding proposed rule changes in relation to the suspension of Standing Orders to remove the requirement for revised or supplementary accompanying documents to be provided in respect of emergency Bills.

The Bureau discussed this matter at its meeting on 2 March 2021. The Bureau notes that the rules in question have been routinely suspended where a Bill has been treated as an emergency bill, due to expedited timescales under which such Bills are scrutinised. Therefore, the Bureau considers that a rule change to remove this requirement would be appropriate.

I hope this is helpful in informing your Committee's consideration.

Yours sincerely

Rt Hon Ken Macintosh MSP

Presiding Officer

Annexe C: Extract from minutes

5th Meeting 2021 (Session 5), Thursday 25 February 2021

Standing Order Rule changes (in private): The Committee considered the Standing Order Rules in relation to legislation. The Committee agreed to write to the Parliamentary Bureau.

7th Meeting 2021 (Session 5), Thursday 11 March 2021

Standing Order Rule Changes (in private): The Committee agreed a draft report and draft Standing Order Rule Changes in relation to legislation.

