Law Society of Scotland—Written evidence (LEG0046)

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society’s Constitutional Law Sub-Committee welcomes the opportunity to consider and respond to the House of Lords consultation: House of Lords Constitution Committee Inquiry: The Legislative process: Call for Evidence on the Delegation of Powers. The Sub-committee has the following comments to put forward for consideration in response to the questions raised by the Committee.

Consistency of Approach

1. **For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand, and for secondary legislation on the other?**

   The Delegated Powers and Regulatory Reform Committee of the House of Lords in its response to the Strathclyde Review sketched out the boundary between primary and delegated legislation. That Report noted in paragraph 17 “Delegated legislation serves an important purpose. Erskine May describes the advantages of delegated legislation as follows “it has been recognized that the greater the number of details of an essentially subsidiary or procedural character which can be withdrawn from the floors both Houses, the more time will be available for the discussion of major matters of public concern”. Therefore delegated legislation allows the Executive more time in either House of Parliament to deal with primary legislation.

   The number of detailed provisions in statutory instruments cannot be adequately scrutinized by Parliament were they to be included in Bills. Furthermore the need to change these detailed provisions from time to time would place impossible burdens on Parliament if the changes always required the introduction of new primary legislation.

   The Delegated Powers and Regulatory Reform Committee took the view in its response to the Strathclyde Commission Review that “the issue is not the delegation powers in principle but the scope and nature of the delegations sought by Governments. The fundamental point as far as consideration of
the Strathclyde Review is concerned is that the use and misuse of provision for the delegation of powers underpins any examination of the role of the House of Lords, and of Parliament more generally, in relation to delegated legislation”. Therefore the number of matters on which Parliament needs to legislate and the technicality of many of those issues effectively requires delegated powers and delegated legislation but the issue is what is the real boundary between placing a power on the face of the Bill or delegating the power to another authority to carry out.

There is no clear boundary between the subject matters which are appropriate for primary legislation on the one hand and for secondary legislation on the other. However it is possible to identify certain principles from which the location of a subject matter in the primary legislation or a secondary legislation arena may be derived. Therefore secondary legislation may not be appropriate if the planned law is:-

(a) Of political or legal importance or especially controversial.

(b) Or if there had been changes in circumstances since the Parent Act was passed which make secondary legislation inappropriate or

(c) The power is unduly wide unless there is an adequate scrutiny mechanism attached

(d) Where the issue is a de-regulation order concerning a significant or important issue.

In all of these circumstances the subject matter would suggest that primary legislation is more appropriate than secondary legislation and that full scrutiny should be given to the subject matter of the proposed law rather than the truncated scrutiny which secondary legislation attracts.

On the other hand secondary legislation is more appropriate where less scrutiny and less time spent by Parliament is or appropriate.

Accordingly secondary legislation is appropriate in the following circumstances:-

(a) Where the issue is a technical change such as a commencement order or perhaps a change of a fine amount.

(b) The subject matter requires significant detailed complex issues but at the same time requires flexibility or

(c) The legislation implements EU legislation under the European Communities Act 1972 Section 2.

2. **Does the Government have a consistent approach to the delegation of powers and, if so, on what basis has that approach been adopted? Has the outcome of this approach been satisfactory?**

Government does not appear to have a consistent approach to the delegation of powers as the delegated powers and Regulatory Reform Committee noted in paragraphs 21 and 22 of the Report on the
Strathclyde Review “Our reports on Bills, however, indicate as time and again successive governments have attempted to relegate too many important policies to delegated legislation, leaving too little on the face of the ill. Of particular concern to the Committee is the use of skeleton bills or skeleton provisions in bills and Henry VIII powers”.

3. How effective is parliamentary scrutiny of provisions in primary legislation that delegate power to the Government?

The Parliamentary scrutiny of provisions in the primary legislation delegate power to the Government is relatively effective. The Delegated Powers and Regulatory Reform Committee note in the Report on the Strathclyde Review (para 25) “So far this session (up to 15 March) we have made 102 recommendations about 18 Bills. 13 Recommendations have yet to be considered. Of the remaining 89 recommendations whilst 25 have been explicitly rejected and five have received no comment at all, the remainder have been exclusively accepted by the Government or given a rise to debate in the House”.

This in our view, is good evidence of the effectiveness of current parliamentary scrutiny.

4. Are there circumstances in which ‘skeleton’ Bills and clauses are appropriate? Are ‘skeleton’ Bills and clauses becoming more frequent, and if so, why?

In the Delegated Powers and Regulatory Reform Committee Report on the Strathclyde Review the Committee took the view that skeleton Bills or part Bills should not be put to Parliament except in the most exceptional circumstances.

If the Parliamentary Counsel Guidance on making good law is adhered to, that law will be necessary, clear, coherent, effective and accessible. Skeleton Bills by their very nature do not fulfil these criteria. We would agree with that proposal that skeleton Bills should only be used in exceptional circumstances. It is far better if a Bill was fully developed before being introduced into Parliament.

There does seem to be a slight increase in the use of skeleton Bills as indicated in the Delegated Powers Committees Report references made to paragraph 33 and 35 which refer to the Energy Bill (2013-14), the Water Bill (2013-14), the Citizen Local Government Devolution Bill (2015-16) and the Childcare Bill (2015-16).

5. How far are matters previously dealt with in secondary legislation moving into guidance, codes of practice and directions; and what are the implications of any such movement for Parliamentary scrutiny?

We have no statistics on how far matters previously dealt with in secondary legislation are moved into Guidance, Codes of Practice and Direction. However that process does make it more difficult for Parliament to scrutinise Guidance, Codes of Practice and Directions as these are not characteristically brought to Parliament during the course of legislation. In this connection it should be noted that the case of R (on the application of Munir and another) v Secretary of State for the Home Department [2012] UKSC32 discusses the difference between law and guidance.
Care needs to be taken that legal rules are not put into guidance. Perhaps mechanisms could be created to require Ministers to make available draft Codes of Guidance, Practice and Directions during the passage of a Bill to aid MPs and Peers to scrutinise and question Ministers on the nature of these documents.

Scrutiny of Secondary Legislation

6. The extent to which it is appropriate for Parliament to devolve power to the Government inevitably depends on the appropriateness of Parliament’s future scrutiny of the exercise of those powers. To what extent are current procedures for scrutinising secondary legislation effective?

The system of scrutiny which has been highlighted by the Hansard Society in their Report “The Devil Is In The Detail” notes that the system of scrutiny is overly complex and confusing. Some statutory instruments are not subject to any form of Parliamentary scrutiny and the majority are simply made by Ministers and are not laid before Parliament for scrutiny purposes and are therefore not subject to a vote or debate. Some are laid before Parliament after being signed off but they too are not subject to scrutiny. The system seems formalistic and essentially voluntary.

The scrutiny arrangements for those statutory instruments are subject to Parliamentary scrutiny depends on the nature of the order and the scrutiny procedure assigned to that order whether it be in the negative resolution procedure, the affirmative resolution procedure or a strengthened procedure.

The Hansard Society Report confirms there are no fewer than 16 variations on these procedures including eleven forms of strengthened procedure. A public bodies order or a legislative reform order can attract significant scrutiny which undermines the concept of speed and flexibility which delegated legislation is supposed to represent. 25 legislative reform orders have been laid since 2007, one localism order since 2011 and only 29 public bodies orders have been laid to date.

We agree with the Hansard Society that it is better to use a bill rather than these forms of delegated legislation and that the system should be reviewed in its entirety.

7. Is there a case for making secondary legislation amendable in certain circumstances (and if so, in which circumstances), or for greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval (such as the existing super-affirmative procedure)? What problems arise from the ‘take it or leave it’ process currently used for agreeing secondary legislation?

Theoretically there is a case for making secondary legislation amendable in certain circumstances and for using enhanced scrutiny processes that allows Parliament to scrutinize draft instruments before the final version is introduced.

However the question then should be asked if such a process is adopted why would the parent Bill not have the same level of detail in it and would it attract the full scrutiny of Parliamentary process in both Houses. The current process only provides for the instrument to be rejected by Parliament. Given that
one reason for likely delegated legislation is the speed of the process that may result in more delay and undermine the initial reason for delegated legislation. To counter this there should be a general presumption that draft delegated legislation should be consulted upon broadly so that problems in connection with the order can be identified at an early enough stage for Government Ministers to take account of the criticisms and if so advised change the direction and wording of the order.

8. **Is there a case for allowing either or both Houses of Parliament additional powers to delay or reject secondary legislation?**

If the current procedures are changed to allow for a simplified system and the possibility of amending secondary legislation there would be no need for additional powers of delay or rejection.

**Henry VIII Powers**

9. Bills often include ‘Henry VIII powers’, which allow the Government to amend or repeal primary legislation by secondary legislation. For what reasons might such powers be appropriate, and with what level of scrutiny? Are there any subject-matters or purposes for which Henry VIII powers should never be used? Should Henry VIII powers ever be exercisable by a person who is not a Minister?

Henry VIII clauses are not new but in a lecture entitled “Why Henry VIII clauses should be consigned to the dustbin of history”, Richard Gordon QC explained that they are named after royal proclamation following of the Statute of Proclamations (1539) which allowed Henry VIII’s decisions to have the same force as Acts of Parliament. Subordinate legislation (with wide powers to amend other legislation) has increased since 1888.

The Donoughmore Committee (1932) reported that between 1888 and 1929 only 9 Acts of Parliament contained such clauses but during the Second World War they found favour again. In Mr Gordon’s view it is wrong to deny a Henry VIII clause any value. Such clauses can be useful if the Act question conflicts with a of local Acts that may not be easily identifiable or to allow either the old or the new Acts to be amended as necessary but there are dangers in this approach. Firstly, Parliament is not given an adequate opportunity to consider such orders and secondly there is no way of assessing at the time of enactment which future statutes the power will be used in connection with. The Legislative and Regulatory Reform Bill 2006 allowed a Minister to by order make provision for “reforming legislation”. After a public outcry the Government accepted that the Bill went too far and it was considerably amended to build in various safeguards including the super affirmative procedure. The Public Bodies Act 2011 is another example of Henry VIII clauses and the House of Lords Constitution Committee report on the Bill was very critical.

In our opinion Henry VIII powers should be used with care for matters of constitutional law (in very defined circumstances) or tax raising.
In our view Henry VIII powers should never be exercisable by a person who is not a Minister – it is extremely important that the exercise of these powers is subject to proper Parliamentary scrutiny and that there is proper consideration of the order concerned.

Information provision

10. Do the Explanatory Notes that accompany a Bill contain sufficient information about what the proposed secondary legislation will do?

Sometimes the Explanatory Notes that accompany a Bill do contain sufficient information but there is no hard and fast rule about how the proposed secondary legislation will be exercised. The intended content of secondary legislation is rarely made specifically clear when a Bill is going through Parliament. MPs, Peers and external observers all rely on the Reports of the Delegated Powers Regulatory Reform Committee or the Secondary Legislation Scrutiny Committee, the Joint Committee on Statutory Instruments or the Statutory Instruments Committee to provide guidance on the nature of delegated powers contained in a Bill.

11. How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament? Are there any examples of secondary legislation that brought forward provisions which were unexpected in the light of information provided by Government when the primary legislation was being enacted?

As far as possible draft legislation of a substantive rather than a formal nature should be made available when Bills are scrutinized by Parliament. This helps to understand the operation of policies in a bill. During the passage of the Scotland Bill (2015/16) we argued that draft Orders in Council under the Bill should be produced during the passage of the bill. A draft Order concerning the devolution of certain UK tribunals was placed in the library but was not circulated to Peers in time for the debate. The debate would have been improved had the Order been sent to those Peers who were particularly interested in the bill.

Brexit

12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the ‘acquis’ (the body of existing EU law) into British law?

The House of Commons Briefing Paper number 7863, 12 January 2017 notes that there are “nearly 20,000 EU Legislative Acts in force. These are mainly Directives, Regulations, Decisions and International Agreements and they include a range other instruments of these around 5,000 EU Regulations and directly applicable in all EU member states”. Section 2(1) of the European Communities Act 1972 provides the authority for directly applicable EU Law to have a legal effect in the UK without needing further UK enactment.
The Briefing Paper states that “The Government proposes that the great repeal bill will make provision for the EU Acquis to be converted into UK Law whenever practicable”. This means that directly applicable laws will need to continue to operate until the Government and Parliament decides whether to repeal, retain or amend them.

Secondary legislation will be used to convert the EU Acquis into British Law given the number of EU Legislative Acts in force including the 5,000 Regulations which are directly applicable. Professor Alan Page in his paper “The implications of EU withdrawal for the devolution settlement” prepared for the Culture, Tourism, Europe and External Relations Committee of the Scottish Parliament states “… as with the transposition of EU obligations since the UK joined the EU in 1973, it is difficult to see the relationship between EU law and UK law being unpicked without heavy reliance on subordinate legislation. Under the Scotland Act the power to make such legislation will be exercisable by the Scottish Ministers in areas of devolved competence (SA 1998, s 53(1)). The question that will arise is whether it should be exercisable by UK Ministers as well, as is currently the case with the transposition of EU obligations in the devolved areas (SA 1998, s57(1)). This would then open up the possibility of relying on UK subordinate legislation in disentangling UK law from EU law, which in turn raises the question of Scottish Parliamentary control over such legislation. At the moment there is no requirement of the Scottish Parliament’s consent to UK subordinate legislation transposing EU obligations in the devolved areas; nor is the Parliament routinely informed about such legislation. Were obligations to be transposed by UK Act of Parliament the Scottish Parliament’s consent would be required, but if they are transposed by subordinate legislation its consent is not required. The situation could thus arise in which the UK legislated extensively in areas devolved to Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas.”

Professor Page’s comments raise a number of issues which require careful consideration.

In Professor Page’s view, there is a significant potential gap in the framework of Scottish parliamentary control over UK law making in the devolved areas, which the Scottish Parliament should be alert to the need to close should UK Ministers be given the power to revise EU law in the devolved areas.

In our view there may be circumstances where UK subordinate legislation in connection with Brexit could deal with EU legal issues which fall within the devolved area but there would need to be justification for that approach. At the least discussions should take place at the Joint Ministerial Council and agreement reached on the terms of such UK delegated legislation. Following on such a Ministerial agreement this legislation should be laid in each of the devolved legislatures for information only.

13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

In the first instance Government will require to consult on their policy proposals for the EU legislation which is preserved by the Great Repeal Bill or through the Withdrawal Agreement or the Continuing
Relationship Agreement. This consultation effort will be a significant undertaking and involve multiple consultations from each Whitehall Department. A similar exercise would be needed from each of the devolved administrations.

The process of scrutiny of the delegated legislation involved may need a review of the Committee structure in both Houses and perhaps enlarged Committees. Bearing in mind that this material will already have the status of law in the UK there will need to be a sift to identify those Statutory Instruments which require special attention because of proposals to repeal or amend the law involved. That sifting process will require significant effort on the part of the Committees, Peers and MPs and the Civil Service.

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