

COMMONWEALTH ASSOCIATION OF LAW REFORM AGENCIES

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IMPLEMENTATION OF REPORTS OF LAW REFORM AGENCIES: SOME NEW DEVELOPMENTS

SCOTLAND

There has been an exciting development for law reform in Scotland.

A new process for certain Scottish Law Commission Bills is bedding down in the Scottish Parliament. This new process was specially designed to increase capacity within the Scottish Parliament for law reform, and so improve the rate of implementation of Commission Reports.

This development opens a new era for implementation of law reform for Scotland.

This is well timed, given that the Scottish Law Commission celebrates its 50th anniversary in 2015. The Scottish Law Commission, along with the Law Commission in England and Wales, was established by an Act of the UK Parliament: the Law Commissions Act 1965, and has operated as an independent law reform body for 50 years.

The Scottish Parliament : the Delegated Powers and Law Reform Committee

A Committee of the Scottish Parliament has been established with a specific remit on law reform: the Delegated Powers and Law Reform Committee.

The Scottish Parliament has made special provision for a “Commission Bill”: a Bill which implements all or part of a Report of the Scottish Law Commission, and which meets certain criteria laid down by the Presiding Officer. Such Bills are within the remit of the Delegated Powers and Law Reform Committee.

Background: the Scottish Parliament

The Scottish Parliament was established by an Act of the UK Parliament at Westminster: the Scotland Act 1998; with devolved powers to legislate for Scotland on a wide range of matters.

It is a single chamber Parliament; it has no upper house or second chamber. The Committees of the Parliament therefore play an important role. Each Committee is chaired by a Convener, and most Committees have between 5 and 9 members MSPs as members. These are selected with regard to the balance of the various political parties and groupings in the Parliament.

A Committee can invite any person to attend a meeting as a witness. Witnesses give evidence or provide documents related to the business of the Committee. The Parliament has a number of mandatory Committees; and sets up subject Committees to look at areas of policy such as justice.

There are usually 3 stages of a Bill.

Stage 1: the Parliamentary Committee or Committees take evidence on the Bill and produce a Report on its general principles. If the Parliament agrees, the Bill goes on to Stage 2. If it does not agree, the Bill falls.

Stage 2: the Bill is considered in detail by a Committee, or occasionally by a Committee of the whole Parliament. Amendments to the Bill can be made at this stage.

Stage 3: the Bill is again considered at a meeting of the Parliament. Further amendments can be made and the Parliament then debates and decides whether to pass the Bill in its final form.

Once the Bill has been passed, there is a four week period during which it may be challenged if it is believed to be outwith the legislative competence of the Scottish Parliament. If the Bill is not challenged by a reference by a UK or Scottish Law Officer to the UK Supreme Court, it is then submitted by the Presiding Officer to the Queen for Royal Assent. On receiving the Royal Assent, the Bill becomes an Act of the Scottish Parliament.

Scottish Parliament decision

The Scottish Parliament decided in May 2013 to make changes to its Standing Orders, to provide for the Delegated Powers and Law Reform Committee; and to confer a remit on the Committee that includes law reform. An existing Committee of the Parliament, the Subordinate and Legislation Committee, was renamed the Delegated Powers and Law Reform Committee; and the remit of the Committee was extended to include scrutiny of certain types of Commission Bills.

The Parliamentary Bureau were given the power, after introduction of a Bill meeting criteria set by the Presiding Officer, to refer the Commission Bill to the Delegated Powers and Law Reform Committee. This Committee would then be the lead Committee in scrutinising the Bill.

The Delegated Powers and Law Reform Committee is given the power to refer such a Bill back to the Parliamentary Bureau if it becomes clear that the Bill does not in fact meet the criteria for such a Bill. The Parliament can then designate another Committee as the new lead Committee, which can take into account any evidence gathered and any views submitted to it by the Delegated Powers and Law Reform Committee.

These changes took effect on 5 June 2013.

Criteria for such Bills

The Presiding Officer of the Parliament made a determination on 6 June 2013 setting out the criteria for Commission Bills for this process:

“As well as implementing all or part of a report of the Scottish Law Commission... The Presiding Officer has determined under Rule 9.17A.1 (b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament—

(a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;

(b) which does not relate directly to criminal law reform;

(c) which does not have significant financial implications;

(d) which does not have significant European Convention on Human Rights (ECHR) implications; and

(e) where the Scottish Government is not planning wider work in that particular subject area.”

Consideration of the criteria

The criteria reflects concerns raised in Parliament that the remit of a new Committee is not extended so as to in effect encroach on the territory of the existing Justice Committee, or create a second Justice Committee (given a previous poor experience of having two Justice Committees in place in one session). The focus of the Parliament was on finding a way forward to address law reform Bills of a certain type: ones that reform the law to reflect changes in society or develop the common law; rather than Bills that are, for example, contentious or have a political profile.

Many Commission Bills, emanating from useful law reform projects designed to address a variety of technical legal issues, will qualify for the process. This is subject to the proviso that on consultation, consultees generally agree the reform is needed and on the approach to reform put forward.

This process is therefore not a route for implementation of Commission Bills that seek to reform the law but require decisions by the Parliament on sensitive issues on which there may be a range of views within the country and across political parties.

First Bill successfully through the process

The first Commission Bill to be put into the new Parliamentary process has now successfully been enacted, following scrutiny by the Delegated Powers and Law Reform Committee. It received Royal Assent on 1 April 2015.

This is the Legal Writings (Counterparts and Delivery) (Scotland) Bill, introduced in May 2014 and which passed Stage 3, the last Parliamentary stage, in February 2015.

The Bill makes two significant improvements to Scots law and practice when executing documents. It provides that a document which to be signed by two or more parties can be executed in counterpart - ie that each party can sign its own copy of the document, which will then be delivered to other party or parties (or their nominee where there are several of them). The Bills also permits delivery of paper legal documents by electronic means, meaning that the document will take legal effect upon such delivery: thus resolving the current doubt as to whether faxing or emailing a copy of the signed paper document can make it legally effective.

The Scottish Government's Programme for Scotland 2014/15 stated that the Government will continue to identify opportunities to make use of the new legislative procedure established to improve the rate of implementation of Commission Reports. A second Bill will be put forward as a candidate for this procedure, on technical aspects of succession law. This would implement a number of recommendations made by the Commission in its Report on Succession in 2009.

Issues

There may be questions in practice as to which Bills qualify for the process. The criteria may be thought to be restrictive.

It has been noted however that the criteria require an element of interpretation; and also that criteria in a determination can more easily be adjusted in the light of experience than can Standing Orders. A question was raised in the Parliament by the Convener of the Delegated Powers and Law Reform Committee, on whether thinking should start about a wider remit for the Committee, in order to look after the maintenance of Scots law.

So as the process beds in, and confidence in it grows in light of experience, it may be that the criteria can be interpreted broadly, or the terms adjusted in the light of experience.

Benefits

The benefits of the new process include:-

- more Parliamentary time/capacity is available to deal with Commission Reports
- this will increase implementation of Commission Reports
- an enhanced responsibility is provided for a Committee which had the expertise, and some capacity to take on a new area of work
- making improvements to Scots law, for example as with the first Bill, to make Scots law more efficient and up to date, and so make things easier for people, and for businesses and their advisers.

Effect on the Commission

The establishment of the process in the Scottish Parliament has an effect on the Scottish Law Commission:

- The profile of the Commission and of law reform has been considerably increased, within the Parliament and beyond
- Implementation of Commission Bills will be increased, with a dedicated process available for certain types of Bills
- There is an obligation on the Commission to identify law reform projects that will result in a Bill suitable for the process. The Commission has adapted its methodology for this purpose: for example, specifically consulting on suggestions for projects that would result in a Bill for the process; and being aware of the need to identify potential candidate Bills from within current law reform projects.
- Resource issue: the Commission needs to support the Government Bill team and the Committee.

Summary

It took some years of steady work to increase the capacity of the Scottish Parliament to address Commission Bills, by providing for the new process.

This involved raising the issue of implementation, and the need to increase implementation; for this purpose engaging with Ministers, Government and the Parliament by a series of meetings and events. This led to the establishment of working groups to consider the issues and find a way forward. These working groups identified a way of increasing capacity within the Parliament, while respecting the sensitivities of existing Committees. Finally, Parliament decided to accept the recommendations for establishing this process.

The result reflects a common understanding reached amongst Ministers, Government officials, Parliamentarians and the Commission that it is important to find opportunities for Parliament to consider Bills implementing Commission recommendations.

The new process recognises the valuable role of the Scottish Law Commission in making recommendations to improve, simplify and update the law of Scotland.

This has raised the profile of the Scottish Law Commission and of law reform in Scotland, in particular within the Scottish Government and with the Scottish Parliament.

It is recognised however that the new process is but a partial answer to the issue of finding Parliamentary time to implement Commission recommendations. So work on the general implementation agenda continues.

The expectation, overall, is that many Commission Bills, including Bills on difficult and complex areas, will continue to be taken forward by the Scottish Government as Government Bills in the Scottish Parliament; these may be considered by other Committees, principally the Justice Committee.

In addition, however, there will be a steady flow of Commission Bills also being implemented; via the new process involving the Delegated Powers and Law Reform Committee

The hope is therefore that a new era for law reform in Scotland has begun in the golden anniversary year of the Commission.

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