Law Society of Scotland

Response to the Hansard Society Consultation on its Proposals for a New System for Delegated Legislation

March 2023

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Law Society Scotland welcomes the opportunity to consider and respond to the Hansard Society's Consultation on *Proposals for a new System for Delegated Legislation*. We have the following comments to put forward for consideration.

General Comments

The proposals by the Hansard Society are concerned with changes to the system of delegated legislation in the United Kingdom Parliament.

They do not concern Scottish Statutory Instruments or the procedure for their scrutiny in the Scottish Parliament. These procedures were reformed in Part 2 of the Interpretation and Parliamentary Reform (Scotland) Act 2010.

However, we suggest that some of these proposals, suitably modified, would be of considerable benefit in the Scottish context. It is therefore suggested that the Scottish Parliament and, in particular, its Delegated Powers and Law Reform Committee, should be urged to consider them along with the Scottish Government.

PART 1 THE BOUNDARY BETWEEN PRIMARY AND DELEGATED LEGISLATION

Parliament and Government should negotiate and agree a Concordat comprising a set of 'Principles of Legislative Practice' for the preparation, production and scrutiny of delegated powers and Statutory Instruments, and a list of 'Criteria on the Use of Delegated Legislation', setting out matters that should not be included in delegated legislation.

Questions

What should be included in the Concordat – particularly in the Principles of Legislative Practice and the Criteria on the Use of Delegated Legislation?

How might adherence to the Concordat be overseen by Parliament?

We agree with the Hansard Society that it would be useful if a Concordat on Legislative Delegation could be agreed between the Government and Parliament (paragraph 8).

We also agree that such a Concordat should include the proposed Principles of Legislative Practice (paragraphs 11- 13) and Criteria on the use of Delegated Legislation (paras 14 and 15)

The Criteria

The proposed Criteria on the use of Delegation Legislation (para 15) do not appear to add anything to what has been the existing practice for 20 years or more. There has always been some uncertainty as to what is meant by sub-delegating a power to legislate. However it would do no harm to have the existing practice formalised into agreed criteria.

The Operation

As for its enforcement, we agree that the Concordat should not be embodied in legislation but should simply rely upon being a constitutional convention. The Concordat should not be justiciable.

The Concordat should be subject to the proposed compliance provisions including, where there is disagreement between the Government and the Parliament which cannot be resolved, the "badging" of the disputed provisions in primary legislation and the enhanced scrutiny of delegated legislation made under those provisions.

PART 2 SCRUTINY OF DELEGATED LEGISLATION

Proposal 2: A new Statutory Instruments Act should remove the existing scrutiny procedures applied by parent Acts to the use of delegated powers. In their place, a new single scrutiny procedure should apply to all SIs, in which Parliament can calibrate the level of scrutiny to the content of the Instruments.

We agree with the criticisms of the existing scrutiny procedures (paragraphs 28 to 33) and that they should be replaced by a single scrutiny procedure.

Proposal 3: All SIs should be laid before Parliament in draft, other than in exceptional circumstances.

We agree that all SIs should be laid in draft, except in those cases where the Government considers that there is a need for the urgent procedure.

The 21 day rule should continue to apply so that, normally, SIs should not come into operation less than 21 days after being laid. (Paragraphs 39 to 43).

Although the Government may have reservations about this those reservations may be answered by the consideration that:

> *"the overall period of time between the laying of an SI and its entering into force would not deviate significantly from existing practice."(para 41).*

In any event, the advantages of laying in draft which are mentioned in paragraph 39 would appear to be so beneficial to those affected by the SI, including the Law Society, that they should outweigh the objections by the Government.

The new scrutiny procedure

Proposal 4: A Parliamentary Office for Statutory Instruments (POSI) should be established as a joint department of both Houses of Parliament to analyse and produce briefings on SIs for MPs and Peers.

Proposal 5: A Joint Secondary Legislation Sifting Committee (JSLSC) should be established to determine which SIs require further scrutiny and approval by Parliament.

We have no comments upon these proposals or upon the selected questions relating to them.

However, it may be doubted whether, without a considerable increase in resources,

- the POSI would be able to analyse all the draft SIs which are laid and provide briefing to JSLSC upon each of them within fourteen calendar days (paragraphs 46 to 52); or

- the JSLSC could complete the sift of all draft SIs within 15 siting days from the date of laying and identify which SIs should go into Group A where no further scrutiny is required or Group B which require further scrutiny and approval by both Houses because they raise “legal or political issues likely to be of interest to both Houses” (paragraphs 57 to 60)

It may be expected, therefore, that, in many cases, the JSLSC would need to extent their period of scrutiny by up to twenty sitting days and require more evidence to be given by the Government (paragraphs 61)

The proposals to extend the period of scrutiny introduce uncertainly and delay into the process which may make it unlikely that the Government will approve them.

Consideration and approval of Sis placed in Group B

Proposal 6: In the House of Commons, a set of permanent Regulatory Scrutiny Committees (RSCs) should be established to scrutinise, debate and – in some circumstances – approve SIs placed into ‘Group B’ by the JSLSC.

Proposal 7: In the House of Commons, motions to approve SIs should be amendable so that MPs can propose changes to an SI before it is approved.

Proposal 8: In the House of Lords, a new ‘think again’ procedure should be introduced so that Peers can ask the House of Commons to consider their concerns before an SI is approved.

We have no comment to make upon these proposals or upon the selected questions relating to them.

It will be for the House of Commons to decide whether and when a RSC can act on its behalf in debating and approving a SI or in suggesting amendments to the approval motion.

Making and revoking an SI

Proposal 9: A 30-sitting-day 'safety window' should be introduced during which any parliamentarian could table a revocation motion against an SI after it had been made.

If the SI has already been brought into operation before the revocation motion is passed, what is intended effect of a revocation motion which is then passed?

Variations on the standard procedure

Proposal 10: A new urgent procedure should be introduced for use only in exceptional circumstances when the Government needs an SI to be made and come into force more quickly than is possible under the new standard scrutiny procedure.

Some alternative process may be needed when the Government needs an SI to come into force during a Parliamentary recess but recalling Parliament is not warranted.

Devolution

Proposal 11: The UK's legislatures should agree a hierarchy of conditions that must be met before a UK Minister can lay and / or make an SI that engages a devolved competence.

What happens:

- if the inter-parliamentary working group does not succeed in reaching a negotiated agreement about those conditions; or
- if the UK Minister does not agree to abide by those conditions.

It is suggested that the JSLSC be able to delay Parliament's approval of an SI where the POSI finds that the Minister has not complied with the relevant conditions.

PART 3: THE PREPARATION AND PUBLICATION OF STATUTORY INSTRUMENTS AND SUPPORTING DOCUMENTATION

Proposal 12: The Joint Secondary Legislation Sifting Committee (JSLSC) should be able to delay Parliament's approval of an SI where the Parliamentary Office for Statutory Instruments (POSI) finds that important information and / or supporting documentation has not been provided by Ministers. POSI and the National Audit Office should report regularly on the relative performance of Departments in relation to the preparation of SIs.

Proposal 13: Parliament should publish draft SIs together with related materials on its website, bringing the SI publication process in line with that for primary legislation.

We have no comments upon these proposals.

In addition, however, we suggest that consideration should be given to making it mandatory to have a Keeling Schedule, or preferably a running consolidation, where the SI makes substantial amendments to other SIs made under the same power.

Law Society of Scotland

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