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Stuart McMillan MSP
Convener
Delegated Powers and Law Reform Committee

By email: SPPA.Committee@parliament.scot

23 October 2024

Dear Stuart

Thank you for your letter of 8 October 2024 following up on the meeting of the Delegated Powers and Law Reform Committee held on 1 October. You requested information relating to two items discussed at that meeting.

Firstly in relation to the process of SSI drafting, as the Committee will appreciate a one size fits all approach to the preparation of SSIs is not necessarily the most effective – or possible – approach. But I will set out the typical approach and process.

Similar to primary legislation, the drafting of an instrument is an iterative and dynamic process that involves ongoing testing and consideration by officials to ensure that it achieves the desired effect. This may involve wider discussions within Government if there are cross cutting issues. Once it is agreed that the instrument achieves the policy it will be subject to a range of checks within the Scottish Government Legal Directorate. These checks will typically involve a review of the instrument by other lawyers within the relevant team that has responsibility for the instrument. The need, and time necessary, for these checks will be built into the timetable.

Throughout the drafting and checking process, consideration is given to range of matters, including:

- that the instrument achieves the policy objectives,
- that the instrument is within the scope of the enabling powers,
- that the instrument is within devolved competence.

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Once the instrument has completed these checks, it will be reviewed by a solicitor who has not previously been involved in drafting the instrument. This consists of a technical check of the SSI, including:

- that the enabling powers for the instrument have been correctly identified,
- that the correct form of Parliamentary procedure has been identified,
- that the drafting is in accordance with relevant drafting style and conventions.

As with other stages in the process, the time set aside for this review will vary. On occasion, additional time might be built in for this stage of the process, for example for particularly large instruments. As the Committee will appreciate, on occasion checking times require to be truncated, for example should there be a need for an urgent SSI.

On the point about the historic commitment on the Budget (Scotland) Act 2023 Amendment Regulations 2023, you asked for clarification of the Scottish Government's position. I noted in the session that the 2023 Act has now been superseded, so we do not intend to deal with the issue that was identified in relation to that legislation. I can confirm that the Scottish Government consider that the previous commitment to amend the Budget (Scotland) Act 2023 Amendment Regulations 2023 has now lapsed as the Budget (Scotland) Act 2023 to which those regulations related has ceased to be of practical effect in the current financial year. Therefore the point to which the commitment related, having effect in relation to financial year 2023/24, can no longer be usefully corrected.

In relation to the brief discussion on future Scottish Law Commission reports, I thought it would be helpful to clarify that the SLC has not yet published recommendations on housing (tenement law) or industrial injuries (damages for personal injuries) so it is not yet possible to offer a view on their suitability for scrutiny by this committee. I expect the former to be published by Spring 2026 and the latter to be published before the end of this year. When relevant Ministers have had time to consider any recommendations they will respond to the SLC as is normal and I will ensure that the Committee is kept aware of those developments if that would be helpful.

Yours,



JAMIE HEPBURN

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