

Freedom of Information Reform (Scotland) Bill

The Law Society of Scotland's Privacy Sub-Committee would like to thank you for the opportunity to give evidence to the committee on 13 November as part of Stage 1 scrutiny of the Freedom of Information Reform (Scotland) Bill¹ (**Bill**).

I am writing to follow up on two points arising from the evidence session.

Proposals on the Designation of Scottish Public Authorities

During the session, Emma Roddick MSP asked our views on;

1. whether we support Parliament in having a more active role in reviewing section 5 reports under the Freedom of Information Act 2002 (**2002 Act**); and
2. our general thoughts on broadening Parliamentary involvement in the designation of Scottish Public Authorities (**SPA's**).

Having had a chance to consider, in terms of the proposed changes to the reporting requirements under section 5 of the Bill (amending section 7A of the 2002 Act²), we support the increased use of section 5 reports in Parliament to outline how Scottish Ministers have exercised the use of their designation powers.

We believe this will increase rates of designation and better serve capturing areas where a change in delivery in public services has occurred (or is about to occur). In achieving this, we also believe that the proposed changes will ensure that the 2002 Act keeps pace with the way that public services are delivered in Scotland.

In terms of our more general view on Parliamentary involvement in the designation process, we note that section 2(1) of the Bill sets out a new requirement for Scottish Ministers to consider a proposal made by the Scottish Information Commissioner (**SIC**) when deciding whether to designate a SPA. We further note that subsection (2) (inserting section 5A to the 2002 Act) will also confer powers on the Scottish Parliament to add, by resolution, to the list of Scottish public authorities in Schedule 1 of the 2002 Act.

We support the underlying policy intention behind this and agree it will encourage the further designation of SPAs. Whilst we view the existing powers of designation as being relatively broad and flexible in approach, we also recognise the need for reforms, particularly in view of comments³ made by the SIC that these provisions have been underused in the 10 years since this law came into effect.

We therefore welcome this revised approach and believe it will lead to better transparency and accountability in the public sector. At the same time, we also believe that wider Parliamentary involvement will further embed a consultative process in the designation of SPAs which will mitigate the risk of any arbitrary designation.

¹ [Contract \(Formation and Remedies\) \(Scotland\) Bill as introduced](#)

² [Freedom of Information \(Scotland\) Act 2002 – section 7A](#)

That being said, we would ask that consideration is given to the associated difficulties with timing that may arise in opening up the powers of designation to the Scottish Parliament. Should any delays arise in the Parliamentary process, certain organisations that may have otherwise fallen within scope may avoid designation until such a point that a public sector contract has either commenced or concluded. We therefore welcome the Bill's insertion of subsection 5A into the 2002 Act which requires that a section 5 report is debated within twenty sitting days of it being laid.

Alongside this, it may also be prudent to consider what other triggers might encourage (or require) Ministers to lay a report outside of the 2 year reporting period required under the section 7A(3) of the 2002 Act⁴. One such trigger may be at the request of a particular quasi-organisation delivering both public and private services.

Finally, we would also ask that consideration is given to complexities that may arise in designating non-Scottish registered companies or cross-border contractors. This is in terms of enforcement issues that may present themselves should a specific breach arise.

Repeal of First Minister's Veto Power on certain decisions of the Scottish Information Commissioner

During the evidence session, Sue Webber MSP asked why we do not support the repeal of the First Minister's veto powers under section 52 of the 2002 Act⁵, and highlighted that the Society was an outlier from other responses the Committee had received to the Call for Views⁶.

In response, we confirmed we did not support the repeal given that existing safeguards already exist to protect against the over-extension of this power. For example, we pointed to the fact that a decision notice must be made on reasonable grounds and that the First Minister must consult with other members of the executive when exercising any such a decision. We also noted that this power has never been used and is also subject to judicial review.

Having had a chance to further reflect, we believe that other examples do also exist to support retaining this veto power. For example, this may be required to protect highly sensitive information held by the police where its confidentiality may be of the upmost importance and in the wider public interest.

³ [FOIR\(S\) Bill Policy Memorandum, at Para 37](#)

⁴ [Freedom of Information \(Scotland\) Act 2002 – section 7A](#)

⁵ [Freedom of Information \(Scotland\) Act 2002 – section 52](#)

⁶ [Published responses for Freedom of Information Reform \(Scotland\) Bill - Scottish Parliament - Citizen Space](#)

However, we do also acknowledge that other mechanisms exist which act as an alternative check on a decision of the SIC. For example, we note that an application to appeal direct to the Court of Session is available under section 56 of the 2002 Act⁷. This is in relation to a decision notice that has been issued by the SIC where it is believed that an error of law may have been made. Whilst we accept that this could act as an alternative provision to that of the First Minister's veto power, we would point to the significant financial resource (and time) that may be required in any appeal to the Court of Session. This in itself could pose a challenge to certain smaller public authorities where financial resources are already stretched, or if the disclosure needs to be prevented in a timely manner.

With the above in mind, whilst it remains the case that we do not support the proposed repeal of the First Minister's veto power, we do recognise that a range of arguments exist, both for and against, in any repeal of this provision.

I hope that the above is of assistance to the committee. If the Society can assist further, please do not hesitate to contact us.

⁷ [Freedom of Information \(Scotland\) Act 2002 – section 56](#)