



The Scottish Parliament
Pàrlamaid na h-Alba

Published 30 October 2025
SP Paper 899
79th Report, 2025 (Session 6)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated Powers in the Freedom of Information Reform (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Overview of the Bill

1. This Bill was introduced on 2 June 2025 by Katy Clark MSP. The lead committee is the Standards, Procedures and Public Appointments Committee.
2. The Bill consists of 23 sections reforming the provisions of the Freedom of Information (Scotland) Act 2002 (“FOI Act”), making provision in relation to the designation of a Scottish public authority, the proactive publication of information, designation of freedom of information officers and enforcement.
3. Although Katy Clark MSP is a Member of the Committee, she was not present on either of the occasions the Committee considered it. On [30 September 2025](#), as the Member-in-charge of the Bill, Katy Clark MSP did not attend for the agenda item under which it was discussed. On [28 October](#), Katy Clark MSP sent apologies for the Committee meeting.
4. Following consideration on 30 September, correspondence was sent [from the Committee to the Member on 2 October 2025](#). A [response was received](#) on 16 October 2025.

Delegated Powers

5. The Bill confers 3 powers to make subordinate legislation on the Scottish Ministers and others. It also confers a resolution making power on the Scottish Parliament.
6. While this power is not being delegated from the Parliament, if it were exercised, the resolution of the Parliament would be treated “as if it were a Scottish statutory instrument”.
7. The Member has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the more normally framed delegated powers in the Bill and the procedure chosen.
8. All the powers are discussed in full below.

Review of relevant powers


Section 2(2) - Power of the Parliament to designate Scottish public authorities

Power conferred on: The Scottish Parliament

Power exercisable by: Resolution of the Parliament

Parliamentary procedure: Resolution of the Parliament

Provision

9.  Section 2(2) of the Bill inserts section 5A into the FOI Act. This power allows the Parliament to designate persons not listed in schedule 1 or capable of being added to that list, and who is neither a public body or holder of any public office, as a Scottish public authority for the purposes of the FOI Act. This power is only exercisable in relation to persons who, it appears to the Parliament, are exercising functions of a public nature or are providing services under a contract with a Scottish public authority as part of their functions.
10. When designating a Scottish public authority the Parliament must specify the functions of a public nature which appear to be exercised or specify the service being provided. Before making a resolution, the Parliament must arrange for one of its committees or sub-committees to consult with every person to whom the resolution relates or who appear to represent those persons and any such other persons they consider appropriate.
11. A resolution may make different provision for different purposes and may make any incidental, supplementary, consequential, transitional, transitory or saving provision.

Committee consideration

12. Although this power is not being delegated from the Parliament, if it were to be exercised, it would be treated “as if it was a Scottish Statutory Instrument” but it was not addressed within the DPM. The Committee wrote to the Member to ask for the information that would generally be in the DPM to allow a full assessment of the power to be undertaken.
13. In correspondence with the Committee, the Member states that this power, and the Bill, are intended to address the outstanding recommendations of the May 2020 Public Audit and Post Legislative Scrutiny report. The Member notes that this power would allow the Parliament to take the initiative, where Scottish Ministers have failed to act, to designate a Scottish public authority so they will be subject to the provisions of the FOI Act without the need for primary legislation to do so. This is to ensure that public services are provided subject to transparency and openness.
14. This power is in very similar terms to that already conferred on the Scottish Ministers in section 5 of the FOI Act. The intention from the Member’s response is to provide a mechanism whereby the Parliament may take action to designate a Scottish public authority if it is considered appropriate and the Scottish Ministers have not done so. This can only be done where the criteria specified in the Bill are

met. In addition, there is also a requirement to consult before the Parliament can make a resolution. Any resolution made is treated as if it is an SSI and subject to the Interpretation and Legislative Reform (Scotland) Act 2010.

15. The terms of the power are similar to those already conferred on the Scottish Ministers, there are specified criteria that require to be met that are on the face of the Bill and it is clear what can be done via this procedure. No more can be done other than designating a person or persons as a Scottish public authority and so making them subject to the requirements of the FOI Act. For these reasons the Committee is content with the power.

- 16. The Committee is content with the power in principle and that it is subject to the procedure as set out in the Bill.**

Section 15: Proactive publication duty and publication code

Power conferred on: Scottish Information Commissioner

Power exercisable by: Code of practice

Parliamentary procedure: Affirmative

Provision

17. Section 15 of the Bill inserts new sections 60A and 60B into the FOI Act. Section 60A places a duty on Scottish public authorities to proactively publish information relevant to their functions and in doing so must comply with any guidance issued by the Scottish Information Commissioner.
18. Section 60B places a duty on the Scottish Information Commissioner to prepare a draft code of practice setting out how Scottish public authorities must comply with that duty. New section 60B(2) sets out a non-exhaustive list of what must be included in the draft code of practice including what information must be proactively published, how it should be made available and searchable, and how long it should be available for.
19. The Scottish Information Commissioner cannot publish the code of practice until they have consulted with the Keeper of the Records of Scotland, any Scottish public authority listed in schedule 1 or such persons as appear to the Commissioner to represent those authorities, any person designated by means of an order under section 5, the Scottish Ministers, and such other persons as appear to the Commissioner to be relevant. The code of practice must also be laid before and approved by the Parliament before publication.

Committee consideration

20. The Member explains in the DPM that the Scottish Information Commissioner is best placed to determine the specific requirements in respect of the broad proactive publication duty given their role and that this will be a substantial document. The code will be imposing duties on Scottish public authorities and so the affirmative procedure is considered appropriate.

21. The specific detail of the proactive publication duty would not normally appear on the face of a Bill. It is common practice for such technical detail to be contained in a code of practice that must be complied with, and the power itself sets out a number of matters that must be specified within the code so the Parliament can anticipate the provision that may be made. It also appears appropriate that the Scottish Information Commissioner prepares and publishes the code given their area of expertise.
22. The code of practice does have legislative effect given that Scottish public authorities are to have regard to it in carrying out their functions under the FOI Act. There is a requirement on the Scottish Information Commissioner to consult with the Keeper of the Records of Scotland, any Scottish public authority listed in schedule 1 or such persons as appear to the Commissioner to represent those authorities, any person designated by means of an order under section 5, the Scottish Ministers, and such other persons as appear to the Commissioner to be relevant.
23. The FOI Act has several provisions that permit the Scottish Ministers to issue codes of practice, specifically in sections 60 and 61. These codes of practice are laid only before the Parliament and the code of practice in the Bill is subject to a much higher level of scrutiny. The codes of practice in sections 60 and 61 which provides it is *“in the opinion of the Ministers, be desirable for the authorities to follow in connection with the discharge of the authorities’ functions under this Act.”*
24. The code of practice to be issued under the Bill requires that Scottish public authorities must comply with the code of practice, so a distinction can be drawn. The code of practice is to be laid before and approved by the Parliament offering a high level of scrutiny given the effect that it will have for Scottish public authorities carrying out their functions.

25. The Committee is content with the power on the Scottish Information Commissioner to prepare a draft code of practice and that it is subject to the affirmative procedure.

Section 20(1): Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

26. Section 20 confers power on the Scottish Ministers by regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act. Regulations under this section may make different provision for different purposes and are subject to the negative procedure.

Committee consideration

27. The power to make stand-alone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill.
28. The reason given in the DPM for taking this power is that it is necessary to ensure the Bill can be given its full effect. The DPM also states that as this is a new body of law, the Bill may need further provision to be made to ensure that the policy objectives can be achieved with the power ensuring that issues of an ancillary nature can be dealt with effectively.
29. The power is limited to giving full effect to the Act so the power can only be used to make provision that was within the scope and intention of the Act as passed. Additionally, it does not permit the amendment of primary legislation. Given the limited nature of the power and the fact it cannot be used to modify primary legislation the negative procedure appears appropriate.

30. The Committee is content with the power in principle and that it is subject to the negative procedure.

Section 22: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

31. Section 22 sets out when the provisions of the Bill will come into force. Sections 1 to 7, 8(c), 9 to 11, 13, 14, 17 to 20, 21 and 23 will come into force on the day after Royal Assent. Sections 8(a), (b) and (d), 12, 15 and 16 will come into force either 12 months beginning with the day of Royal Assent or, if earlier, on such day, or days, as the Scottish Ministers appoint in regulations.
32. Section 22(3) provides that regulations made may include transitional, transitory or saving provision and make different provision for different purposes. Commencement regulations are to be laid before the Parliament but are not subject to any Parliamentary procedure.

Committee consideration

33. The Member explains in the DPM that the power to commence the remaining provisions in the Bill will ensure that Scottish public authorities have been able to take necessary steps to prepare for the new duties imposed by them. It is further explained that such provisions may require to include transitional or transitory provision, or the saving of repealed or amended provisions. If the Scottish Ministers do not exercise this power within 12 months of Royal Assent, they will come into force at the end of that period.
34. Commencement powers are another common feature in modern primary

legislation. Most of the Bill's provisions come into force on the day after Royal Assent and only limited provisions can be brought into force through the exercise of the commencement provision. The provision also effectively has a sunset clause built in so if the remaining provisions are not commenced within 12 months of the Bill receiving Royal Assent they will automatically come into force. The power is very limited in nature and narrow in scope. It is also appropriate that it is subject to the laid only procedure.

35. The Committee is content with the power in principle and that it is laid only.

