

Greg Black
Clerk to Delegated Powers and Law Reform Committee
The Scottish Parliament
Horse Wynd
Edinburgh
EH99 1SP

25th April 2025

Thank you for your very helpful letter of 26 March 2025 regarding the delegated powers in the Scottish Parliament (Recall and Removal of Members) Bill. I apologise for the length of time it has taken me to respond.

This response seeks to address your questions regarding the delegated powers in section 21(2)(c) of the Bill.

Regulations under section 21(1) of the Bill may make any provision that would be within the legislative competence of the Scottish Parliament, if included in an Act of the Scottish Parliament, as to (a) the conduct of recall petition processes, (b) the conduct of polls under section 16 (Poll to determine if recalled member to fill regional vacancy); and (c) the questioning of such a process or poll and the consequences of irregularities.

This power itself is similar to the regulation-making power in section 18 of the Recall of MPs Act 2015. However, the framing of this power echoes the order-making power in section 12 of the Scotland Act 1998. The scope of the power in section 12 of the Scotland Act is supported by section 113, which includes under subsection (7) that the power may be exercised to make provision for the delegation of functions.

The power in section 12 has been used, for example, to make The Scottish Parliament (Elections etc.) Order 2015 (“the 2015 Order”) which sets out the provisions as to the conduct of elections and the return of members to the Scottish Parliament.

Section 21(2) of the Bill does not add to, rather it restates, the power in section 21(1), as signalled by the opening words (“[f]or the avoidance of doubt”). As with section 12 of the Scotland Act, the intention is that regulations made under section 21(1) of the Bill can do whatever an Act of the Scottish Parliament can do, and thus subsection (2) seeks to illustrate the scope of the power (much like section 113 of the Scotland Act).

There is a presumption that a delegate cannot delegate, and the inclusion of subsection 2(c) in section 21 of the Bill seeks to address this. The aim is to give the new mechanisms of recall equivalent flexibility as similar orders to deal with elections

under section 12 of the Scotland Act and regulations dealing with recall at a UK level in section 18 of the Recall of MPs Act 2015.

Addressing each of the questions in turn:

1. Who does the Member anticipate will be given powers to make subordinate legislation under regulations made under section 21?

It is anticipated that those given powers to make subordinate regulations under any regulations made under section 21(1) would be similar to those given such powers under the 2015 Order. Namely, the Scottish Ministers themselves (e.g. power to make regulations in article 14(b) regarding constituency returning officers, article 18(2) regarding payments by and to returning officers, or article 72(7) regarding the details to appear on electoral publications) or the Electoral Commission (e.g. under article 47(8) may, by regulations, prescribe a form of return which may be used for the purposes of making any (or any description of) return on expenses).

2. Why have those persons not been specified on the face of the Bill?

The Scottish Ministers are specified in section 21(1). It would be for Ministers to determine, whether there are any other bodies with a role whom it would be appropriate to delegate to, for example the Electoral Commission or the Electoral Management Board. These are not specified on the face of the Bill to ensure maximum flexibility.

3. Why is it considered appropriate to confer a power to subdelegate? Can examples be provided of how this power might be exercised?

As noted above, section 21(2)(c) is not itself conferring a power to subdelegate, rather the power is inherent in the framing on section 21(1) (echoing section 12 of the Scotland Act) and thus subsection (2) seeks to restate this.

The running of recall petitions which are new in Scotland and regional polls which are an entirely new mechanism will require the development of detailed rules and requirements to cover the conduct and administration of these processes. These will guide the work of all involved, including Petition Officers. The ability for the relevant regulations to include regulation-making powers within them, both for Scottish Ministers themselves and potentially other bodies – as with the 2015 Order for elections – enables maximum flexibility to respond to changing circumstances and provide the necessary detail.

For example, it is anticipated that the financial regime for the recall petition process and a poll for a regional seat would be set out in regulations, which will need to build in the ability to make changes over time – including to any financial amounts.

Another example would be the text of the signing petition sheet or the wording of the question to be put on the poll, both of which would require input from the Electoral Commission.

Any subordinate legislation made as a result of regulations made under section 21(1) would still be subject to parliamentary scrutiny.

4. Why it is considered appropriate to give a third party the power to make subordinate legislation which can modify primary legislation (including the Act resulting from the Bill) and create criminal offences? Has any consideration been given to restricting this power, for instance, by removing the power to create offences or amend primary legislation?

The types of offences created in respect of regulations made under the Recall of MPs Act 2015 include the offences of personation (for example signing as someone else, whether alive, fictitious or deceased), breaching an official duty, tampering with signing sheets, making false statements, illegal canvassing and breaching secrecy requirements. Therefore, in the development of regulations regarding recall in Scotland and particularly the new mechanism of regional polls, it may emerge that further regulations covering conduct which would constitute a criminal offence need to be covered.

The ability to modify primary legislation is important given the interaction with existing electoral law.

Restricting the power, would run the risk of removing the required flexibility for the new regime.

5. Additionally, the Committee seeks clarification on whether the procedures provided for by section 30 of the Bill will also apply to such subordinate legislation or if they only apply to regulations made directly (i.e. the “second tier legislation”) under section 21(1).

The regulations under section 21 would specify the appropriate procedure for any further delegated power.

If I can be of further help to the committee then please let me know and I am, of course, happy to attend the committee should that be deemed necessary.

Yours sincerely,
Graham Simpson MSP