

Scottish Biometrics Commissioner Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Biometrics Commissioner Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill provisions

3. The Bill will create a new Commissioner and provides for a code of practice to support and promote good practice and consistent standards in relation to the acquisition, retention, use and destruction of biometric data by the police. The provisions of the Bill are necessary to maintain public and professional confidence in the use of biometric data in the context of policing and criminal justice.
4. The Bill is composed of 29 sections and two schedules. In summary, they make provision as follows:
 - Section 1 establishes the office of Scottish Biometrics Commissioner and introduces schedule 1.
 - Sections 2 to 5 set out the Commissioner's functions and powers.
 - Sections 6 to 10 make provision for a code of practice which relevant persons must have regard to.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

- Sections 11 to 14 deal with the Commissioner’s information-gathering powers.
- Sections 18 to 22 set out the accountability arrangements for the Commissioner.
- Sections 23 and 24 defines the term “biometric data” for the purposes of the Bill and other terms used in the legislation.
- Sections 25 to 29 contain general and ancillary provisions.
- Schedule 1 makes detailed provision concerning the appointment, status, disqualification, terms of office and remuneration, pension and subsequent appointments of the Commissioner.
- Schedule 2 adds the Commissioner to various pieces of public authority legislation.

Rationale for subordinate legislation

5. Section 25 makes general provision about regulation-making powers and in particular makes provision as to whether the powers in the Bill are subject to the affirmative or negative procedure. Section 25(1) provides that each power of the Scottish Ministers to make regulations under the Bill includes a power to make different provision for different purposes, and to make any incidental supplementary consequential, transitional, transitory or saving provision which they consider appropriate. This ensures that each of the powers in the Bill can operate effectively as required.

6. In deciding whether provisions should be specified on the face of the Bill or provided for using delegated powers proposed to be exercisable by subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue;
- the need to provide flexibility to respond to changing and unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and
- to ensure the proper use of parliamentary time is made.

7. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated Powers

Section 2 – Functions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

8. Section 2 of the Bill provides for the Commissioner's general function, which is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data by the Police Service of Scotland and the Scottish Police Authority. Section 2(6) allows Scottish Ministers to amend, by regulations, the list of persons within the Commissioner's purview by adding, removing or varying a person or description of a person.

Reason for taking power

9. Over time, it may be necessary or desirable to include another body or person to the scope of the Commissioner's oversight (within the field of those who use biometric data for criminal justice and police purposes. The power therefore allows the flexibility to respond to developments in policing as the law, policy and practice evolve and the provisions of the Bill take effect.

Choice of procedure

10. Given that the provision may add to or amend the bodies or persons to whom the Commissioner's scrutiny will apply, it is considered appropriate that this power is subject to affirmative procedure to afford Parliament a high level of scrutiny.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

Section 7 – Effect of a code

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

11. Section 7(1) of the Bill lists the persons who are required to have regard to a code of practice prepared by the Commissioner under section 6. Section 7(4) allows Scottish Ministers by regulations to amend the list by adding a person or description of a person, by varying an existing entry, or by removing an entry.

Reason for taking power

12. Over time, it may be necessary or desirable to amend the list of persons who are required to have regard to the code of practice (particularly if the power under section 2(6) is exercised). The power therefore allows the flexibility to respond to developments in policing as the law, policy and practice evolve and the provisions of the Bill take effect.

Choice of procedure

13. Given that the provision may add to, remove or amend the persons who must have regard to the code of practice, it is considered appropriate that this power is subject to affirmative procedure to afford Parliament a high level of scrutiny.

Section 9 – Bringing a code into effect

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

14. Section 9(1) provides that any code of practice has no effect until the day appointed for the code by regulations made by the Scottish Ministers. Section 9(2) provides that, when laying the draft regulations before Parliament to bring the code into effect, the Scottish Ministers must also lay a copy of the code before Parliament. The Commissioner must publish the code as soon as reasonably practicable after the regulations are made.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

Reason for taking power

15. The date on which a code of practice is to take effect cannot be determined at this point. The Commissioner, in the early days of office, will need time to draft and consult on the first code of practice. It would also be beneficial to appoint a date that will give persons who must have regard to the code sufficient time to prepare for the code coming into effect. Furthermore, in order to improve transparency and accountability regarding the use of biometric data by the police, it is beneficial that the Parliament should have a role in bringing the code into effect. This ensures that the code can be suitably scrutinised by the Parliament.

Choice of procedure

16. The affirmative procedure is considered appropriate for this power because in considering the regulations which set the relevant date, Parliament will also get to consider the code of practice which the Scottish Ministers are required to lay at the same time. Affirmative procedure will ensure that the Parliament has the opportunity to fully consider the code of practice before it is published and comes into effect.

Section 21 – Accounts and audit

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

17. Section 21 of the Bill sets out the accounting and auditing requirements that apply to the Commissioner. Section 21(2) provides that the Commissioner must comply with any directions which the Scottish Ministers give in relation to the matters mentioned in sections 21(1)(a) and (b). The power allows the Scottish Ministers to give directions as to the keeping of accounting records and the preparation of accounts by the Commissioner.

Reason for taking power

18. The Scottish Public Finance Manual (SPFM) requires that where a sponsored body is set up under statute, the founding legislation should normally provide for the sponsored body to prepare accounts in such form as the Scottish Ministers may direct. The SPFM applies to bodies sponsored by the Scottish Parliamentary Corporate Body.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

Choice of procedure

19. This provision is not subject to any parliamentary procedure. This is considered appropriate as it is a low-level direction-making power which is of limited extent and will be used simply to ensure compliance with standard accounting practices.

Section 26 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure where regulations amends primary legislation, otherwise negative Provision

20. Section 26(1) provides that Scottish Ministers may by regulations make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with or for giving full effect to the Bill. Under subsection (2) regulations may modify the Bill or any other enactment.

Reason for taking power

21. Any new law may give rise to the need for a range of ancillary provisions. Without the power to make supplementary, incidental and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with in order to give full effect to the original Bill. That would not be an effective use of either the Parliament's or of the Scottish Government's resources. The power itself is restricted by being ancillary to the provisions of the Bill and any such provision must clearly be for the purposes of the Bill, or in consequence of it, or for giving full effect to it.

Choice of procedure

22. Under section 25(3) any regulations made under section 26(1) will be subject to affirmative procedure if they contain provisions which add to, or replace or omit any part of, the text of primary legislation. Otherwise, they will be subject to negative procedure. It is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to Parliamentary procedure. This provides the appropriate level of parliamentary scrutiny for the textual

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

amendment of primary legislation while ensuring that other ancillary provision is still subject to scrutiny by Parliament.

Section 28 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

23. Section 28(2) provides that most of the provisions of the Bill will come into force on such a day as the Scottish Ministers may by regulations appoint. Section 28(1) provides that sections 25, 26, 28 and 29 will come into force on the day after Royal Assent. These are formal sections which relate to regulations, ancillary provision, commencement, and the short title. Section 28(4) provides that commencement regulations may amend section 18(6)(a) so that a date for the beginning of the first four year period for a strategic plan is specified.

Reason for taking power

24. Given that the Bill will create a new officeholder, facilitate the creation of codes of practice and subject public bodies to new duties it is desirable that the decision on when and to what extent the Bill is commenced is made by the Scottish Ministers, particularly since it will be appropriate to commence provisions at different times. Section 28(3) allows the commencement regulations to make ancillary provisions to ensure the smooth and orderly commencement of provisions of the Bill. The power under section 28(4) allows a date for the beginning of the first four year period for a strategic plan to be specified as a date for ease of reference, rather than being specified by reference to a particular event which those looking at the Bill would then need to ascertain the date of in order to fully understand the effect of the provision.

Choice of procedure

25. As is now usual for commencement regulations, the default laying requirement applies, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

This document relates to the Scottish Biometrics Commissioner Bill (SP Bill 48) as introduced in the Scottish Parliament on 30 May 2019

Scottish Biometrics Commissioner Bill

Delegated Powers Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents