

Freedom of Information Reform (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared on behalf of Katy Clark MSP, the Member in charge of the Bill, in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Freedom of Information Reform (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 72–EN);
- a Financial Memorandum (SP Bill 72–FM);
- a Policy Memorandum (SP Bill 72–PM);
- statements on legislative competence made by the Presiding Officer and the Member in Charge of the Bill (SP Bill 72–LC).

3. This Memorandum has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill's provisions

4. The Bill amends the Freedom of Information (Scotland) Act 2002 (the "FOI Act") to extend, and provide for the further extension of, the definition of Scottish public authority, to create new duties in respect of the proactive publication of information, and to make further provision as regards monitoring and enforcement of compliance with that Act. The Bill confers on the Scottish Information Commissioner the power to make provision for a code of practice regarding compliance with the duty of proactive publication.

5. The Bill also repeals provisions of the FOI Act relating to publication schemes, model publication schemes, and when certain applications to the Scottish Information Commissioner are not possible.

Rationale for subordinate legislation

6. The Bill contains three delegated powers provisions (two regulation making powers concerning ancillary provisions and commencement and one power for the Scottish Information Commissioner to issue a code of practice) each of which is described in more detail below.

7. In considering what should be left to subordinate legislation, the Member has had regard to the need to strike a balance between the importance of ensuring full parliamentary scrutiny of the policy that the Bill seeks to deliver whilst recognising the relatively better position of the Scottish Ministers and Scottish Information Commissioner when compared with an individual member in making decisions as to how ancillary provision and the publication code can best give effect to the obligations provided for in the Bill.

Delegated powers

Section 15: Proactive publication duty and publication code

Power conferred on: Scottish Information Commissioner

Power exercisable by: code of practice

Parliamentary procedure: Affirmative

Provision

8. Section 15 inserts new sections 60A and 60B into the FOI Act which place a duty on Scottish public authorities to proactively publish information relevant to their functions and place a duty on the Scottish Information Commissioner to prepare a draft code of practice setting out how they must comply with that duty. The new section 60B(2) sets out a non-exhaustive list of the content of that code including what information must be proactively published, how it should be made available and searchable, and how long it should be available for.

Reason for taking power

9. As mentioned in paragraph 7 above, the Member understands that the Scottish Information Commissioner is best placed to determine more specific requirements in respect of the broad proactive publication duty set out in the Bill. The detail of that duty and how, in practice, it is to be complied with (including which information it should apply to and how information should be made available) is therefore left to the Scottish Information Commissioner to set out in a code of practice.

Choice of procedure

10. The new section 60B(3)(b) provides that the code made under new section 60B(1) would be subject to the affirmative procedure. As it is anticipated that the code

would be substantial in nature, imposing duties on public bodies, the use of the affirmative procedure is considered appropriate to allow for parliamentary scrutiny.

Section 20(1): Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

11. Section 20 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision for the purposes of, in connection with, or for giving full effect to the Bill.

12. This is a standalone power enabling ancillary provision to be made where the Scottish Ministers consider it appropriate to ensure the Bill can be given its full effect.

Reason for taking power

13. As with any new body of law, the Bill may give rise to a need for further provision to be made to ensure that policy objectives can be achieved.

14. Whilst the Member has given careful consideration to the provisions of the Bill, there may, in addition, be some ancillary provisions that require to be made in order for the policy to be fully delivered. This power ensures that issues of an ancillary nature which may arise can be dealt with effectively by the Scottish Ministers.

Choice of procedure

15. As the ancillary power is limited and does not extend to modifying “any enactment (including this Act)” (“enactment” being defined in the Interpretation and Legislative Reform (Scotland) Act 2010 as including primary and secondary legislation), the negative procedure is considered appropriate.

Section 22: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

16. Section 22 sets out when the provisions will come into force (i.e. begin to have effect). 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 on the day falling at the end of a period of 12 months beginning with the day of Royal

Assent or, if earlier, on such day, or days, as the Scottish Ministers appoint in regulations.

17. Regulations under this section will be laid before the Parliament but will not otherwise be subject to any parliamentary procedure (see section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

18. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. In particular, this allows different sections of the Bill to be commenced on different days.

Reason for taking power

19. Whilst most of the Bill will come into force on the day after Royal Assent, sections 7 (the repeal of provisions in the FOI Act relating to publication schemes), 8 (the repeal of provisions in the FOI Act relating to model publication schemes), 12 (extending the scope of enforcement notices to compliance with codes of practice), 15 (making provision for the proactive publication duty and a code of practice on publication) and 16 (making provision requiring the appointment of freedom of information officers) will come into force on a day or days to be decided by the Scottish Ministers. This will allow the Scottish Ministers to ensure that these provisions come into force at a time when they and other Scottish public authorities have been able to take necessary steps to prepare for the new duties imposed by these provisions. Such provisions may require to include transitional or transitory provision, or the saving of repealed or amended provisions. This is subject to section 22 providing that if the Scottish Ministers do not commence these provisions within 12 months of Royal Assent, they will come into force at the end of that period.

Choice of procedure

20. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies.

21. Commencement regulations bring into force provisions, the substance of which have already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made (and in any event before the legislation is due to come into force).

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