

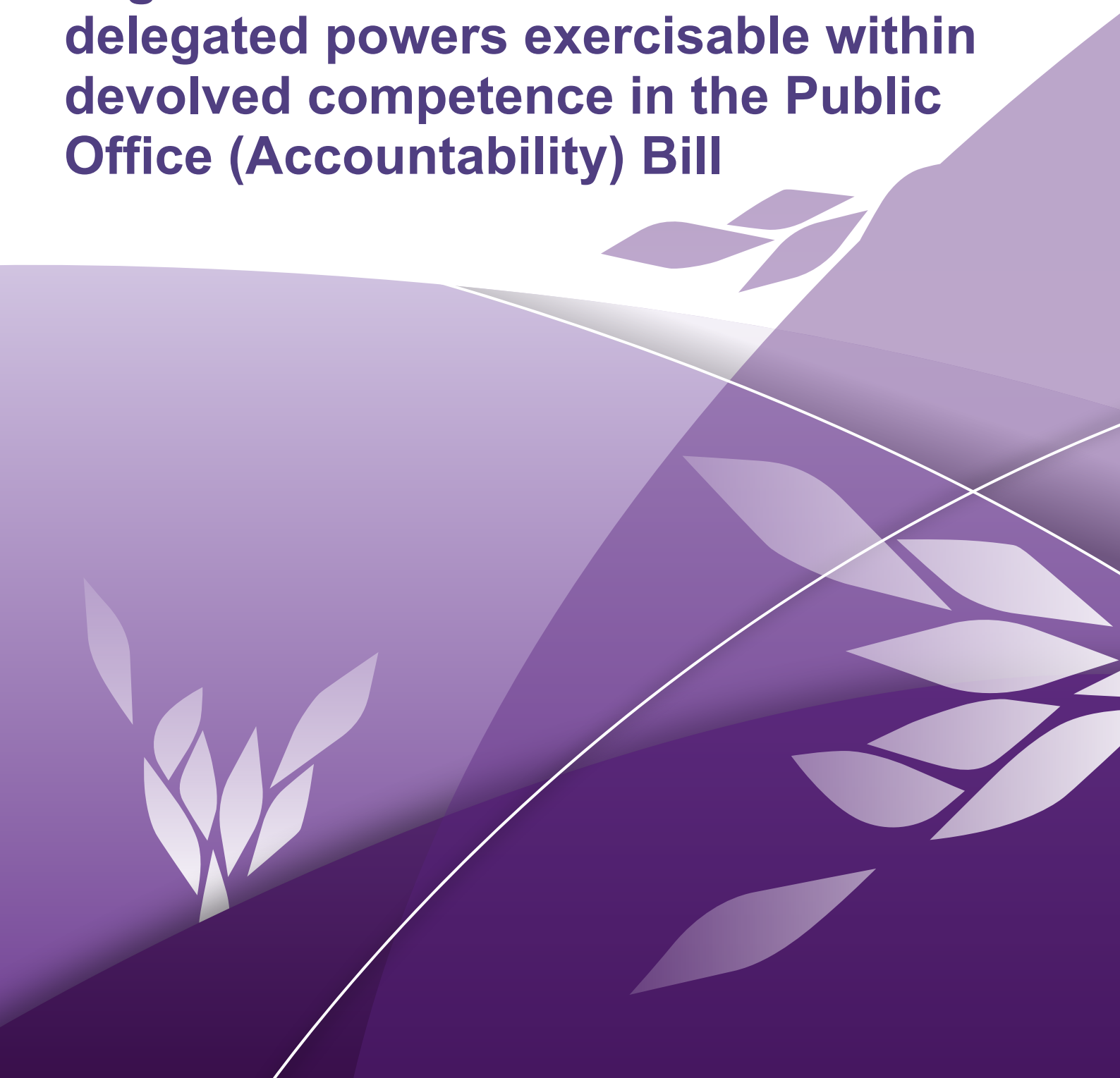


The Scottish Parliament  
Pàrlamaid na h-Alba

Published 27 November 2025  
SP Paper 922  
87th Report, 2025 (Session 6)

## **Delegated Powers and Law Reform Committee**

# **Legislative Consent Memorandum: delegated powers exercisable within devolved competence in the Public Office (Accountability) Bill**



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# Delegated Powers and Law Reform Committee

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;

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

(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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**Jeremy Balfour**  
Independent

# Introduction

1. The purpose of this paper is to consider the delegated powers that are exercisable within devolved competence in the [Public Office \(Accountability\) Bill](#) (“the Bill”).
2. Parliament is considering the [Legislative Consent Memorandum](#) (“LCM”) dated 31 October 2025 for the Bill under Rule 9B.3.6 of the Standing Orders, which states that where the Bill that is the subject of the memorandum contains provisions conferring powers on Scottish Ministers to make subordinate legislation, the Delegated Powers and Law Reform Committee (“the Committee”) shall consider and may report to the lead committee on those provisions.
3. The LCM is also being considered in terms of the Committee’s wider remit contained in Rule 6.11.1(b) of the Standing Orders which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation. This definition encompasses powers to make subordinate legislation in UK Bills, where exercisable within devolved competence and the Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.
4. The Committee considered the LCM at its meeting on 25 November 2025.<sup>i</sup>

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<sup>i</sup> Stuart McMillan MSP submitted his apologies for this meeting.

## The Bill

5. The Bill was introduced by the UK Government on 16 September 2025 and is at the Committee stage in the House of Commons. As the Bill is still progressing through the UK Parliament, it is subject to amendment. Further, it is the Scottish Government's intention to update the Parliament and lodge a supplementary LCM following the outcome of discussions with the UK Government (see next section of report "Scottish Government Rationale for Recommending Withholding Legislative Consent" for further details). It is therefore expected that the Committee will consider this supplementary LCM in due course.
6. The Bill consists of 26 clauses in 5 parts and 6 schedules. Part 1, chapters 1 and 2 of part 2, part 5 and schedules 1 to 3 extend to Scotland.
7. Part 1 summarises the Bill's policy objectives, which are to ensure that public authorities and public officials perform their functions with candour, transparency and frankness, and in the public interest.
8. Chapter 1 of part 2 places a duty of candour and assistance on public authorities and public officials, requiring them to act with candour, transparency and frankness in their dealings with inquiries and specified investigations; and to assist inquiries and investigations to achieve their objectives, with criminal sanctions for non-compliance.
9. Chapter 2 of part 2 places a duty on public authorities to promote and take steps to maintain high standards of ethical behaviour amongst its workforces. This includes an obligation to adopt a code of ethical conduct. A code must set standards of conduct expected of individuals who work for the authority. The Bill sets out various minimum criteria that a code must satisfy.
10. Part 5 makes provision for Crown application, consequential provision, interpretation, commencement and extent.
11. Schedule 1 sets out which inquests and inquiries the duty of candour and assistance applies to and makes the necessary changes to other legislation to achieve that. Schedule 2 sets out the meaning of "public authority" and "public official" for the purposes of Part 2 of the Bill. Schedule 3 makes further detailed provision about the criminal offences at clause 5 and clause 11 of Part 2 of the Bill.
12. In its LCM, the Scottish Government sets out that matters relating to propriety and ethics and the procedures which apply in the context of public inquiries (where the subject of the inquiry is not reserved), including Fatal Accident Inquiries, do not relate to reserved matters in terms of Schedule 5 of the Scotland Act 1998. Similarly, there is no reservation in that Act for codes of conduct. The UK Government agrees that legislative consent is required for Part 1 and chapters 1 and 2 of Part 2, which includes Schedules 1-3, however has not given an indication for Part 5. The Scottish Government includes Part 5 in its draft motion and therefore considers that legislative consent is required for this part. The Committee agrees that as Part 5 relates to Parts 1 and 2 and Schedules 1 to 3, it is therefore within legislative competence.
13. Further, in its LCM, the Scottish Government states that, at this stage, it cannot

recommend that the Scottish Parliament consents to the relevant provisions in the Bill, as reflected in the draft motion. It does, however, anticipate that it will be in position to recommend consent once its concerns are resolved, at which stage the Scottish Government will lodge a supplementary Legislative Consent Memorandum and update the Scottish Parliament on the outcome of discussions with the UK Government.

14. The draft motion therefore states:

” That the Parliament agrees that consent is withheld in relation to the relevant provisions of the Public Office (Accountability) Bill, introduced in the House of Commons on 16 September 2025, in relation to Part 1, Part 2 (chapters 1 and 2), Schedules 1-3 and Part 5, so far as these matters fall within the competence of the Scottish Parliament, or alter that legislative competence or the executive competence of the Scottish Ministers, being considered by the UK Parliament.

15. The lead committee in respect of the LCM is the Finance and Public Administration Committee

# Scottish Government Rationale for Recommending Withholding Legislative Consent

16. The Scottish Government has stated in the LCM that its rationale for withholding legislative consent at this stage includes as follows:
- The Scottish Government is, in principle, supportive of the commendable aims of this Bill and believes it will significantly contribute to improving accountability and full evidence disclosure at relevant inquiries and investigations.
  - It also recognises that there is a strong public and parliamentary interest in the integrity and openness of public servants and Ministers.
  - The Scottish Government is determined to learn from past mistakes and agrees with the principles of this Bill which introduces a duty of candour and assistance and requirements in relation to standards of ethical conduct.
  - In Scotland, requirements for standards of ethical conduct are already in place in some areas however, the Scottish Government is not complacent and recognises the need for further, more consistent, action to apply across the public sector.
  - At present, there are some points of detail, many of them technical, which the Scottish Government considers still need to be tidied up to ensure that this Bill will work in practice as intended for Scotland. The Scottish Government is engaging with the UK Government on amendments to the Bill, which it considers are needed to address these points. These include: the appropriate definition of a school and of an NHS body, appropriate local authorities' executive arrangements and an explanation of the role of NRS (National Records of Scotland) as a public body.
  - The Scottish Ministers are fully committed to integrity and transparency, as well as positive joint working with the UK Government on an area of mutual interest and look forward to ensuring that the Bill will work effectively in Scotland.
17. Therefore, while the Scottish Government supports the overall aims of the Bill, the provisions are subject to ongoing discussion with the UK Government and will be the subject of a supplementary LCM, which the Committee is expected to consider in due course. Pending these discussions, the Scottish Government currently recommends that the Scottish Parliament withholds consent to Part 1, Part 2 (chapters 1 and 2), Schedules 1-3 and Part 5 of the Public Office (Accountability) Bill as introduced.

# Delegated Powers

18. The UK Government has published a [Delegated Powers Memorandum](#) (“DPM”) to accompany the Bill. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected. The Committee has therefore relied on the explanation provided in the DPM and in the Scottish Government’s LCM in considering the powers.
19. As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s current view on the five clauses/ paragraphs discussed below are set out in the LCM.

## *Powers exercised by UK Ministers within devolved competence*

20. The provisions discussed in this report confer powers on UK Ministers which may be exercisable within the Scottish Parliament’s legislative competence. The Committee’s position in relation to such powers has been that, in general:
  - a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
  - b) Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
  - c) If such powers contain a requirement for the Scottish Ministers’ consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers’ consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers’ consent and may suggest matters for the lead committee to consider.

- d) As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the powers is within the scope of that protocol.

# Review of relevant powers

## Note on clause 22(2): requirement to obtain consent of Scottish Ministers on provisions which relate to a Scottish devolved matter

21. Under clause 22(2), when exercising their power to make regulations and guidance under this Act in relation to devolved matters, the Secretary of State must first obtain the consent of the Scottish Ministers.
22. This consent requirement does not apply to powers made under clause 21(1) - consequential provision, or clause 25 – commencement. In relation to Clause 21(1), the Committee asks the Scottish Government to raise this in their discussions with the UK Government.
23. This consent requirement on the Secretary of State's powers is not discussed in any detail in either the UK Government's DPM or in the Scottish Government's LCM. However, the Committee considers that it is important to draw this consent requirement on the powers to the attention of the lead committee.

24. **The Committee calls upon the Scottish Government to set out in its supplementary LCM how it will facilitate scrutiny by the Scottish Parliament of:**
  1. **any proposals by the Secretary of State to make regulations/guidance under these powers containing provision which relate to a devolved matter, and**
  2. **the Scottish Ministers' response in respect of such proposals and obtaining their consent.**

25. **As such, and as set out below, the Committee will wait for this information in respect of clause 10, paragraph 7 of schedule 1 and paragraph 4(4) of schedule 2 before reaching a conclusion on whether it is content with these powers conferred on the Secretary of State in respect of devolved matters.**

### Part 2 Chapter 2 Clause 10: Guidance

**Power conferred on: Secretary of State, Scottish Ministers**

**Power exercised by: Guidance**

**Parliamentary Procedure: None**

### Provision

26. Clause 10 provides that the “appropriate national authority” may issue guidance for the purposes of clause 9, and that public authorities must have regard to that guidance. Clause 9 requires public authorities to promote and take steps to maintain high standards of ethical behaviour at all times by those who work for the

authority, including adopting a code of ethical conduct.

27. “Appropriate national authority” is defined for the purposes of the Bill at clause 23(1) and clause 22(1) as:
- The Secretary of State;
  - The Scottish Ministers (in relation to Scottish devolved matters)
  - The Welsh Ministers (in relation to Welsh devolved matters)
  - A Northern Ireland department (in relation to Northern Ireland devolved matters).
28. In accordance with this clause and clause 22, where the Secretary of State makes guidance containing provision which relates to a Scottish devolved matter, they must have the consent of the Scottish Ministers (see further below).

### **Committee consideration**

29. The UK Government has stated in its DPM that the reason for taking the power is to enable the appropriate national authority to issue guidance to assist public authorities in complying with their duties under clause 9, including drafting and adopting a code of ethical conduct. It is intended that the guidance will provide clear and accessible advice on how a code can be best structured and promoted to workers. This will require detailed practical guidance which the UK Government considers would not be appropriate to include in legislation.
30. The duties under clause 9 apply to a broad range of public authorities discharging a variety of functions, therefore it necessarily allows authorities a degree of flexibility. Authorities will be different sizes and have different functions; some will have existing relevant policies or procedures. Nonetheless, the UK Government considers that consistency in some aspects of implementation is desirable. It considers that guidance is an appropriate and important way of ensuring that there is consistency in the approach that public authorities take when considering how to comply with their duties under clause 9.
31. The UK Government also considers that parliamentary oversight is not required in connection with this guidance, as the guidance will primarily contain technical and operational details, assisting authorities in the implementation of the legal duty.
32. The Scottish Government has stated in the LCM that its rationale for withholding legislative consent is as set out above (however it is noted that the Scottish Government recognises the need for consistency). The Scottish Government therefore does not seek the consent of the Scottish Parliament to the provisions of clause 10 of the Bill.
33. The Committee finds this power acceptable. It considers that there is sufficient detail in clauses 9 and 10 and in the DPM as to how this power is to be exercised. The Committee agrees with the UK Government that the issuing of guidance is a suitable vehicle to assist public authorities in complying with their duties under clause 9 and provides for an element of consistency of approach while acknowledging that some authorities already have existing relevant policies or procedures in place. Further, guidance allows for flexibility and can be issued and

updated easily.

34. The Committee considers it is appropriate that the power is being delegated to Scottish Ministers to exercise in respect of devolved matters and that consent of Scottish Ministers is required if exercised by the Secretary of State (subject to clarification as to how the Scottish Government will facilitate scrutiny by the Scottish parliament).
35. The Committee also agrees that because the guidance is intended to be of assistance and to provide advice then it is appropriate that there is no requirement for parliamentary oversight of this guidance.

**36. The Committee is content with the power conferred on Scottish Ministers to issue guidance in relation to Scottish devolved matters in principle and that it is not subject to any parliamentary procedure.**

**37. The Committee welcomes the Scottish Government's undertaking to update the Parliament on the outcome of its discussions with the UK Government and to lodge a supplementary LCM.**

**38. The Committee notes that where the Secretary of State makes guidance containing provision which relates to a devolved matter, they must have the consent of the Scottish Ministers.**

**39. In order to reach a conclusion on whether the Committee is content with the power conferred on the Secretary of State, the Committee calls upon the Scottish Government, once its ongoing discussions with the UK Government are complete, to set out in its supplementary LCM how it will facilitate scrutiny by the Scottish Parliament of:**

1. any proposals by the Secretary of State to make guidance under this power containing provision which relate to a devolved matter, and
2. the Scottish Ministers' response in respect of such proposals and obtaining their consent.

#### **Part 5 Clause 21: Power to make consequential provision**

**Power conferred on: Secretary of State, Scottish Ministers**

**Power exercised by: Regulations**

**Parliamentary Procedure: Affirmative if amending, repealing or revoking primary legislation; otherwise negative**

**Provision**

40. Clause 21 confers a power to make provision which is consequential upon other provisions of the Bill. This may include repealing, revoking or otherwise amending primary and secondary legislation passed or made before the end of the Parliamentary Session in which the Bill becomes law.
41. Clause 21(1) confers a power on the Secretary of State to make provision that is consequential on this Act or on regulations made under it.
42. Clause 21(2) confers a power on Scottish Ministers to make provision that is consequential on Part 4 of Schedule 1 - Inquiries into fatal accidents and sudden deaths – and on regulations made under this Act by Scottish Ministers.

### **Committee consideration**

43. The UK Government has stated in its DPM that the reason for taking the power is to enable the relevant authority to make any minor or technical changes which are necessary in consequence of the Bill's provisions. It allows for efficient implementation of the Bill measures.
44. The UK Government considers that the power is appropriately limited in scope. It can only be used to make changes that are consequential on the Bill or on regulations made under it. It cannot be used to expand or change duties or obligations. By virtue of subsection (5) the power can only be used to amend primary legislation passed or made before the end of the Session in which this Bill is passed.
45. Regulations made under this power which do not amend or repeal primary legislation will be subject to the negative procedure. If regulations amend or repeal provision in primary legislation, they will be subject to the affirmative procedure. The UK Government considers that this is the standard approach for powers of this type and provides the appropriate level of parliamentary scrutiny.
46. The Scottish Government has stated in the LCM that its rationale for withholding legislative consent is as set out above. The Scottish Government therefore does not seek the consent of the Scottish Parliament to the provisions of clause 21 of the Bill.
47. With regard to the power conferred on Scottish Ministers in clause 22(2), the Committee considers that this power is similar in terms to other consequential powers that the Committee has scrutinised. The extent of the power is restricted as it can only be used for the purposes of making provision that is consequential on Part 4 of Schedule 1 - Inquiries into fatal accidents and sudden deaths – and on regulations made under this Act by Scottish Ministers. The power also allows issues of a consequential nature which may arise to be dealt with effectively by Scottish Ministers. Without such a power, any consequential changes to primary legislation would require to be made by primary legislation, which the Committee considers would not be an effective use of either the Parliament's time or the Scottish Government's resources.
48. With regard to the Secretary of State's power under clause 21, this is limited in scope as it can only be used to make changes that are consequential on the Bill or on regulations made under it; and can only be used to amend primary legislation passed or made before the end of the Session in which this Bill is passed. Nevertheless, the Committee asks the Scottish Government to raise, in their discussions with the UK Government, the lack of a consent or consultation provision

if the Secretary of State were to exercise this power within devolved competence. Further if a consent or consultation provision is to be included the Committee also asks how the Scottish Government will facilitate scrutiny of this by the Scottish Parliament.

49. **The Committee is content with the power conferred on Scottish Ministers in principle and the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.**

50. **With regard to the power conferred on the Secretary of State, the Committee asks the Scottish Government to raise, in its discussions with the UK Government, the lack of a consent or consultation provision if the Secretary of State were to exercise this power within devolved competence; and to report back on this discussion in its forthcoming supplementary LCM.**

51. **If, following these discussions, a consent or consultation provision is included, the Committee calls upon the Scottish Government to set out how it will facilitate scrutiny of this by the Scottish Parliament in practice.**

#### **Part 5 Clause 25: Commencement**

**Power conferred on: Secretary of State, Scottish Ministers**

**Power exercised by: Regulations/Order**

**Parliamentary Procedure: None**

#### **Provision**

52. Clause 25 contains a standard power for the appropriate authority to bring certain provisions of the Bill into force by commencement regulations (or, in Northern Ireland, by order). Such instruments may appoint different days for different purposes or areas.
53. Clause 25 also allows the appropriate authority to make transitional or saving provision in connection with the commencement of any of the Bill's provisions, and that this includes the power to make different provision for different purposes or areas.
54. "Appropriate authority" is defined for the purposes of this provision as:
- The Secretary of State (including the Chancellor of the Duchy of Lancaster);
  - The Scottish Ministers (in relation to the bringing into force of Part 4 of Schedule 1 – Inquiries into fatal accidents and sudden deaths))
  - The Department of Justice in Northern Ireland (in relation to the bringing into force of Part 5 of Schedule 1).

## **Committee consideration**

55. The UK Government has stated in its DPM that the reason for taking this power is to afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.
  56. The UK Government considers that, as is usual with commencement powers regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.
  57. The Scottish Government has stated in the LCM that its rationale for withholding legislative consent is as set out above. The Scottish Government therefore does not seek the consent of the Scottish Parliament to the provisions of clause 25 of the Bill.
  58. The Committee agrees that this is a standard commencement provision. If the Parliament is content to give its consent for the substantive provisions in the Bill, it would be reasonable and appropriate for it also to consent to the taking of a standard commencement power to give effect to the Bill. As such, the Committee is content.
  59. The Committee also agrees that it is standard that commencement regulations are laid but are not subject to further parliamentary procedure.
60. **The Committee is content with the power conferred on Scottish Ministers in principle and that it is not subject to any parliamentary procedure.**

### **Schedule 1 - Part 6 - Paragraph 7: power to extend the duty of candour and assistance to other investigations**

**Power conferred on: Secretary of State, Scottish Ministers**

**Power exercised by: Regulations**

**Parliamentary Procedure: Affirmative/Made Affirmative in Urgent Cases.**

#### **Provision**

61. Paragraph 7 enables the duty of candour and assistance to be extended to a public authority or public official in respect of certain sorts of investigation (defined to include any form of examination, inquiry or inquest) that are specified or meet a specified description. An investigation of the following kinds may be specified in regulations made by an appropriate national authority: a criminal investigation, a regulatory or supervisory investigation, or an investigation into the provision or exercise of public functions.
62. Any regulations must include provision to secure the restrictions and protections as applied in the context of an inquiry or inquest e.g. legal professional privilege, public interest immunity etc. and contain provision to protect information subject to the

Official Secrets Act 1989. The power also enables regulations to be made applying the duty to a person who is not a public authority or public official but who had a health and safety responsibility in connection with an incident – this mirrors the provision in clause 4 of the Bill. Regulations may amend, repeal or revoke an enactment.

63. Regulations made under this power are subject to the affirmative procedure, unless the conditions in paragraph 8(1) are satisfied in which case the made affirmative procedure applies. Paragraph 8(1) applies to regulations specifying a particular investigation which contain a statement by the authority that by reason of urgency it is necessary to make the regulations without a draft of the regulations first being laid and approved. The regulations must still be approved by the relevant legislature within 40 days of being made.
64. In accordance with clause 22, where the Secretary of State makes regulations containing provision which relates to a Scottish devolved matter, they must have the consent of the Scottish Ministers (see further below).

### **Committee consideration**

65. The UK Government has stated in its DPM that the reason for taking the power is that it is considered necessary as there may be investigations other than inquiries and inquests in respect of which it is appropriate to enable the duty of candour and assistance to be applied. There are many different types of investigation conducted by a wide range of persons. The relevant legislation varies from investigation to investigation. Taking this power enables the appropriate national authority to make bespoke provision for different types of investigation to ensure that the duty can be applied effectively.
66. Further the UK Government considers that the power is subject to appropriate limitations as it can only be exercised in respect of investigations which fall within one of the categories. Broadly, these are investigations that are likely to be concerned with matters that involve the public or are of public interest. The Bill also requires that regulations provide certain protections, such as not requiring someone to do anything which could not be required of them in civil proceedings.
67. The power is subject to the affirmative procedure. The UK Government considers this appropriate because this is a Henry VIII power; and the power will enable the duty to be applied to persons where failure to comply is punishable by criminal prosecution. Parliament should therefore have the opportunity to scrutinise the application of the duty.
68. The exception to this is where the regulations specify a particular investigation and the appropriate national authority considers due to urgency it is necessary to make the regulations without waiting for a draft to be approved. This faster route may be needed where an investigation is set up immediately after a major incident. It is important that the duty of candour and assistance can be applied in respect of that investigation immediately after it is established. The UK Government considers that in these circumstances it is reasonable to use the made affirmative procedure, under which the regulations will lapse after 40 days if not approved.
69. The Scottish Government has stated in its LCM that its rationale for withholding legislative consent is as set out above. The Scottish Government therefore does not

seek the consent of the Scottish Parliament to the provisions of paragraph 7 of schedule 1 of the Bill.

70. The Committee find this power acceptable. It considers that there is sufficient detail in paragraph 7 and in the DPM as to how this power is to be exercised. The Committee also considers it appropriate that the power is being delegated to Scottish Ministers to exercise in respect of devolved matters and that consent of Scottish Ministers is required if exercised by the Secretary of State (subject to clarification as to how the Scottish Government will facilitate scrutiny by the Scottish parliament). The power is clearly drafted, will operate in a balanced and a proportionate manner, and goes no further than necessary.
71. Further, as the regulations will contain the details of the obligations to be placed on authorities, it is the Committee's view that it is appropriate that they receive the Parliamentary scrutiny provided by the affirmative procedure, subject to the urgency exception.

**72. The Committee is content with the power conferred on Scottish Ministers in principle and that its exercise would be subject to the affirmative procedure, subject to the urgency exception whereby the made affirmative procedure will apply.**

**73. The Committee welcomes the Scottish Government's undertaking to update the Parliament on the outcome of its discussions with the UK Government and to lodge a supplementary LCM.**

**74. The Committee notes that where the Secretary of State makes regulations containing provision which relates to a devolved matter, they must have the consent of the Scottish Ministers.**

- 75. In order to reach a conclusion on whether the Committee is content with the power conferred on the Secretary of State, the Committee calls upon the Scottish Government, once its ongoing discussions with the UK Government are complete, to set out in its supplementary LCM how it will facilitate scrutiny by the Scottish Parliament of:**
- 1. any proposals by the Secretary of State to make regulations under this power containing provision which relate to a devolved matter, and**
  - 2. the Scottish Ministers' response in respect of such proposals and obtaining their consent.**

## **Schedule 2 – Part 3 - Paragraph 4(4): Power to specify public functions**

**Power conferred on: Secretary of State, Scottish Ministers**

**Power exercised by: Regulations**

## Parliamentary Procedure: Affirmative

### Provision

76. Chapter 2 of Part 2 of the Bill places an obligation on public authorities to promote and uphold ethical conduct amongst all those who work for the authority. This requires public authorities to adopt a code of ethics setting out the standards of conduct expected of those who work for the authority. The Bill sets out various requirements that a code must meet and requires the publication of the code.
77. The requirement to adopt a code of ethical conduct will apply to “public authorities” defined under Part 3, Schedule 2 of the Bill. For this purpose, public authorities include:
1. A government department;
  2. The Scottish Ministers and Ministers of devolved administrations /authorities;
  3. The armed forces, a police force or policing body, local authority, NHS body, school or further education provider; and
  4. Any other non-excluded body (parliaments and courts are excluded) which either:
    - a. exercises functions of a public nature (to be specified in regulations); or
    - b. is created by Royal prerogative, through an enactment or government department, including by any devolved Minister or authority.
78. In the absence of regulations which specify functions of a public nature, no body will be caught by the reference under (d)(i) above. However, paragraph 4(4) of schedule 2 enables the appropriate national authority to specify “functions of a public nature”.
79. In accordance with clause 22, where the Secretary of State makes regulations containing provision which relates to a Scottish devolved matter, they must have the consent of the Scottish Ministers (see further below).

### Committee consideration

80. The UK Government has stated in its DPM that the reason for taking the power is because functions of a public nature may sometimes be discharged by private bodies on behalf of a public authority, for example a private company may operate a prison under contract. Functions of this nature can vary widely, both in terms of the content of the function and the sector where they arise. It would not, in the UK Government’s view, be proportionate to subject all such bodies to the duty to adopt a code of ethical conduct nor to list individually private bodies on the face of the legislation.
81. The UK Government considers that this power allows the appropriate national authority to target sectors where it is appropriate to apply the duty. These will change over time, and the power allows for the list of relevant functions to be amended as needed. The power is limited in that it can only be used to specify functions of a public nature - wholly commercial functions cannot be specified. This ensures that the duty to adopt a code can only be imposed on bodies which perform

public acts.

82. As the regulations will impose a requirement on bodies that would not otherwise be considered to be a public authority, the UK Government considers that the affirmative procedure is appropriate to ensure that the imposition of the duty is appropriately scrutinised.
83. The Scottish Government has stated in its LCM that its reasons for withholding legislative consent are as set out above. The Scottish Government therefore does not seek the consent of the Scottish Parliament to the provisions of paragraph 4(4) of Schedule 2 of the Bill.
84. The Committee finds this power acceptable. It considers that there is sufficient detail in paragraph 4(4) and in the DPM as to how this power is to be exercised. The Committee also considers it is appropriate that the power is being delegated to Scottish Ministers to exercise in respect of devolved matters and that consent of Scottish Ministers is required if exercised by the Secretary of State (subject to clarification as to how the Scottish Government will facilitate scrutiny by the Scottish parliament). The power is clearly drafted, will operate in a balanced and a proportionate manner, and goes no further than necessary.
85. Further, as the regulations will contain the details of the obligations to be placed on bodies, it is the Committee's view that it is appropriate that they receive the Parliamentary scrutiny provided by the affirmative procedure.

**86. The Committee is content with the power conferred on Scottish Ministers in principle and that its exercise would be subject to the affirmative procedure.**

**87. The Committee welcomes the Scottish Government's undertaking to update the Parliament on the outcome of its discussions with the UK Government and to lodge a supplementary LCM.**

**88. The Committee notes that where the Secretary of State makes regulations containing provision which relates to a devolved matter, they must have the consent of the Scottish Ministers.**

**89. In order to reach a conclusion on whether the Committee is content with the power conferred on the Secretary of State, the Committee calls upon the Scottish Government, once its ongoing discussions with the UK Government are complete, to set out in its supplementary LCM how it will facilitate scrutiny by the Scottish Parliament of:**

- 1. any proposals by the Secretary of State to make regulations under this power containing provision which relate to a devolved matter, and**
- 2. the Scottish Ministers' response in respect of such proposals and**

**obtaining their consent.**

