



The Scottish Parliament
Pàrlamaid na h-Alba

Published 10 June 2025
SP Paper 822
44th Report, 2025 (Session 6)

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

Delegated powers in the Scottish Parliament (Recall and Removal of Members) Bill at Stage 1



Published in Scotland by the Scottish Parliamentary Corporate Body.

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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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Introduction

1. At its meetings on 25 March,, 20 May and and 3 June 2025, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers contained in the [Scottish Parliament \(Recall and Removal of Members\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The lead committee is the Standards, Procedures and Public Appointments Committee.

Overview of the Bill

4. This Member's Bill was introduced by Graham Simpson MSP on 17 December 2024.
5. This Bill proposes to introduce new processes for removing Members of the Scottish Parliament from office.
6. The Bill makes provision for 3 key matters: -
 - Recall: it establishes a system that allows constituents to recall members.
 - Non-participation: it provides for the removal of a member who has not participated in parliamentary proceedings for a given period without a valid reason.
 - Prison sentences: it reduces the period of imprisonment required for removal of a member from 1 year to six months.

Delegated Powers

7. The Bill contains three provisions which create new delegated powers. The Non-Government Bills Unit (“NGBU”) has prepared a [Delegated Powers Memorandum](#) (“DPM”) on behalf of the Member, which sets out all the delegated powers in the Bill and explains the Member’s reasons for taking the powers and for the choice of procedure.
8. At its meeting on Tuesday 25 March 2025, the Committee considered an Approach Paper on the delegated powers in the Bill and agreed to write to the Member in charge of the Bill to raise several queries regarding the delegated power in section 21 (Power to make further provision about processes, etc). The Committee was content with the remaining delegated powers in the Bill. The Committee [wrote](#) to the Member on 26 March 2025 and received a [response](#) on 25 April 2025.
9. The Committee considered this response at its meeting on 20 May and decided to invite the Member in to further discuss aspects of this delegated power.
10. The Committee's consideration of the Member's response, evidence, and the other delegated powers contained in the Bill, are set out in the next section of the report.

Review of relevant powers

Section 21: Power to make further provision about processes, etc.

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Provision

11. Section 21(1) provides that the Scottish Ministers may by regulations make provision about:
 1. the conduct of recall petition processes,
 2. the conduct of polls under section 16 to determine if a recalled member is to fill a regional vacancy, and
 3. the questioning of such a process or poll and the consequences of irregularities.
12. Section 21(2) provides that these regulations made under subsection (1) may modify any enactments, create criminal offences, and confer powers to make subordinate legislation.
13. The wording of the power at Section 21 in the Bill is as follows. The Committee's questions focus on subsection (2)(c) (which is highlighted in bold and italic font below), which permits legislative sub-delegation.

Power to make further provision about processes, etc.

(1) The Scottish Ministers may by regulations make any provision that would be within the legislative competence of the 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,
- (c) the questioning of such a process or poll and the consequences of irregularities.

(2) For the avoidance of doubt, regulations under subsection (1) may—

- (a) modify any enactment (including this Act),
- (b) create criminal offences,
- (c) confer powers to make subordinate legislation.**

(3) Regulations under subsection (1) may, in particular—

(a) apply, with or without modifications or exceptions, any provision made by or under—

- (i) the Representation of the People Acts,
- (ii) section 12 of the Scotland Act 1998,
- (iii) the Political Parties, Elections and Referendums Act 2000,
- (iv) any other enactment relating to elections for membership of the Parliament, and

(b) so far as may be necessary in consequence of any provision made by or under subsection (1), modify any provision made by any enactment relating to the registration of electors in any register of electors maintained under Part 1 of the Representation of the People Act 1983.

Legislative sub-delegation

- 14. An instrument made under a statute is to be regarded as a second “tier” of legislation, but the statute may also empower the maker of the instrument to further delegate to another body or person, allowing them to create “tertiary legislation”.
- 15. This is called legislative sub-delegation. As a general rule, the person on whom a power to legislate is conferred (in this case, the Scottish Ministers) cannot use that power to confer a further power to legislate. However, Parliament can provide for departures from this rule by conferring an express power to sub-delegate. Section 21(2)(c) of the Bill contains an express power to this effect.

Written questions, answers and committee consideration

- 16. The Committee asked several questions regarding the power to sub-delegate under section 21 of the Bill:
 - (i) Anticipated delegates: the Committee asked who the Member anticipates will be given powers to make subordinate legislation under regulations made under section 21.
 - (ii) Specification in the Bill: the Committee queried why these persons have not been specified on the face of the Bill.
 - (iii) Appropriateness of sub-delegation: the Committee sought clarification on why it is considered appropriate to confer a power to sub-delegate and requested examples of how this power might be exercised.
 - (iv) Third party powers: the Committee questioned why it is considered appropriate to give a third party the power to make subordinate legislation that can modify primary legislation (including the Act resulting from the Bill) and create criminal offences. The Committee also asked if any consideration has been given to restricting this power, such as by removing the power to create offences or amend primary legislation.
 - (v) Application of procedures: lastly, the Committee sought clarification on whether the procedures provided for by section 30 of the Bill will also apply to

subordinate legislation made by a third party or if they only apply to regulations made directly under section 21(1) (i.e., the “second tier legislation”).

Anticipated delegates

17. In response, the Member explained as follows:

(i) Anticipated delegates: the Member anticipates that powers will be given to the Scottish Ministers and potentially the Electoral Commission.

Committee consideration

18. The Scottish Ministers already have powers to make regulations directly under section 21. They do not require to delegate power to make further regulations to themselves. Section 21(2)(c) provides that regulations made by Scottish Ministers under section 21 may, in turn, give a third party the power to make further subordinate legislation (third tier or tertiary legislation).

19. Tertiary legislation has as much legal force as any other form of law. Allowing Scottish Ministers to confer power to legislate on a third party represents a potential erosion of democratic accountability. It follows that legislative sub-delegation should be limited, specific, subject to parliamentary scrutiny, and fully justified.

Specification in the Bill

20. (ii) Specification in the Bill: the Member’s response cites the Electoral Commission and the Electoral Management Board as potential delegates but states that these bodies have not been specified on the Bill “to ensure maximum flexibility”.

Committee consideration

21. If the Member anticipates that it will be the Electoral Commission and/or Electoral Management Board who will be given power to make subordinate legislation, the Committee considers that these bodies should be named on the face of the Bill.

Appropriateness of sub delegation

22. (iii) Appropriateness of sub delegation: the Member explains that section 21(2)(c) does not itself confer a power to sub-delegate because the power is “inherent” in section 21(1) and is necessary to enable “maximum flexibility”.

Committee consideration

23. As a general rule, the person on whom a power to legislate is conferred (in this case, the Scottish Ministers) cannot use that power to confer a further power to legislate. However, Parliament can provide for departures from this rule by conferring an *express* power to sub-delegate. Section 21(2)(c) of the Bill contains an express power to this effect. Without section 21(2)(c), the presumption against legislative sub-delegation would apply and only Scottish Ministers would have the power to make regulations. In any event, whether the power is in section 21(1) or 21(2) is of no consequence to the question of whether it is appropriate to confer the power in principle.

24. The Member argues that allowing legislative sub-delegation allows for “maximum flexibility”. However, the Committee considers that desire for flexibility does not, of itself, provide sufficient justification for conferring power to legislatively sub-delegate.

Third Party Powers

25. (iv) Third Party Powers: the Member gives examples of the types of offences which were created in regulations made under the Recall of MPs Act 2015 and argues that the ability to create offences and modify primary legislation is necessary for “comprehensive regulation”.

Committee consideration

26. Regulations have been made under the Recall of MPs Act 2015 and those regulations created offences (see the Recall of MPs Act 2015 (Recall Petition) Regulations 2016). However, those Regulations were made by UK Ministers directly under powers conferred by the 2015 Act. What the Committee is concerned with in the present case is that section 21 allows Scottish Ministers to give as yet unnamed third parties power to make subordinate legislation which is capable of creating criminal offences and amend primary legislation.
27. The enabling power in section 18 of the Recall of MPs Act 2015 does not permit legislative sub-delegation, nor does it permit the amendment of *any* primary legislation (section 18(2)(a) allows regulations made under it to “apply or incorporate any provision of electoral legislation (with or without modifications or exceptions)”. It follows that the proposed power in section 21 goes much further than the power in section 18.

Application of Procedures

28. (v) Application of Procedures: The Member explains that regulations under section 21 will specify the appropriate procedure for any further delegated power.

Committee consideration

29. Regulations under section 21 made by the Scottish Ministers are subject to the affirmative procedure. As noted above, unless otherwise stated, when a power is sub-delegated, it follows the extent of original power, meaning the sub-delegate can exercise the powers originally delegated to the first delegate (in this case the Scottish Ministers). It would therefore be anomalous if the exercise of the power by Scottish Ministers was subject to the affirmative procedure but the exercise of the power by a third party was subject to the negative procedure, or no procedure at all, which would be possible under the current drafting.

Oral questions, answers and consideration

30. On 3 June 2025, the Committee questioned the Member-in-charge of the Bill about the inclusion of a power to legislatively sub-delegate in section 21. [The official report of that meeting is available at this link.](#)
31. The Member informed the Committee that, since he had been invited to appear before it, he had been in touch with Electoral Commission, which is a body which

might be invited to make subordinate legislation, if Scottish Ministers were to delegate that power. The Electoral Commission had confirmed that it would not seek to take on the writing of secondary legislation, given its role as an independent statutory body accountable to the Scottish, Welsh and UK Parliaments and expects that “it would be for Scottish government Ministers to write the secondary legislation as is set out in section 21 of the Bill as introduced.”

32. [The Member subsequently sent on a copy of this correspondence with the Electoral Commission.](#)
33. In light of the Electoral Commission’s position, the Member indicated that he intends to consider this matter further during Stage 2.

34. **The Committee recommends that the power to sub-delegate be removed from section 21.**
35. **Otherwise, the Committee is content with the power in principle and that it is subject to the affirmative procedure.**

Section 22: Power to replace references with actual dates

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Laid, no procedure

Provision

36. Section 22 provides that Scottish Ministers may by regulations modify any provision in Part 1 of the Bill to replace a reference to the day on which a provision comes into force with the actual date on which it came into force.

Committee consideration

37. The Member addresses the power at paragraphs 56 to 60 of the DPM. The Committee accepts the reasons set out in the DPM as regards the taking of this power in principle and the choice of procedure applicable to its exercise.

38. **The Committee agrees that this power is appropriate in principle. It also accepts that the laid only procedure is appropriate.**

Section 29(1): Power to make ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative procedure if adding to, replacing or omitting any part of the text of an Act, otherwise negative procedure

Provision

39. Section 29(1) of the Bill confers on the Scottish Ministers a power 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 the Bill as enacted. This includes the power to modify any enactment (including the Act which will flow from the Bill).

Committee consideration

40. The DPM explains that this power is being taken so that Scottish Ministers will be able to address unforeseen issues efficiently, avoiding the need for further primary legislation.
41. This power is drafted in similar terms to the ancillary powers which are taken in most Bills. Its extent is restricted, as it can only be used to give full effect to the Bill as enacted and any provision made under it. The power allows the Scottish Ministers to effectively address any ancillary issues that may arise. Without such a power, any changes would require primary legislation, which we would consider to be an inefficient use of the Parliament's time and the Scottish Government's resources.
42. If the power is exercised to make regulations that amend primary legislation, the affirmative procedure applies. The negative procedure applies where no modifications to primary legislation are included in the regulations.

- 43. The Committee finds the power acceptable in principle and is content with the applicable parliamentary procedures, which vary depending on whether the power is used to amend primary legislation.**

