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

# **Scottish National Investment Bank Bill: as amended at Stage 2**



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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 7 and 14 January 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Scottish National Investment Bank Bill as amended at Stage 2.
2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
3. This Scottish Government Bill was introduced by the Cabinet Secretary for Finance, Economy and Fair Work, Derek Mackay MSP, on 27 February 2019. The lead Committee is the Economy, Energy and Fair Work Committee.
4. The Committee published its Stage 1 Report on the Bill on 27 March 2019.<sup>i</sup> The Committee reported that it was content with the delegated powers in the Bill.
5. The Bill completed Stage 2 on 19 November 2019. The Scottish Government lodged a Supplementary Delegated Powers Memorandum covering the one new delegated power in the Bill after Stage 2.<sup>ii</sup>

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<sup>i</sup> Delegated Powers and Law Reform Committee, 17th Report 2019 (Session 5): Scottish National Investment Bank Bill: Stage 1

<sup>ii</sup> Scottish National Investment Bank Bill, Supplementary Delegated Powers Memorandum

# Overview of the Bill

6. The Bill requires the establishment of a Scottish National Investment Bank (the “Bank”). It places a duty on the Scottish Ministers to establish a public company limited by shares, named the Scottish National Investment Bank p.l.c. Its only member is the Scottish Ministers and its articles of association are drawn up in accordance with the provisions of the Bill.
7. The Bank is to be a public body. Its policy objective is to give financial assistance to commercial activities in promoting or sustaining economic development or employment in Scotland. The Bill requires the Scottish Ministers to set “strategic missions” for the Bank. In response the Bank will prepare a “mission report” explaining how the Bank intends to respond to the strategic missions set for it.
8. The Bill is divided into three Parts, concerning the requirements of the establishment of the Bank, operational matters, and final provisions. A schedule applies public bodies legislation to the Bank.

# **Delegated Powers**

9. One new power has been added to the Bill at Stage 2. This is considered below.

## **Section 14A – Fair work direction**

### **Power conferred on: the Scottish Ministers**

### **Power exercisable by: direction**

### **Parliamentary procedure: neither laid nor subject to parliamentary procedure**

#### **Provision**

10. Section 14A was agreed at Stage 2. It requires the Scottish Ministers to issue a direction about fair work to the Scottish National Investment Bank within one year of section 14A being brought into force and provides that the Bank must comply with such a direction.
11. The direction by the Scottish Ministers must stipulate that the Bank must seek to promote fair work in exercising its functions and must set out what “fair work” means for the purposes of the direction. The direction may also include any other provision about the Bank’s promotion of fair work that the Scottish Ministers consider appropriate.
12. Before making such a direction, the Scottish Ministers must consult the Bank, and persons who appear to the Scottish Ministers to represent the interests of both workers and businesses in Scotland. The Scottish Ministers, having issued the direction, must publish it.

#### **Committee Consideration**

13. At its meeting on 7 January, the Committee considered that the delegated power in section 14A is broad in its scope as the Bill does not provide for a definition of “fair work”. The Bill also does not provide any indication of what Scottish Ministers could define “fair work” to mean when issuing the direction under section 14A. The Committee wrote to the Scottish Government seeking further detail on its view of the appropriateness of the broad scope of the power and what a definition of fair work set by the Scottish Ministers would be likely to include. The correspondence with the Scottish Government is set out in Annex A.
14. The Scottish Government provided a response to the Committee (see Annex A) explaining its view that the scope of the delegated power in section 14A is appropriate and provided the Committee with further detail of its understanding of what “fair work” is and what information it would likely take into consideration when defining “fair work” when exercising the power under section 14A.
15. The Scottish Government did provide some context on what any a definition of “fair work” set by the Scottish Government would be likely to include. The Scottish Government referred to the Scottish Government’s Fair Work Action Plan, which in turn refers to the Fair Work Convention Framework and provides for a general interpretation of “fair work”:

Fair work is work that offers effective voice, opportunity, security, fulfillment and respect; that balances the rights and responsibilities of employers and workers and that can generate benefits for individuals, organisations and society.<sup>iii</sup>

16. The Committee still considers this interpretation of “fair work” to be broad in scope. It considers that the definition does not provide the necessary clarity and context to what the Scottish Government would take into consideration when defining “fair work” for the purposes of issuing a direction under section 14A.
17. **The Committee is exploring this matter further through correspondence with the Scottish Government (see Annex B).**

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<sup>iii</sup> [Fair Work Framework \(2016\)](#), page 6.

# Annex A

## Letter to the Scottish Government dated 7 January

### **Scottish National Investment Bank Bill at Stage 2**

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 7 January and seeks an explanation of the following matter:

#### **Section 14A – Fair work direction**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: neither laid nor subject to parliamentary procedure**

**New or revised power: new**

Section 14A of the Bill, agreed at Stage 2, requires the Scottish Ministers to issue a direction to the Scottish National Investment Bank (“the Bank”) about fair work within one year of that section coming into force.

The direction must stipulate that the Bank is to seek to promote fair work in exercising its functions and set out what fair work means for the purpose of the direction. It may also contain any other provision which the Scottish Ministers consider appropriate in relation to the promotion of fair work by the Bank.

“Fair work” as a term is not defined in the Bill. Section 14A does not provide any indication of what Scottish Ministers could define fair work to mean for the purposes of any direction it issues under the power.

**The Committee would therefore welcome the Scottish Government’s views on the appropriateness of the broad scope of this power and an explanation as to what a definition of fair work set by the Scottish Ministers would be likely to include.**

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Thursday 9 January.

Thank you.

## Response from the Scottish Government dated 9 January

Many thanks for your letter of 7 January regarding the Fair Work direction-making power introduced to the Scottish National Investment Bank Bill at Stage 2. The Government does not consider that section 14A of the Bill confers a particularly broad power.

Powers of ministerial direction are common in statutes that establish public bodies. Those powers are frequently open-ended as to the matters that a direction can address (unlike the power that section 14A confers). The Parliament recently approved just such an open-ended power of direction in the South of Scotland Enterprise Act. The Committee stated that it was content in principle with that power in its Stage 2 report on the Bill for that Act

(Delegated Powers and Law Reform Committee 29th report, 2019, South of Scotland Enterprise Bill: as amended at Stage 2 (SPP 545)).

The power that section 14A confers is limited to giving the Scottish National Investment Bank directions about Fair Work. As Willie Coffey explained when moving the amendment which, with the unanimous support of the Economy, Energy and Fair Work Committee, inserted section 14A: “the intention is to ensure consistency with the implementation of Fair Work across the public sector landscape” (SP OR EEFW 19 November 2019 col 63). Setting further constraints on the exercise of the power conferred by section 14A, when the exercise of the other direction-making powers available to the Scottish Ministers to advance the Fair Work agenda across the public sector are not subject to the same constraints, may result in its failing to deliver the intended consistency across the public sector landscape.

In his remarks at Stage 2, the Cabinet Secretary for Finance, Economy and Fair Work recognised the significant contribution that the Bank can make to advancing Fair Work. He also stressed the need for flexibility in how the Bank uses its role as an investor to support the embedding of fair work practices across Scottish workplaces.

The Government published its Fair Work Action Plan in February 2019. The committee will find extensive information about how the Government, with the advice of the independent Fair Work Convention, defines fair work on the action plan’s website:  
<https://economicactionplan.mygov.scot/fair-work/>.

# Annex B

## Further Letter to the Scottish Government dated 14 January

### Scottish National Investment Bank Bill

Dear Cabinet Secretary,

The Committee is grateful for the response it received, dated 9 January, to the question it raised in relation to section 14A of the above Bill.

After further consideration of this issue at its meeting on 14 January, the Committee considers the interpretation of “fair work” set out in your response still to be broad in scope. It considers that the definition does not provide the necessary clarity and context to what the Scottish Government would take into consideration when defining “fair work” for the purposes of issuing a direction under section 14A.

The Committee appreciates that a similar power exists in the South of Scotland Enterprise Act 2019, and that it is beneficial to have consistency across the public sector landscape. However, the Committee did not consider the power to issue a fair work direction in the SOSE Bill (section 18 as enacted) as this power was added as an amendment agreed at Stage 3. The Committee does not consider that the benefits of consistency outweigh the need to have clarity on delegated powers and how they will be used.

In relation to section 14A, the Committee is concerned that there remains a lack of clarity about the meaning of the term “fair work”. The Committee are particularly concerned that the Parliament will not be able to scrutinise the definition of fair work that is adopted, as this is to be set in the direction under section 14A.

### **Does the Scottish Government consider that it is appropriate for the meaning of “fair work” to be set out in a direction without any parliamentary scrutiny of the definition adopted?**

While the Committee is keen to consider your response, it has discussed the option of lodging an amendment to insert a regulation making power in section 14A of the Bill to define “fair work”.

### **Would the Scottish Government consider having this definition set by regulations to be beneficial?**

The Committee would be grateful for a response by 9am on Wednesday 15 January to allow for further consideration of this matter in advance of Stage 3.

Yours sincerely,

Convener of the Delegated Powers and Law Reform Committee

