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

Scottish Biometrics Commissioner 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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 3 March 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Scottish Biometrics Commissioner Bill as amended at Stage 2.ⁱ
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 Justice, Humza Yousaf MSP, on 30 May 2019. The lead Committee is the Justice Committee.
4. The Committee published its Stage 1 Report on the Bill on 3 October 2019.ⁱⁱ The Committee reported that it was content with the delegated powers in the Bill.
5. The Bill completed Stage 2 on 4 February 2020. The Scottish Government lodged a Supplementary Delegated Powers Memorandum covering the new and revised delegated powers in the Bill after Stage 2.ⁱⁱⁱ

ⁱ [Scottish Biometrics Commissioner Bill as amended at Stage 2](#)

ⁱⁱ [Delegated Powers and Law Reform Committee, 48th Report, Scottish Biometrics Commissioner Bill: Stage 1](#)

ⁱⁱⁱ [Scottish Biometrics Commissioner Bill, Supplementary Delegated Powers Memorandum](#)

Overview of the Bill

6. The Bill will create a new Scottish Biometrics 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 purpose of the Bill is to establish independent oversight arrangements for the collection, use, retention and disposal of biometric data in Scottish policing and criminal justice. Biometric data encompasses fingerprints, DNA, custody photographs, facial recognition software, remote iris recognition and voice pattern analysis. The Policy Memorandum describes the field of biometrics as evolving rapidly, and the policy driver is to ensure that the Scottish approach is lawful, effective and ethical.^{iv}
7. In June 2017, the Scottish Government tasked an Independent Advisory Group to consider the taking, use and retention of biometric data in policing. Their March 2018 recommendations called for legislation to create an independent Scottish Biometrics Commissioner, answerable to the Scottish Parliament, who would keep under review the acquisition, retention, use and disposal of all biometric data by the Police, the Scottish Police Authority, and other public bodies, who would promote good practice, and who would monitor compliance with a Code of Practice. And they called for legislation to establish such a Code of Practice covering the acquisition, retention, use and disposal of DNA, fingerprints, facial and other photographic images (including custody images) and all existing, emerging and future biometrics for the Police.
8. The recommendations of this Independent Advisory Group on the Use of Biometric Data in Scotland are also in line with the findings of Professor Jim Fraser in 2008 and Her Majesty's Inspector of Constabulary in Scotland ("HMICS") in 2016. Professor Fraser reviewed the operation and effectiveness of certain aspects of the law relating to the acquisition, use and destruction of forensic data and to identify proportionate options for reforming Scots law. HMICS carried out an audit and assurance review on police use of facial recognition technologies in Scotland following questions directed to the Scottish Government in 2015. That review included a review of the statutory framework.

Delegated Powers

9. Two new delegated powers have been added to the Bill at Stage 2 and one has been revised. The Committee considered each of these at its meeting on 3 March 2020.

10. The Committee agreed that it was content with the revisions to the power in Section 9 which supplements the procedure that applies in relation to bringing the code into effect.

11. The Committee also agreed that it was content with the new power in Section 23A to change or clarify the meaning of biometric data.

Section 22A – Ethics Advisory Group

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: none

Revised or new power: new

Provisions

12. Section 22A was added by a non-Government amendment at Stage 2 in the name of Liam McArthur. It establishes a new Ethics Advisory Group to provide independent advice to the Commissioner on the promotion of ethical considerations in the acquisition, retention, use and disposal of biometric data, as well as the legal and ethical issues arising from technological developments.

13. Under section 22A, Scottish Ministers may make regulations to determine the governance, remuneration and membership of the Group. Regulations made under this section must be laid within one year of section 22A coming into force.

14. Regulations made under this section are currently not subject to any parliamentary procedure.

Comment

15. The Scottish Government states in its supplementary DPM that it does not consider it appropriate that the regulation making power in section 22A is not subject to any parliamentary procedure. It states that it is anticipated that the Member (Liam McArthur) may bring forward an amendment at Stage 3 to adjust this and, if not, the Scottish Government would bring forward an amendment.

16. The Scottish Government also states that it may consider it appropriate to remove the regulation making power altogether and to allow matters relating to the group to be determined by the Commissioner or the Scottish Parliamentary Corporate Body (SPCB) directly. The Scottish Government states that regulations instigated by Scottish Ministers may not be the most appropriate approach to take, given that the

Commissioner is to be an independent office holder which is accountable to the SPCB rather than the Scottish Ministers.

17. The Committee agrees that the lack of procedure attached to this regulation making power at present is inappropriate. Given the practical matters that this regulation making power deals with, the Committee considers that the negative procedure would be appropriate.

18. The Committee therefore recommends that this power should be subject to the negative procedure.

19. However, the Committee also notes that an amendment has been lodged by Liam McArthur replacing Section 22A with a new section which provides that an advisory group is established and maintained by the Commissioner, with certain matters being subject to the approval of the Parliamentary corporation. This is in line with the option considered by the Scottish Government, discussed above at paragraph 16, and removes the regulation making power.
20. The Committee notes that if this amendment is agreed, the recommendation above becomes irrelevant as the regulation making power to which it relates would no longer exist.

