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

Disclosure (Scotland) 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

At its meeting on 21 April 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Disclosure (Scotland) Bill ("the Bill") as amended at Stage 2.ⁱ

The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.

The Delegated Powers and Law Reform Committee published its Stage 1 Report on the Bill on 2 October 2019.ⁱⁱ The Committee reported that it was content with all of the delegated powers in the Bill.

The Bill completed Stage 2 on 11 March 2020. The Scottish Government has since lodged a Supplementary Delegated Powers Memorandum covering the powers in the Bill as amended at Stage 2.ⁱⁱⁱ

ⁱ [Disclosure \(Scotland\) Bill. As amended at Stage 2 \(SP Bill 50A, Session 5 \(2020\)\)](#)

ⁱⁱ [Delegated Powers and Law Reform Committee, 46th Report, Disclosure \(Scotland\) Bill: Stage 1 \(Session 5 \(2019\)\)](#)

ⁱⁱⁱ [Disclosure \(Scotland\) Bill. Supplementary Delegated Powers Memorandum \(SP Bill 50A-DPM, Session 5 \(2020\)\)](#)

Overview of the Bill

1. This Scottish Government Bill was introduced by Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP, on 12 June 2019.
2. The Bill's purpose is to reform the system of disclosure of criminal records administered by the Scottish Government through their executive agency Disclosure Scotland. The Policy Memorandum states that the Bill "focuses on safeguarding children and vulnerable adults, whilst balancing an individual's right to move on from offending and get on with their life."^{iv}

Delegated Powers

3. At its meeting on 21 April 2020, the Delegated Powers and Law Reform Committee agreed that it was content with the following new delegated powers:
- Section 18A(5) – power to make regulations about further provision in connection with the carrying out of a review of relevant overseas police information by the independent reviewer
 - Section 34(5A)(a) – power to make regulations specifying the period after which a subsequent review application may be made
 - Section 76(2) – amending section 94 of the PVG Act – power to prescribe services which if provided to an individual aged 18 or over means they are a “protected adult”
 - Section 85B – inserting new section 84A into the PVG Act – requirement to issue guidance for chief constable

Section 74 – inserting new section 45DA(1) into the PVG Act - power to require organisations to stop using individuals for regulated roles without scheme membership

Provision

4. Section 74 inserts a new section 45DA(1) into the PVG Act. This provides the Scottish Ministers with a regulation making power to require organisations to stop using individuals for regulated roles without scheme membership. Regulations made under subsection (1) may (a) prevent an organisation from allowing an individual to carry out a regulated role, and (b) require that the organisation remove an individual from a regulated role. Subsection (2) provides that regulations made under subsection (1) may impose prohibitions or requirements in relation to particular types of organisations or in relation to particular kinds of regulated roles. As per subsection (3), it is an offence for an organisation to fail to comply with regulations made under subsection (1). A defence is provided at subsection (4) for an organisation charged with an offence under subsection (3) to prove that it did not know, and could not reasonably be expected to have known, that the individual does not participate in the Scheme in relation to the relevant type of regulated role.

Committee Consideration

5. At present, this power is subject to the negative procedure. However, the Scottish Government explains in the supplementary Delegated Powers Memorandum that there is an unintended discrepancy between this and the regulation making power in section 35(2) of the PVG Act on which section 45DA is based. Section 100(4) of the PVG Act makes regulations made under section 35(2) subject to affirmative procedure.
6. The Scottish Government considers that both section 35(2) and the new section 45DA(1) should be subject to the same form of procedure. To remedy this, the Scottish Government intends to bring forward an amendment at Stage 3 to make the power in new section 45DA(1) subject to the affirmative procedure.

7. The Committee agrees that there should be consistency regarding the procedure applicable to regulations made under section 35(2) and new section 45DA(1) and supports the Scottish Government's proposed course of action.
8. The Committee is content with the proposed power in principle but finds the current application of negative procedure to the exercise of this power to be inappropriate. The Committee therefore welcomes the Scottish Government's intention to bring forward an amendment to change the procedure to the affirmative procedure at Stage 3.

