



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 30 November 2023  
SP Paper 487  
72nd Report, 2023 (Session 6)

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

## **Delegated powers in the Scottish Employment Injury Advisory Council 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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# Committee Membership



**Stuart McMillan**  
Scottish National Party



**Bill Kidd**  
Scottish National Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Oliver Mundell**  
Scottish Conservative  
and Unionist Party



**Colin Smyth**  
Scottish Labour

# Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the delegated powers provisions in the Scottish Employment Injury Advisory Council Bill:
  - on 16 November 2023, Colin Smyth MSP replaced Mercedes Villalba MSP.

# Introduction

2. At its meetings on 7<sup>i</sup> and 28 November<sup>ii</sup> 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Scottish Employment Injury Advisory Council Bill](#) ("the Bill") at Stage 1.
3. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

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<sup>i</sup> Mercedes Villalba MSP submitted apologies for this meeting

<sup>ii</sup> Rona Mackay MSP substituted for Bill Kidd MSP

## Overview of the Bill

4. This Member's Bill was introduced by Mark Griffin MSP (“the Member-in-charge”) on 8 June 2023. The lead committee is the Social Justice and Social Security Committee.
5. The stated purpose of the Bill is to establish a new advisory body, the Scottish Employment Injuries Advisory Council (“the Council”), to facilitate research, report and scrutinise the social security assistance provided to persons injured through their employment. This type of social security now forms part of the benefits devolved to the Scottish Government.
6. The main benefit for industrial injury is the Industrial Injuries Disablement Benefit which is administered by the UK Government. The UK Government is advised by the UK Industrial Injuries Advisory Council (“IIAC”). Prior to the devolution of social security benefits in respect of employment injuries, IIAC’s role covered Scotland.
7. Industrial Injuries Disablement Benefit continues to be provided in Scotland under interim arrangements between the Scottish Ministers and the Department for Work and Pensions. It is proposed that the Council will play a similar role in Scotland as IIAC does for the rest of the UK.



# Delegated powers

8. The Bill confers four powers to make subordinate legislation on the Scottish Ministers.
9. The Member-in-charge has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the parliamentary scrutiny procedures chosen.
10. At its meeting on 3 October, the Committee indicated that it was content with the delegated powers in relation to **section 7(1)** and **schedule 1, paragraph 13(2)**.
11. However, the Committee agreed to write to the Member-in-charge to raise questions in relation to **section 2(5)** and **schedule 1, paragraph 4(2)**.
12. The Committee [wrote](#) to the Member-in-charge on 8 November and received a [response](#) on 15 November. The Committee's consideration of this, and the other delegated powers contained in the Bill, are set out in the next section of the report.

# Review of relevant powers

## Section 2(5): Council functions

### Power conferred on: Scottish Ministers

### Power exercisable by: Regulations made by Scottish statutory instrument

### Parliamentary procedure: Affirmative

#### *Provision*

13. Section 2(1)(a) to (e) sets out the core functions of the Council. These include carrying out research in relation to employment injuries, and reporting on the social security assistance provided to persons injured through their employment. Section 2(5) enables Scottish Ministers to confer additional functions on the Council by regulations.

#### *Committee consideration*

14. In its letter to the Member-in-charge, the Committee queried (i) why flexibility to add additional Council functions is required, (ii) in what circumstances it is envisaged that the Council's functions may require to change, and (iii) how this power might be more focused, given the remit of the Council and the policy areas within which it will be operating.
15. In his response, the Member-in-charge explains that:
  1. this is an identical provision to one in section 22(1)(e) of the Social Security (Scotland) Act 2018 in relation to the functions of the Scottish Commission on Social Security.
  2. flexibility is required because until the Council is established and begins its work, it is not possible to predict where its expertise might additionally prove useful; and
  3. the requirement to consult the Council before modifications are made to the functions provides an additional check on this power.
16. The Member-in-charge advises that in his view the provision balances the potential need for additional powers to be conferred on the Council timeously with effective Parliamentary scrutiny.
17. On balance, considering that there is precedent for this approach, the explanation regarding the need for flexibility and that the exercise of the power will be subject to the affirmative procedure, the Committee is now content.

18. **The Committee accepts the power in principle and is content that it is subject to the affirmative procedure.**

## Section 7(1): Ancillary Provision

**Power conferred on: Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise, negative procedure***Provision*

19. Section 7(1) confers power on Scottish Ministers, by regulations, to make any incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill or any provision made under it. Regulations made under this provision may make different provision for different purposes.

*Committee consideration*

20. Paragraph 11 of the DPM explains that “The Member considers that this power is necessary to ensure flexibility when it comes to implementation of the Bill and the effective operation of the legislation once it comes into force.”
21. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to, the Bill or any provision made under it.
22. The power allows issues of an ancillary nature which may arise after the Bill is passed to be dealt with effectively by Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which would not be an effective use of either the Parliament’s or the Scottish Government’s resources.

- 23. The Committee is content with the power in principle and with the parliamentary procedure applicable.**

**Schedule 1, Paragraph 4(2): Access to information****Power conferred on: Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Affirmative***Provision*

24. Paragraph 4(1) of schedule 1 of the Bill provides the Council with the right to access “relevant information” that it may reasonably require for the purpose of performing its functions. Paragraph 4(2) provides that “relevant information” is information in the possession or under the control of a list of bodies which is set out in sub-sub paragraphs (a) to (h). Paragraph 4(2)(i) gives Scottish Ministers power to specify in regulations additional persons to those listed in sub-sub-paragraphs (a) to (h).

*Committee consideration*

25. In its letter to the Member-in-charge the Committee queried (i) what persons or categories of persons this power might be required to capture in future and (ii) to consider ways in which the scope of this power might be appropriately limited.
26. In his response the Member-in-charge explains that:
1. this provision mirrors a similar provision in schedule 1, paragraph 4(2) of the Social Security (Scotland) Act 2018, with the difference that that power is subject to the negative procedure;
  2. there may be specific cases where it is reasonable for the Council to require information from a private sector body (not subject to FOISA) to inform specific work the Council is undertaking; and
  3. this power is subject to schedule 1, paragraph 4, sub-paragraph 3, which provides that these provisions are subject to any other enactment or rule of law that prohibits or restricts the disclosure of any information or the giving of any assistance or explanation, so the delegated power is constrained by other legislative measures.
27. On balance, considering that there is precedent for this approach, the explanation regarding the potential need for a statutory basis to request information from bodies which are not subject to FOISA, and the fact that the exercise of the power will be subject to the affirmative procedure, the Committee is content that the power is appropriate in principle and that the affirmative procedure applies to this power.

**28. The Committee accepts the power in principle and is content that it is subject to the affirmative procedure.**

### **Schedule 1, Paragraph 13(2): Number of members of the Council**

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

#### **Power exercisable by: Regulations made by Scottish statutory instrument**

#### **Parliamentary procedure: Affirmative**

##### *Provision*

29. Paragraph 13 of schedule 1 of the Bill sets out the membership of the Council. Paragraph 13(1)(a) provides that the Council is to consist of one member to chair it, and 13(1)(b) provides that the Council is to consist of at least six but no more than 12 members other than the chair.
30. Paragraph 13(2) enables the Scottish Ministers to amend Paragraph 13(1)(b) by substituting a different number of members for a specified time, subject to the minimum number of members being no less than six.

##### *Committee consideration*

31. The DPM explains that the Member-in-charge intends for the Scottish Ministers to have the power to increase the number of members on the Council, with a view to ensuring that the members have experience or knowledge of a range of matters

relevant to the work of the Council.

32. **The Committee accepts the power in principle and is content that it is subject to the affirmative procedure.**

