

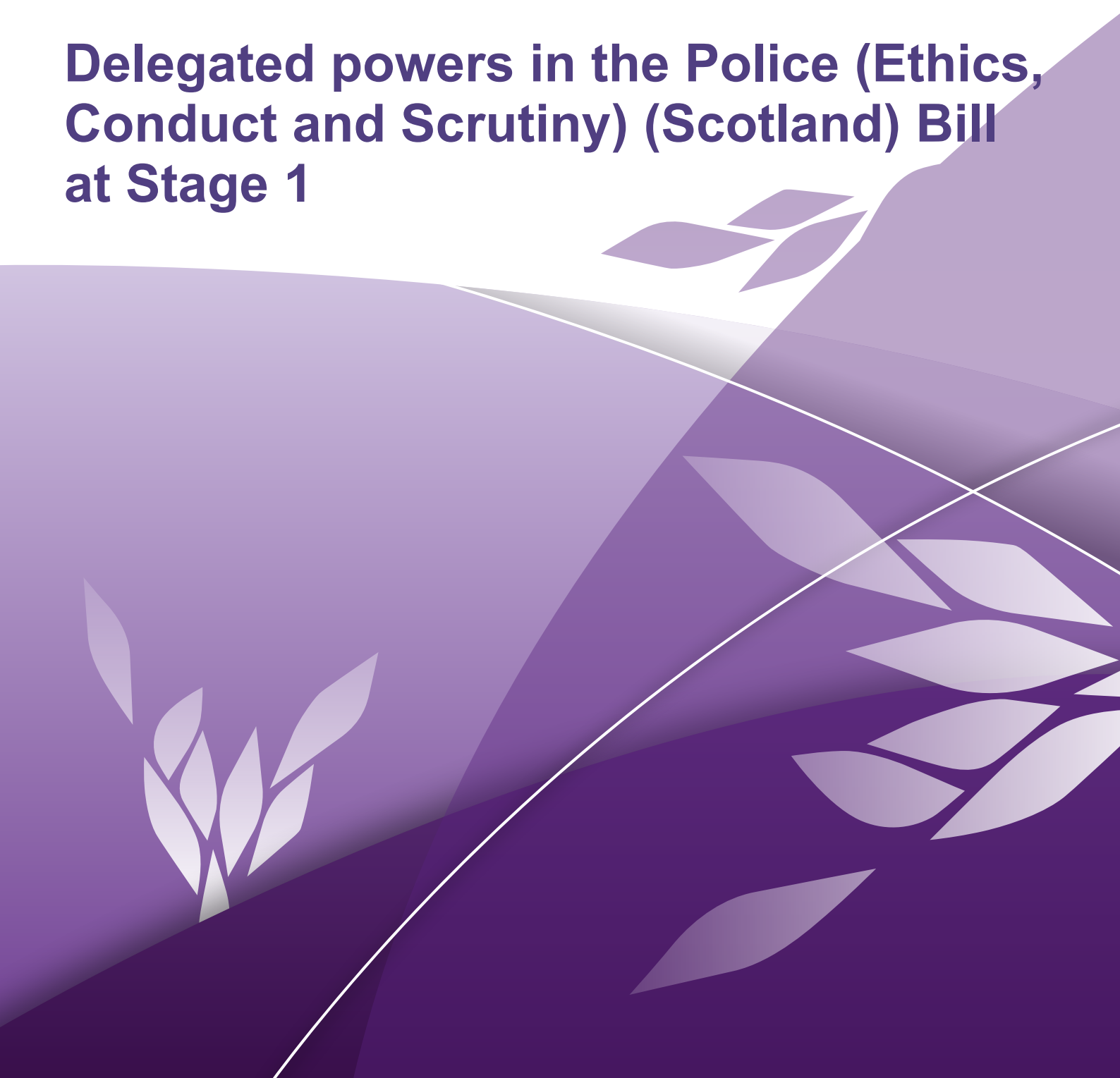


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill at Stage 1



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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 meeting on 12 December 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Police \(Ethics, Conduct and Scrutiny\) \(Scotland\) 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.

Overview of the Bill

3. This Scottish Government Bill was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 6 June 2023. The lead committee is the Criminal Justice Committee.
4. The Bill amends various aspects of the law regulating the conduct of the police. The Bill makes provision about the ethical standards of the Police Service of Scotland (“the Police Service”), procedures for dealing with and the consequences of misconduct by constables, and how policing in Scotland is scrutinised.
5. It forms one element of wider work to implement the 111 recommendations contained in the preliminary and final reports of an independent review by Dame Elish Angiolini commissioned by the Scottish Government and the Lord Advocate. The final report of the review was published in November 2020 as the *Independent Review of Complaints Handling, Investigations and Misconduct in Relation to Policing*.
6. The Bill contains 20 sections, organised under four main cross headings: Ethics of the Police, Police Conduct, Functions of the PIRC and Governance of the PIRC.
7. Section 1 identifies the two Acts amended by the Bill: the Police and Fire Reform (Scotland) Act 2012 and the Police, Public Order and Criminal Justice (Scotland) Act 2006. Sections 2 and 3 deal with police ethics. Section 2 imposes a requirement on the chief constable to prepare and publish a Code of Ethics for the Police Service and makes provision for consultation on the draft Code and for its regular review. Section 3 places a duty of candour on police constables.
8. Sections 4 – 8 deal with police conduct. Section 4 makes the Scottish Police Authority (“SPA”) liable for unlawful conduct by the chief constable in the carrying out of any of his functions. Section 5 extends the remit of the PIRC to investigate any unsatisfactory behaviour by a constable rather than limiting PIRC’s involvement to investigating misconduct as is the case now. Section 6 provides for the possibility of disciplinary proceedings to be brought against a constable after they have resigned or retired and are no longer a serving police officer. Section 7 provides for the establishment of two lists of former constables subject to disciplinary proceedings who may be barred from future employment as a police officer. Section 8 makes changes to the arrangements for appeals by senior police officers, including the establishment of an independent appeals panel of the SPA.
9. Sections 9 – 16 relate to the functions of the PIRC. Section 9 clarifies that PIRC may carry out investigations into alleged criminality by police officers or staff who have left the service. Section 10 defines what types of complaints made by police employees may and may not fall within PIRC’s remit. Section 11 widens the scope of reviews by PIRC into the handling of complaints and enables the PIRC to make recommendations which require a response from the SPA or the chief constable. Section 12 allows the PIRC to call in and investigate or re-investigate complaints. Section 13 requires the PIRC to keep under review arrangements by the SPA and the chief constable for the investigation of whistleblowing complaints. Section 14 enables the PIRC to investigate serious incidents or allegations of criminality involving police officers from police forces outwith Scotland which have occurred or

are alleged to have taken place in Scotland. Section 15 gives the PIRC a power to review police policies and practices and also requires the SPA and the chief constable to respond to any recommendations made by the PIRC and to set out whether and how they will implement those recommendations. Section 16 requires information about the handling of complaints to be provided to the PIRC electronically.

10. Sections 17 deals with governance and requires the PIRC to establish a statutory advisory board with members to be appointed by the Scottish Ministers.
11. Sections 18 – 20 make general provisions for a delegated power for Scottish Ministers to make ancillary provision by regulations, for commencement and short title.

Delegated powers

12. The Bill confers six powers to make subordinate legislation on the Scottish Ministers.
13. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.

Review of relevant powers

Section 2(2) – Code of ethics

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

14. Section 2 inserts new sections 36A and 36B into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). Section 36A places a duty on the chief constable to prepare a code of ethics for the police service. The chief constable must consult and share a draft of the code with specified persons. Section 36B confers a power on Scottish Ministers to make regulations to add, or remove, or modify the description of persons who must be consulted about the draft code. The power is subject to the affirmative procedure. The Scottish Government’s DPM explains that the list of consultees newly inserted in the 2012 Act is designed to include those with relevant knowledge or expertise and that as groups change and evolve the list may need to be updated to reflect changes to organisational responsibilities.

Committee consideration

15. This power is narrowly drawn and limited to adding, removing or changing the description of persons already listed in primary legislation in new schedule 2ZA to the 2012 Act as requiring to be consulted about the code. Under the affirmative procedure the Parliament will be able to scrutinise any proposed changes to consultees and must approve these before they can take effect.

16. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 7 (2) – Scottish police advisory list and Scottish police barred list

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

17. Section 7(2) amends the 2012 Act to insert Chapter 9A (advisory list and barred list) which introduces two lists which aim to provide information about former police officers who are or would have been subject to disciplinary procedures for misconduct but who have ceased to be a serving member of the Police Service, through resignation, retirement or dismissal. The advisory list provides information about police officers where notice of a disciplinary investigation has been given and

the proceedings have not yet concluded. The barred list provides information about former police officers who have been dismissed or would have been dismissed had they not first ceased to be a police officer. The duty to establish and maintain the lists is placed on the Scottish Police Authority (“SPA”) by new section 59A of the 2012 Act.

18. The Scottish Ministers may by regulations make provision for or about matters specified in section 59A(5), heads (a) - (i). These matters include what information should be entered in each list including the circumstances in which someone’s name is not to be entered on, or may be removed from, the lists, notices to be given to either the SPA or to a person to be entered in or removed from the lists and the consequences of being named on the lists and such other matters in connection with the lists as the Scottish Ministers consider appropriate. Different provision may be made for different ranks of police officer. The delegated power expressly includes the power to make provision preventing the employment or appointment of someone on the barred list by a person specified in the regulations. Regulations made under this power may modify any legislation including this Bill when it is enacted. Regulations will require certain persons to consult the lists before employing or appointing a person to another policing body.
19. The DPM explains that provision for the lists by way of regulations is appropriate because there is a need for flexibility in how the lists should operate to ensure that these will join up with similar lists in other parts of the UK, and so that they interact appropriately with existing statutory procedures for dealing with misconduct.
20. The Scottish Ministers are required to consult the SPA, the chief constable, the joint central committee of the Police Federation for Scotland and such other persons as they consider appropriate before making regulations to give effect to the advisory and barred lists.

Committee consideration

21. This power is central to the functioning of the new lists provided for in the Bill. A list of matters which may be included in regulations in connection with the lists is set out on the face of the Bill. The power includes discretion for the Scottish Ministers to include any aspect they consider appropriate. Nevertheless, the clear guidance in the Bill as to the content which may be included in the regulations and the requirement to consult parties with a relevant interest constrains the exercise of the power to those matters which the Scottish Ministers consider appropriate to achieve the policy aim of the lists. Regulations will be subject to a higher level of parliamentary scrutiny under the affirmative procedure, which appears appropriate given the impact on future employment of people named on these lists.

22. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 14 (2) – Investigations involving constables from outwith Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

23. Clause 14 amends the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”) by inserting sections 41G – 41L which provide for investigations by the Police Investigations and Review Commissioner (PIRC) into matters involving constables employed by police forces outwith Scotland. Section 41H (1) provides for procedures to be followed in investigation of serious incidents involving police officers not serving with the Scottish Police Service, and the reports to be prepared. It provides that the Scottish Ministers may make such regulations about these investigations as they consider appropriate. The provision is akin to existing provision for investigations involving officers employed in Scotland.
24. Section 41H(2) gives examples about what the regulations may contain including the form and procedure of an investigation; when investigations need not take place or when they may be discontinued; time limits; who may be required to assist or co-operate and for delegation of functions to the PIRC. Section 41H(3) requires the Scottish Ministers to consult the Commissioner, the chief constable, representatives of senior police officers, the joint central committee of the Police Federation of Scotland, the Secretary of State and the chief constable of the Police Service of Northern Ireland and any other person they think appropriate.
25. The DPM explains that the power will enable the Scottish Ministers to make regulations about the procedure to be followed in a detailed way that takes account of the need to make proper use of valuable parliamentary time and in consultation with the PIRC.

Committee consideration

26. The power mirrors provision already in place in respect of investigations of incidents involving constables serving in Scotland. Clear parameters for the content of the regulations are set out on the face of the Bill and there is a statutory requirement to consult parties with a relevant interest. Regulations will be subject to a high level of parliamentary scrutiny, which appears appropriate given the impact on future employment of people named on these lists. The affirmative procedure is already applied to regulations relating to investigation of incidents involving police officers serving in Scotland.

27. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 16 (2) – provision of information to the Commissioner

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

28. Section 16 amends the 2006 Act to provide a power for the Scottish Ministers to authorise or require the SPA or the chief constable to provide information and documents to the PIRC by giving access to an electronic database on which they are stored. The aim is to enable PIRC to remotely access Police Scotland's complaints and conduct database (Centurion) to obtain information about the handling of complaints against the police whilst those complaints are being dealt with. This is designed to assist the PIRC in meeting their statutory requirement to audit the police complaints handling system and to review the handling of individual complaints.

Committee consideration

29. The DPM explains that enabling the PIRC to have access to electronic databases will require to take into account a range of things including features specific to the database concerned and data protection requirements. It states that having the details set out in regulations will enable legislation to keep pace with changes in technology whilst respecting parliamentary time.
30. This power implements a recommendation in the independent Angiolini Review to strengthen independence in complaints processes and enhance efficiency. Section 16 augments existing regulatory powers which make detailed provision for the PIRC's access to information and documents. Those existing powers which relate to sharing information and documents with the PIRC are also subject to the negative procedure.

- 31. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 18 – ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

32. Section 18 provides that the Scottish Ministers may by regulations 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 this Act. Regulations made under this section are subject to the negative procedure, unless they add to, replace or omit any part of the text of an Act in which case they are subject to the affirmative procedure. The DPM states that this power is sought to provide flexibility to make any necessary adjustments needed to the Bill after enactment.

Committee consideration

33. This is a standard ancillary clause bounded by the functions of the Act and the appropriate procedure is specified, depending on whether the regulations seek to

modify any primary legislation.

34. **The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.**

Section 19 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid only

Provision

35. Section 19 provides that the final provisions in sections 18, 19 and 20 of the Bill come into force on the day after Royal Assent, and that other provisions of the Bill come into force on a day or days such as the Scottish Ministers may appoint by regulations. Such commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. The DPM explains that the power is needed to enable transitional arrangements and provisions which impact on organisations to be commenced in a practicable way.

Committee consideration

36. This is a standard commencement provision which is not usually subject to any parliamentary procedure. Under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 regulations are laid before parliament as soon as practicable after being made.

37. **The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.**

