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

Delegated powers in the Scottish Elections (Representation and Reform) 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 March 2024ⁱ, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Scottish Elections \(Representation and Reform\) 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.

ⁱ Jeremy Balfour MSP and Oliver Mundell MSP submitted apologies for this meeting.

Overview of the Bill

3. This Scottish Government Bill was introduced on 23 January 2024. The lead committee is the Standards, Procedures and Public Appointments Committee.
4. The Bill deals with a wide range of issues associated with the reform of Scottish Parliament and local government elections in Scotland:
 - Part 1 extends candidacy rights at devolved elections to foreign nationals with limited leave to remain.
 - Part 2 extends disqualification criteria for MSPs and councillors and provides that disqualification from membership of the House of Commons will no longer automatically mean that a person is also disqualified from being an MSP.
 - Part 3 lays down rules about campaign finance and expenditure at devolved Scottish elections.
 - Part 4 makes provision for the rescheduling of elections.
 - Part 5 adjusts existing powers to pilot electoral process and provides the Scottish Ministers with financial assistance powers for the purpose of increasing democratic engagement.
 - Part 6 requires certain unpaid-for digital campaigning material for Scottish elections published by relevant third-party campaigners to display a digital imprint with the name and address of the promoter.
 - Part 7 revises the deadline for Boundaries Scotland to submit its first report on the electoral arrangements for a local government area to April 2031.
 - Part 8 requires the Electoral Commission to prepare a separate 5-year plan in respect of its devolved functions, which is to be scrutinised by the Scottish Parliament Corporate Body.
 - Part 9 adjusts the constitution of the Electoral Management Board for Scotland, most significantly by giving it a separate legal personality as a body corporate and by providing for the post of deputy convener.
 - Part 10 contain the usual ancillary, commencement, and short title provisions.

Delegated powers

5. The Bill confers 10 provisions which create new or adjust existing delegated powers.
6. The Scottish Government has produced a [Delegated Powers Memorandum](#) (“DPM”) which sets out its reasons for taking the powers in the Bill and for the choice of procedure.

Review of relevant powers

Section 9 – Power to amend the schedule (Offences for the purposes of Part 2)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

7. Section 3 creates a new “Scottish disqualification order” to be made by the Scottish courts when a person is convicted of offences where the offence was aggravated by hostility towards an “election worker” (which is defined to include returning officers, election registration officers and chief counting officers, together with their staff).
8. Sections 7 and 8 provide that a person who is subject to a Scottish disqualification order is disqualified from being a member of the Scottish Parliament and local government in Scotland.
9. The Schedule lists the offences in respect of which a Scottish disqualification order can be made, and section 9 allows the Scottish Ministers to amend the Schedule.

Committee consideration

10. This power mirrors that in section 36 of the Elections Act 2022 and is subject to the same procedure. Provisions which confer power to amend the text of an Act, or which deal with offences, are usually subject to the affirmative procedure, as is the case here.
11. In the DPM, the Scottish Government states:

” The purpose of the provision in section 9 is to enable the Scottish Ministers to respond promptly to, and ensure compliance with, any changes in the criminal law, for example where an offence is amended or created or repealed. Delegation of this regulation-making function to the Scottish Ministers will ensure that, once this Bill is in force, the list of offences in the schedule to the Bill is updated as timeously as possible, reflecting changes in the criminal law, while providing an appropriate level of parliamentary scrutiny. It will also allow Ministers to respond if inclusion (or omission) of an offence from the list in the schedule is considered necessary in the light of experience.

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

Section 15 – power to make regulations to add, remove or vary description of third parties who can incur controlled expenditure

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

13. Section 15 allows the Scottish Ministers to amend the list of third parties who can incur controlled expenditure during a regulated period before a Scottish Parliament election. This power can only be exercised on the recommendation of the Electoral Commission.

Committee consideration

14. This power mirrors that in section 88 of PPERA and is subject to the same procedure.
15. In the DPM, the Scottish Government states:
 - ” The purpose of the provision is to ensure the Scottish Ministers are able to respond to changes made by the UK Secretary of State to the list of third party campaigners at reserved elections, as set out in section 88(9) of PPERA. This will allow for consistent rules between devolved and reserved elections, where this is desired. It will also allow for categories to be added if deemed necessary, in response to potential future changes in campaigning.

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

Section 18(2) and (3) – draft Electoral Commission code of practice on third party campaigning

Power conferred on: the Scottish Ministers

Power exercisable by: approval of a code of practice

Parliamentary procedure: bespoke procedure as set out in new section 100BA of PPERA (inserted into PPERA by section 18(3) of the Bill)

Provision

17. Section 18 inserts new sections 100AA and 100BA into PPERA. These place a duty on the Electoral Commission to produce a statutory code of practice on the application of expenditure controls for third party campaigners contained within that Act as it relates to Scottish devolved elections. Section 100BA sets out the process to be followed for the Code to be approved; it provides that the Scottish Ministers may approve a draft code with or without modifications and must then lay it before the Parliament.

Committee consideration

18. Section 100B confers power on Scottish Ministers to approve the code, modify it, and appoint a coming into force date for it. The power and the procedure applicable mirror those set out in section 100B of PPERA.
19. In the DPM, the Scottish Government states:

- ” The purpose of the provision in section 18 is to facilitate the creation of a statutory code of practice on expenditure controls for third party campaigners for Scottish devolved elections and Scottish devolved regulated periods by the Electoral Commission.

20. The Committee finds the power acceptable in principle and is content that it is subject to the bespoke procedure set out in section 100BA.

Section 28 – modification to existing order-making power in relation to pilot schemes for local elections

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: no procedure

Provision

21. Section 28 adjusts existing powers to pilot electoral processes by adding the Scottish Ministers, the Electoral Management Board for Scotland (EMB) and electoral registration officers (ERO) as persons who may propose pilots (in addition to the existing power for local authorities).

Committee consideration

22. This is an adjustment to an existing power and the Committee is content that the procedure remains appropriate. The Committee notes that, although pilots are not subject to any parliamentary procedure, if the changes which are piloted are to become permanent, the instrument which gives effect to those changes will be subject to the affirmative procedure.
23. In the DPM, the Scottish Government states:

- ” The purpose of the provision is to expand what is seen as an overly restrictive existing regime on who can propose pilot schemes for electoral purposes. By allowing other organisations in addition to local authorities to initiate pilots the Bill will allow for increased flexibility in electoral innovation.

Examples of possible future pilots in this area include the use of digital poll cards (transmitted to voters by email or App), either in addition to or in place of paper poll cards this would be aimed at making these accessible for people with sight loss. Other possibilities include a pilot of a new tactile or audio voting aid. No pilots under this legislation are currently planned. It is not anticipated that these changes will result in a substantial number of pilots, for example there could be two pilots in one year and then no pilots for the rest of the five year electoral cycle. For reference, a pilot of advance voting occurred in Wales in 2021 but this is not being considered in Scotland.

By making it possible for pilots to be proposed by the EMB and EROs the Government hopes to encourage innovation.

24. The Committee finds the adjustment to the existing power acceptable in principle and is content that the procedure remains appropriate.

Section 31(3) – power to amend section so as to modify the definition of “electronic material”, “promoter” or “published”, or “relevant third party”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

25. Part 6 of the Bill requires certain unpaid-for digital campaigning material for Scottish elections published by relevant third-party campaigners to display a digital imprint with the name and address of the promoter (and any other publisher) where the electronic material meets certain conditions. Section 31 defines the key terms: "electronic material", "promoter", "published" and "relevant third party". Section 31(3) of the Bill allows the Scottish Ministers to modify these definitions.

Committee consideration

26. This power mirrors that in section 39 of the Elections Act and is subject to the same procedure.

27. In the DPM, the Scottish Government states:

” This provision allows the Scottish Ministers to react to changes made to the UK digital imprints regime set out in the Elections Act and also to account for any issues arising in the operation of Part 6 of the Bill. The Elections Act regime applies to Scottish Parliament and local elections and the scheme set out in Part 6 of the Bill is an addition to that scheme. There is therefore a need to ensure continuity and to respond to relevant changes made to the Elections Act regime.

The Scottish Ministers are only able to make regulations under this power following a recommendation from the Electoral Commission or consultation with the Electoral Commission.

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

Section 35(3) – power to modify descriptions of information included as part of electronic material

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

29. Part 6 of the Bill requires certain unpaid-for digital campaigning material for Scottish elections published by relevant third-party campaigners to display a digital imprint with the name and address of the promoter (and any other publisher) where the electronic material meets certain conditions (this is regularly described as a ‘digital imprint’). Section 35 (3) sets out a regulation-making power to modify the details to be included in the imprint.

Committee consideration

30. This power concerns a matter of administrative detail and mirrors the power in section 41 of the Elections Act 2022. It is only exercisable following a recommendation from, or after consultation with, the Electoral Commission.
31. In the DPM, the Scottish Government states:
- ” This provision allows the Scottish Ministers to react to changes made to the UK digital imprints regime set out in the Elections Act and also to account for any issues arising in the operation of Part 6 of the Bill (including technological advances). The Elections Act regime applies to Scottish Parliament and local elections and the scheme set out in Part 6 of the Bill is an addition to that scheme. There is therefore a need to ensure continuity and to respond to relevant changes made to the Elections Act regime.

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

Section 36(5) – power to modify cases to which section 35 does not apply**Power conferred on: the Scottish Ministers****Power exercisable by: regulations made by Scottish statutory instrument****Parliamentary procedure: affirmative***Provision*

33. Section 36 sets out a number of exceptions to the digital imprint regime under Part 6 of the Bill. It provides that generally, the re-publishing or ‘re-sharing’ of electronic material will not require a new imprint, where the original imprint is retained in the material, and the material (the content or the imprint) has not been materially altered since it was previously published.
34. Section 36(5) allows Scottish Ministers to change the exceptions to the digital imprint regime. The Scottish Ministers are only able to make regulations under this power following a recommendation from, or consultation with, the Electoral Commission.

Committee consideration

35. This power is in the same terms as section 47 of the Elections Act 2022, which is also subject to the affirmative procedure.

36. In the DPM, the Scottish Government states:

” This provision allows the Scottish Ministers to react to changes made to the UK digital imprints regime set out in the Elections Act 2022 and also to account for any issues arising in the operation of Part 6 of the Bill (including technological advances). The Elections Act regime applies to Scottish Parliament and local elections and the scheme set out in Part 6 of the Bill is an addition to that scheme. There is therefore a need to ensure continuity and to respond to relevant changes made to the Elections Act regime.

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

Section 41 – Electoral Commission guidance

Power conferred on: the Scottish Ministers

Power exercisable by: approval of guidance

Parliamentary procedure: bespoke procedure as set out in section 41

Provision

38. Section 41 requires the Electoral Commission to issue statutory guidance on the operation of Part 6 (digital imprints). The guidance must contain details on the operation and enforcement of the digital imprint regime. In enforcing the regime, the Electoral Commission and the police must have regard to the guidance.

Committee consideration

39. This is a power to approve guidance, which is in similar terms to that in section 54 of the Elections Act 2022 and is subject to the same procedure.

40. The Committee finds the power acceptable in principle and is content that it is subject to the bespoke procedure set out in section 41.

Section 48 – Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amending an Act, otherwise negative

Provision

41. Section 48 gives Scottish Ministers power to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill as enacted. This includes the power to make different provision for different purposes. It also includes the power to modify any enactment.

Committee consideration

42. This is a standard ancillary provision.

43. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure if amending an Act, but is otherwise subject to the negative procedure.

Section 49 – commencement**Power conferred on: the Scottish Ministers****Power exercisable by: regulations made by Scottish statutory instrument****Parliamentary procedure: laid, no procedure***Provision*

44. Section 49 provides that it, along with sections 48 and 50 of the Bill, will come into force on the day after Royal Assent. The remaining provisions will commence on such day or days as the Scottish Ministers may by regulations appoint. Subsection (3) provides that commencement regulations may include transitional, transitory or saving provision and make different provision for different purposes.

Committee consideration

45. This is a standard commencement power.

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

