



The Scottish Parliament
Pàrlamaid na h-Alba

Clerk to the Delegated Powers and Law Reform Committee
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Gender Representation on Public Boards (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 5 September and seeks an explanation of the following matters:

Section 8 – Power to modify schedule 1

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Section 8 enables the Scottish Ministers to make regulations modifying schedule 1 so as to add or remove an entry of a public authority caught by the requirements of the Act or to vary the description of such an entry.

In terms of section 11(1), regulations under section 8 may include incidental, supplementary, consequential, transitional or saving provision and may also make different provision for different purposes. Section 11(2) provides that regulations under section 8 may also modify the Act (which is currently the Bill). By virtue of section 11(3), regulations made under section 8 are subject to the negative procedure.

Section 9 introduces schedule 2, which is stated to make provision about the application of the Act in relation to certain public bodies.

The Committee is not clear why the power to make regulations under section 8 includes, by virtue of section 11(2) a power to modify the Act as a whole, rather than being limited to amending schedule 2 in relation to the particular public authority.

The Committee therefore asks the Scottish Government to explain why it is necessary that section 11(2) provides power to modify the Act as a whole, rather than being limited to amending schedule 2. In particular, the Committee requests examples of when it would be necessary for regulations made under section 8 to modify a provision of the Act other than schedules 1 and 2.

Separately, in relation to the parliamentary procedure that applies, regulations made under section 8 of the Bill are subject to the negative procedure. The Freedom of Information (Scotland) Act 2002 provides for a different approach and is a useful comparator. Section 4 of that Act includes a power allowing the Scottish Ministers by order to add or remove the public authorities listed in schedule 1 to which the right of access to information applies. Such an order is to be made under the negative procedure except in particular circumstances where the affirmative procedure applies by virtue of section 7 of that Act. These circumstances are where regulations list the authority only in relation to information of a specified description.

Bearing in mind the approach taken to the regulation-making powers in sections 4(1) and 7(1) of the Freedom of Information (Scotland) Act, the Committee asks the Scottish Government whether it considers that it would be appropriate for regulations made under section 8 of the Bill to be subject to the affirmative procedure where those regulations make any provision in the second column of the table in schedule 1 to exclude certain positions within a public authority from the requirements of the Bill.

Finally, regardless of whether or not section 11(2) is limited to making modifications to schedule 2 (rather than the Act as a whole), the exercise of such a power in regulations made under section 8 would amend primary legislation. Accordingly, the Committee asks the Scottish Government to consider whether it would be more appropriate for the affirmative procedure to apply.

Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Tuesday 19 September.

Thank you.

Euan Donald
Clerk to the Delegated Powers and Law Reform Committee