

Local Government and Communities Directorate

Equality, Human Rights and Third Sector Division

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Dear Mr Donald

Gender Representation on Public Boards (Scotland) Bill at Stage 1

Thank you for your letter of 11 September 2017 on behalf of the Delegated Powers and Legislative Reform Committee to James Hynd, Head of Cabinet, Parliament and Governance Division. In the letter the Committee asked three questions relating to the Gender Representation on Public Boards (Scotland) Bill, to which I am providing the following responses.

1. 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.

Answer

Regulations under section 8 may need to modify the Act because a future addition to schedule 1 may result in the need for consequential change to the Act (other than by amending one of the schedules). An addition to schedule 2 might be required if there were two different persons responsible for making appointments to the board of the public authority added to schedule 1. If adding to schedule 1 a public authority with an unusual structure or with unusual statutory duties, the application of the Act might need to be modified to fit those circumstances. Modification of the Act itself (as opposed to modification of a provision in the schedules) might be the best way of making a particular change.

As a specific example, extra provision might need to be added to the definition of “public board” in section 2 in respect of a new public authority. Depending on when a public authority is added, the way section 6 applies might also need to be adjusted.

Therefore, there may be situations when the Act as a whole might require to be modified, and not simply modification of one or both of its schedules.

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.

Answer

The power to restrict the application of the Freedom of Information (Scotland) Act 2002 (FOISA) to a public authority (to apply to specified information only) has been considered. However, the Scottish Government’s view is that the FOISA power is of a different nature to the power in the Bill to exclude board positions.

When a public authority is added to FOISA, the default position is that a wide range of information (recorded in any form) becomes accessible to those who request it. Public authorities hold an extremely wide range of information, so the type of information that may be excluded is also very wide. The types of information held by an authority will not be readily identifiable. Therefore, when an authority is added to FOISA in relation to specified information only, it is appropriate to have a higher level of scrutiny, for example, to scrutinise what type of information that body holds at that point in time, to see whether the exclusion of some of that information is appropriate.

In contrast, the potential for excluding members from the Act is much narrower because only non-executive members can be excluded, and all of the non-executive members will be readily identifiable. They will be readily identifiable because they will be set out in legislation or, where the public authority is a company, will be named as directors in Companies House records. The types of excluded positions that are most likely to arise are of the types set out in the second column of the table in

schedule 1. These are, for example, ex officio members and members who are appointed by virtue of an election.

Because the exclusion is limited to readily identifiable non-executive members, and there are limited reasons for why those members would be excluded, the Scottish Government's view remains that negative procedure is appropriate.

3. 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.

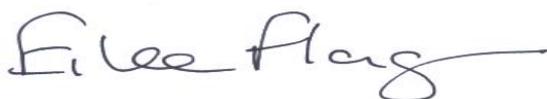
Answer

The Delegated Powers Memorandum set out that negative procedure is appropriate because of the limited nature of the enabling power in section 8 to modify the Act, which must relate to the modification of schedule 1 and that modification itself is limited to the addition, variation or removal of an entry in schedule 1. Any modification of the Act would be limited to its application to the circumstances of a public authority. The kinds of modifications that are most likely to arise are set out in schedule 2. There may be occasions where it would be more appropriate to modify a section of the Act, for example, to deal with the circumstances of a particular public authority.

Therefore the Scottish Government's view is that these modifications would be, and should be treated as, technical matters for which negative procedure is appropriate.

I hope this response is helpful.

Yours sincerely



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