



The Scottish Parliament
Pàrlamaid na h-Alba

Sent via e-mail

15 November 2023

Dear Stuart,

Thank you for your letter of 8 November 2023 seeking further explanation on two provisions in my Bill. My response is as follows:

Section 2(5): Council Functions

The purpose for this power being taken is to allow the Scottish Ministers to confer additional functions on the Council without recourse to primary legislation. This is an identical provision to one in section 22(1)(e) the Social Security (Scotland) Act 2018 in relation to the functions of the Scottish Commission on Social Security. It is possible to envisage situations where the Scottish Ministers may need to confer additional functions on the Council. For example, after Employment Injuries Assistance is fully implemented, and once the Council is established, the Council itself or Scottish Government may consider that the Council requires additional functions that are currently unforeseen to effectively carry out its work. Although Ministers and the Parliament may make requests for reports on specific matters, it may be desirable to give the Council additional functions on a more permanent basis.

Until the Council is established and begins its work, it is impossible to predict where its expertise might additionally prove useful. Without this power, additional functions, no matter how uncontroversial, could only be conferred by primary legislation, leading to delay and use of parliamentary time. Therefore, providing Ministers with a regulation making power to confer functions, subject to parliamentary scrutiny through the affirmative procedure, is in my view a proportionate and reasonable power to confer, balancing the potential need for additional powers to be conferred timeously with the need for the Parliament to fully and effectively scrutinise them.

An additional check on this power is the requirement in section 4(3) of the Bill for Ministers to consult the Council before making any modifications to their functions via regulations under section 2(5). As rehearsed above, this mirrors the approach taken in the Social Security (Scotland) Act 2018 and has the benefit of ensuring consistency between Scottish Government powers in relation to the functions of both the Council and Scottish Commission on Social Security.

Schedule 1, Paragraph 4(2): Access to information

The power conferred in Schedule 1, Paragraph 4 on the Council to provide it with a right of access to relevant information is to enable the Council to carry out its functions effectively. The power would be subject to the affirmative procedure, thereby requiring any such change to the list to be approved by the Parliament before the body is added. 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.

As you indicate, the list of bodies in sub-paragraph (2) are all subject to the Freedom of Information (Scotland) Act 2002 (FOISA). The reason for providing a regulation making power for Ministers to specify additional persons is to enable Ministers to add bodies which are not subject to FOISA to that list. There may be specific cases, for example, where it is reasonable for the Council to require information from, say, a private sector body or other person not subject to FOISA to inform specific work the Council is undertaking. This is to future proof the list where a body not currently covered by this list has information of the type that the Council might reasonably require for the purpose of performing its functions and should it emerge, from experience, that the Council is routinely encountering difficulty accessing certain types of information.

This is still a limited power which requires bodies to be prescribed, rather than, for example, having no limits at all on whom the Council can require information from. Furthermore, the power would still be subject to 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.

I trust that the committee finds this information to be helpful when considering its report on the delegated powers in the Bill to the lead committee.

Yours sincerely,

Mark Griffin MSP