

# The Public Services Reform (Scotland) Bill Response to Finance Committee



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The Public Services Reform (Scotland) Bill was introduced in the Parliament on 28 May 2009. The Finance Committee has been designated the lead committee on the Bill. The Committee called for written evidence on the Bill. This is the submission made by the Scottish Information Commissioner.

## Introduction

1. I welcome the opportunity to submit my views to the Finance Committee on the **Public Services Reform (Scotland) Bill** (the PSR Bill) as it considers the principles of the Bill at Stage 1.
2. By way of introduction, I am the Scottish Information Commissioner appointed by HM the Queen, on the nomination of the Scottish Parliament. I have statutory responsibility for enforcing and promoting Scotland's freedom of information (FOI) laws<sup>1</sup>. My decisions are legally enforceable and can be challenged only by appeal to the Court of Session on a point of law.
3. I have limited my response to comments on the principles of Part 2 of the PSR Bill. In particular, my response addresses whether the order-making powers proposed in Part 2 of the Bill are appropriate in seeking to deliver a *'public sector landscape and public sector functions that are proportionate, responsive and efficient'*.
4. In brief, my submission is that:
  - a) **it is inappropriate to include the Scottish Information Commissioner as one of the bodies listed in Schedule 3;**
  - b) **the use of the order-making powers could effect fundamental changes to the independent role of the Commissioner;**
  - c) **the interests of good governance and efficiency, effectiveness and economy can be advanced through current provision and the proposals it is anticipated will be set out in the Committee Bill arising out of the Review of SPCB Supported Bodies (RSSB).**

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<sup>1</sup> The Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (EIRs).



## Inclusion of Scottish Information Commissioner in Schedule 3

5. Part 2 of the PSR Bill, if enacted, would provide Scottish Ministers with order-making powers to propose changes to the bodies listed in Schedule 3. These are bodies for which Ministers are accountable, such as government agencies, non-departmental public bodies and other national organisations in receipt of government funding. The Government's stated intent is to reform the arrangements for public bodies carrying out their "day to day work independently of Ministers but for which Ministers are ultimately accountable"<sup>2</sup>.
6. In my view the inclusion of the Scottish Information Commissioner in Schedule 3 is anomalous and beyond the scope of the Government's intent - Scottish Ministers are not accountable for the Commissioner, nor do they provide the funding for the Commissioner's work.
7. As I indicated in my introduction, the Scottish Information Commissioner is not appointed by or accountable to Scottish Ministers. Rather the Commissioner's nomination is made by the Scottish Parliament. The independence of the Commissioner is enshrined in legislation, as the Freedom of Information (Scotland) Act 2002 provides that "*The Commissioner, in the exercise of that officer's functions (except for the function of preparing accounts), is not subject to the direction or control of the Parliamentary corporation, of any member of the Scottish Executive or of the Parliament...*"<sup>3</sup>
8. This different status - independent of Government and accountable to Parliament, not Ministers – is well understood by Ministers. Cabinet Secretary John Swinney gave evidence to the RSSB Committee, which was considering whether alterations should be made to the terms and conditions of the office-holders and the structure of bodies supported by the SPCB. He acknowledged that whether and how generating efficiencies can be undertaken by those bodies, is "*properly a matter for the Parliament, not ministers*".<sup>4</sup>
9. It is not at all clear therefore why the Scottish Information Commissioner, an SPCB supported body answerable to the Scottish Parliament, has been included in Schedule 3, and in my view should now be excluded.

<sup>2</sup> First Minister's speech *Delivering More Effective Government*, 30 January 2008 <http://www.scotland.gov.uk/News/This-Week/Speeches/First-Minister/simplifyingpublicservices>

<sup>3</sup> Freedom of Information (Scotland) Act 2002 Section 42(7)

<sup>4</sup> Evidence to RSSB Committee, 24 March 2009 – Official Report:

<http://www.scottish.parliament.uk/s3/committees/rssb/or-09/rssb09-0502.htm#Col217>



## Potential effect of Part 2: Use of Order-Making Powers

10. Part 2 of the Bill would allow Ministers to bring forward orders:

- modifying, conferring, abolishing, transferring, or providing for the delegation of any function;
- amending the constitution of, or abolishing, a person, body or office-holder;
- creating a person, body or office-holder on which functions are conferred or to whom functions can be transferred.

11. Notwithstanding the reassurance that many of these changes will be ‘*small and of a primarily administrative nature*’<sup>5</sup>, it is clear that these statutory orders could be used to effect significant and fundamental change. This might mean, for instance, allowing the Commissioner’s decisions to be amended or overturned by another body; or merging or dispensing with the post in favour of some other arrangement. Whatever the merits of any proposals which may be forthcoming, I am of the view that the use of order-making powers would not be an appropriate mechanism for effecting change on a body such as the Scottish Information Commissioner, which is intended to be independent of Government.

12. I would further argue that it was not the intent of Parliament that such changes be made to the functions of my Office except by amendment to the primary legislation. The role and functions of the Scottish Information Commissioner are fundamental elements of Scotland’s freedom of information legislation.

13. The intent of Parliament was to create a Scottish Information Commissioner to carry out a ‘quasi-judicial’ function i.e. the Commissioner’s decisions are legally enforceable. It was important to parliamentarians to establish the fundamental principle that the Commissioner should be able to perform that function without direction or control by the Government and the Parliament, for which he has jurisdiction. It was also important that the public should have trust in that independence. The then Deputy First Minister, Jim Wallace, described the appointment of a Scottish Information Commissioner as:

14. *“the third, and perhaps the most important, feature of the bill. The commissioner will police the right of access. If an authority does not take seriously its obligations under the legislation or tries to escape them, the commissioner will be there to act. Because of that, I took the view that it was crucial that the commissioner should be fully independent. The bill provides that the commissioner be appointed by the Queen, on the nomination not of ministers, but of the Parliament. The commissioner’s independence will ensure the integrity and credibility of the regime.”*<sup>6</sup>

<sup>5</sup> Public Services Reform (Scotland) Bill policy memorandum, paragraph 113

<sup>6</sup> Deputy First Minister, FOISA Bill Stage 1 debate, 17 January 2002,

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-02/sor0117-02.htm#Col5453>



15. The Act does give Ministers limited power to make orders affecting the FOI regime. However that power was clearly confined to certain specific provisions, none of which determines the functions of the Commissioner, by allowing amendment to:

- the list of bodies (including non-public bodies) covered by FOISA;
- timescales for responding to a request for information;
- timescales for responding to a request for review;
- timescales for making an application to the Commissioner;
- fees which may be charged for responding to information requests;
- timescales for applying exemptions to 'historical records';
- the EIRs;
- other legislation capable of preventing the disclosure of information.

16. I do not believe that the architects of the legislation would have proposed, or been permitted by Parliament, to include a similar order-making power to amend, modify or abolish the enforcement provision, which is embodied in the role of Scottish Information Commissioner.

17. Of course legislation generally can be subject to changes proposed by the Government of the day. Nor do I think that the role of Commissioner should be above scrutiny. However changes to the role and function of the Scottish Information Commissioner would, by purpose or default, also have the effect of fundamentally changing Scotland's FOI regime, and I would argue that it was never the intent of Parliament that this should be done other than by amendment to the primary legislation. If the PSR Bill was enacted with the Scottish Information Commissioner included, then it would have the capacity to allow change with a lesser degree of scrutiny and challenge than was Parliament's intent, or which I think is desirable.

18. Changes to the FOI enforcement provisions require close scrutiny, and procedures for consideration of statutory orders do not, in my view, allow sufficient time for proper consideration of changes which could have the effect of altering Scotland's FOI enforcement provisions. If the current provisions of the PSR Bill were taken forward<sup>7</sup>, there would be the opportunity for only 40 days consideration of such changes, and a maximum time limit of 90 minutes in Committee and only 9 minutes in Chamber to cover all debate of any issues. This is consistent with the intent that the process should be less intensive and demanding on parliamentarians' time than scrutiny of primary legislation.

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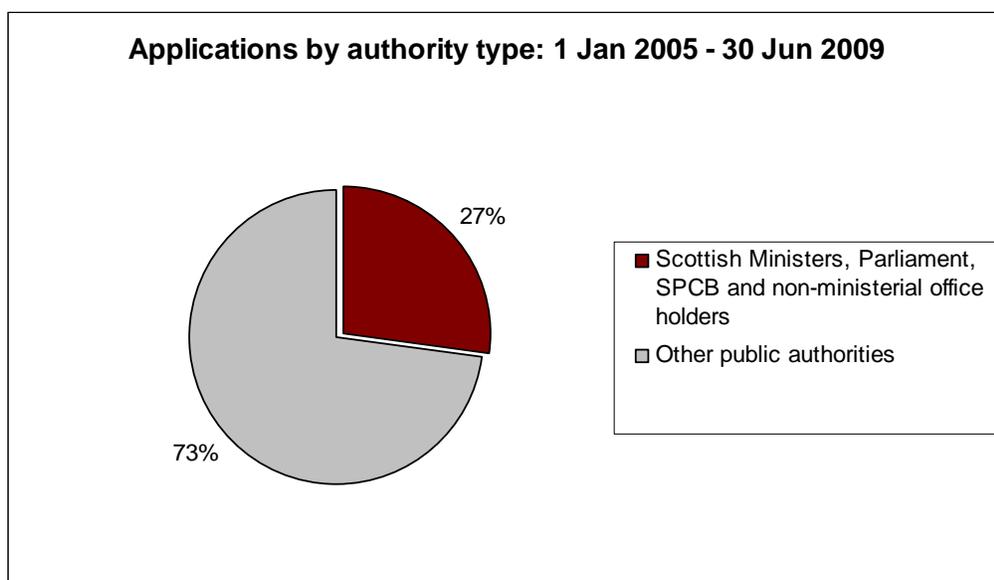
<sup>7</sup> Current provisions are for orders to be made by affirmative instrument.



19. Although the PSR Bill contains several important preconditions and consultation obligations it does not prescribe how these processes would be undertaken. Indeed, clause 21(3) of the Bill allows Ministers to dispense with the consultation requirement altogether if there has, in their view, been previous consultation. It seems to me that the preconditions for a statutory order through the PSR Bill are not strong enough to ensure a sufficiently robust scrutiny of potentially fundamental change, which would equal that afforded to primary legislation.

## Need to maintain public confidence in the independence of the Commissioner

20. Some changes may have an impact upon public confidence and the perception of independence. As the chart below demonstrates, a substantial proportion of applications to me for decision have concerned Scottish Ministers, the Scottish Parliament, the SPCB and non-ministerial office holders.



21. Indeed, more applications are received concerning Scottish Ministers than any other public authority<sup>8</sup>. This is no surprise, given the level of public interest in the workings of Government.

22. Cases concerning Government, by their very nature, frequently involve matters of national importance where consideration of the harm and public interest tests can be particularly complex and politically sensitive. Often the Commissioner, in coming to a decision, will comment adversely on the handling of the request, or will order the release of information, which the Government of the day does not want to disclose. In making decisions on these cases - and in order to safeguard the integrity of the role - it is essential that the Commissioner is free

<sup>8</sup> 314 appeals to the Commissioner from 2005 to end 2008



from interference and control, whether real or perceived. Even where limited changes to the functions of the role are proposed - designed perhaps to alter the way in which the Commissioner conducts investigations or issues decisions - they too must be seen to have received a high level of close scrutiny.

## Ensuring accountability

23. Independence of function does not mean a lack of accountability, nor an absence of opportunities to bring about improvements in the efficient, economic and effective conduct of the activities of the Commissioner. I am not seeking to exclude my Office from scrutiny and the possibility of change, but simply contend that the PSR Bill is not the appropriate route for this.
24. My annual budget is approved by the Finance Committee and I am the accountable officer for the funds allocated to me by the Scottish Parliament each year<sup>9</sup>. I am subject to internal and external audit, my accounts are subject to approval by the Auditor General, and I must lay an annual report before the Scottish Parliament. I am obliged to consult the SPCB about the employment of staff and their terms and conditions. These provisions help ensure accountability and sound governance.
25. The RSSB Committee reported that it was *“satisfied that the governance procedures and processes currently in place are robust and at the same time protect operational independence.”*
26. However the Committee identified changes to the terms and conditions of the office-holders and structure of the bodies supported by the SPCB which would bolster current arrangements. I have welcomed these proposals, which give further powers to the SPCB including:
- approving annual proposals for expenditure;
  - commenting on draft strategic plans from office-holders prior to these plans being laid before Parliament;
  - determining the location of office-holders premises;
  - directing office-holders on sharing of premises, staff and services.
27. The Scottish Parliament has approved a motion<sup>10</sup> to bring forward a Committee Bill to carry many of the report’s recommendations into effect.
28. In my view these specific RSSB recommendations will provide even stronger reassurance as to the accountability of office-holders for the performance of their roles, without encroaching on the independence of their function. It seems to me undesirable to allow the provisions of both the PSR Bill as drafted and the

<sup>9</sup> £1.5m in 2009/10.

<sup>10</sup> Parliamentary Debate of RSSB Committee Report, 18 June 2009:

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0618-02.htm#Col18540>



Committee Bill as proposed to be carried into effect. This would allow both Ministers and the SPCB to direct the Commissioner. For example under the respective PSR and RSSB proposals both Ministers and the SPCB would have the capacity to direct an office-holder to share services or staff. I believe this dual mandate to be potentially onerous and confusing.

## Conclusion

29. The stated aim of the PSR Bill is to institute changes and measures to simplify and improve the landscape of Scottish public bodies for the benefit of the public. It has already been recognised that the role of SPCB supported office-holders should be considered separately given that we are not under the direction of or accountable to Ministers. The review conducted by a Parliamentary Committee has proposed measures which, in my view, are designed to ensure that our functions are conducted in a way which is '*... proportionate, responsive and efficient*'.
30. The provision of order-making powers to the Scottish Government in respect of the Scottish Information Commissioner, however, would allow Ministers to modify, confer, abolish, transfer or delegate any function or even to abolish the Office by statutory order. Whilst I should stress that I am not aware of any plans by the current administration to make any such changes to my Office, these proposals would provide a way for any future administration to direct or to control the performance of the function of the Commissioner. The nature of the enforcement of freedom of information rights was deliberately and carefully constructed to ensure that it could be carried out without direction or control. Effecting such changes to the function of the Scottish Information Commissioner could result in a diminution of the freedom of information regime in Scotland and at the very least should be subject to the scrutiny which changes to primary legislation deserve.
31. I would therefore suggest that it would be appropriate to remove the Scottish Information Commissioner from Schedule 3 of the PSR Bill.
32. I would be very happy to discuss further any of the points in my evidence or any other matters of interest to the Committee.

**Kevin Dunion**

**Scottish Information Commissioner**

**14 August 2009**