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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Police, Crime, Sentencing and Courts Bill



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- a. matters relating to equal opportunities, and upon the observance of equal opportunities within the Parliament; and
- b. matters relating to human rights.
- c. matters relating to civil justice within the responsibility of the Cabinet Secretary for Justice and Veterans.

In these Rules

(a) “equal opportunities” includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions; and

(b) “human rights” includes Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights as for example contained in any international convention, treaty or other international instrument ratified by the United Kingdom.



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Introduction

1. This report considers the delegated powers that are relevant to Scotland in the [Police, Crime, Sentencing and Courts Bill](#) (UK Parliament legislation).
2. The Police, Crime, Sentencing and Courts Bill ("the Bill") is a UK Government Bill introduced in the House of Commons on 9 March 2021 by the former Lord Chancellor and Secretary of State for Justice Robert Buckland MP. The Bill is currently at the Committee stage in the House of Lords. As the Bill is still progressing through the UK Parliament, it is still subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course.
3. The Bill brings together into one bill the Sentencing Bill, Serious Violence Bill and Police Powers and Protections Bill as outlined in The Queen's Speech in December 2019. The continuation of the Bill was confirmed in The Queen's Speech on 11 May 2021. The UK Government's stated policy aim for the Bill is to enhance the democratic accountability of police forces, and fire and rescue services, improve the efficiency and effectiveness of emergency services through closer collaboration, and build public confidence in policing.
4. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("the LCM") on 6 August 2021. As justice is devolved in Scotland, the majority of the provisions in the Bill apply to England and Wales only. There are, however, a number of other provisions that apply to Scotland and Northern Ireland. The provisions in the Bill relate to a mixture of devolved and reserved or excepted matters in Scotland, Wales and Northern Ireland.
5. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a LCM contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee ("the Committee") shall consider and may report to the lead committee on those provisions.
6. The lead committee for the LCM is the Criminal Justice Committee.

Review of powers conferred on Scottish Ministers

Clause 3(8) – Amended section 60 of the Police Act 1996: Power to make regulations for Police Federations

Power conferred on: Scottish Ministers (broadening an existing power)

Power exercisable by: Regulations made by SSI

Parliamentary procedure: Negative

Provision

7. Section 60(1) of the Police Act 1996 (“the 1996 Act”) provides that the Secretary of State may by regulations prescribe the constitution and proceedings of the Police Federations or authorise the Federations to make rules concerning such matters relating to their constitution and proceedings as may be specified.
8. The functions under section 60 of the 1996 Act in or as regards Scotland were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (i.e. the general transfer of functions to Scottish Ministers in devolved areas on devolution).
9. Section 60(2) of the 1996 Act sets out various matters that regulations under section 60(1) may make provision about, without prejudice to the generality of that power. In particular, section 60(2)(e) provides that the regulations may modify any regulations under the Police Pensions Act 1976, section 50 of the 1996 Act (regulations for police forces) or section 48 of the Police and Fire Reform (Scotland) Act 2012 (governance and administration of police). This applies in relation to any member of a police force who is the secretary or an officer of a Police Federation and for requiring the appropriate Federation to make contributions in respect of the pay, pension or allowances payable to or in respect of any such person.
10. Clause 3(8) of the Bill amends section 60(2)(e) of the 1996 Act to widen this particular aspect of the power. The amendment would enable *any* provision to be made about the pay, pension or allowances and other conditions of service for secretaries and officers of the Police Federation. This includes the modification of any existing regulations, whereas the current version of section 60(2) enables the modification of specific regulations (albeit section 60(2) is expressed without prejudice to the generality of the power in section 60(1)).
11. Instruments made by the Scottish Ministers under section 60 of the 1996 Act as modified by clause 3(8) of the Bill as enacted would remain subject to the negative procedure (i.e. no change).

Committee consideration

12. Paragraph 21 of the LCM states the Scottish Government’s position that this amendment is desirable for Scotland as it provides slightly greater flexibility in the regulations which may be made by Scottish Ministers about the pay, pension or

allowances and other conditions of service for secretaries or officers of the Police Federation. The effect is that the regulation-making power is not restricted to modifying specific existing regulations. This puts it beyond doubt that, in the future, Scottish Ministers could apply with modifications other regulations which are not currently listed in section 60(2) but which regulate the pay, pension or allowances or other conditions of service of police officers. An example is provided of regulations made under the Public Service Pensions Act 2013 for Federation officers who fall under that scheme.

13. The Committee noted that the amendment is technical in nature to ensure the Scottish Ministers have the power to fully regulate the pay, pension or allowances and other conditions of service for any member of a police force or special constable who is the secretary or officer of the Scottish Police Federation.
14. The Committee also noted that the negative procedure continues to apply to regulations made by Scottish Ministers under section 60 of the 1996 Act as amended by the Bill as enacted. This is the parliamentary procedure that currently applies to the power and the widening of the power is limited to being technical in nature.
15. The Committee therefore finds the power in section 60 of the 1996 Act, as amended by clause 3(8) of the Bill as enacted, to be acceptable in principle, and is content that the power remains subject to the negative procedure.

Schedule 5, paragraph 4(5) and 5(3) – New sections 9(5) and 14(6) of the Crime (Overseas Production Orders) Act 2019: Power to prescribe person to serve an Overseas Production Order

Power conferred on: Secretary of State and Lord Advocate (new powers)

Power exercisable by: Regulations by SI/SSI

Parliamentary procedure: Negative

Provision

16. Clause 47 and schedule 5 of the Bill make amendments to the Crime (Overseas Production Orders) Act 2019 (“the 2019 Act”). An Overseas Production Order (“OPO”) is an order made by a UK judge under a designated international cooperation agreement requiring the production of electronic data by a person. The 2019 Act contains various safeguards requiring the judge to be satisfied that it is necessary and proportionate to issue an OPO. Section 9(2) and 9(3) of the 2019 Act currently require OPOs to be served by the Secretary of State if they are made in England, Wales or Northern Ireland or by the Lord Advocate if they are made in Scotland.
17. Paragraph 4(5) of schedule 5 of the Bill inserts a new section 9(5) of the 2019 Act (restrictions on service of order) and paragraph 5(3) of schedule 5 of the Bill inserts a new section 14(6) of the 2019 Act (means of service). The effect is to enable both the Secretary of State and the Lord Advocate, by regulations, to delegate functions conferred on them by the 2019 Act in relation to the service of Overseas Production Orders. In particular, the Secretary of State and the Lord Advocate will be able to

prescribe in regulations another person to serve an OPO and to make arrangements for the way in which such an Order or other document may be served.

18. These new powers to make regulations, insofar as exercisable by the Lord Advocate, are subject to the negative procedure.

Committee consideration

19. Paragraphs 124 and 125 of the [UK Delegated Powers Memorandum](#) for the Bill (“the UK DPM”) indicates that at the time of passing the 2019 Act the fine detail of the implementation was not known, and certain changes have had to be made to comply with the UK’s international obligations. Negotiations with the USA have highlighted practical arrangements which should be put in place to ensure that the UK can better comply with the international obligations arising from the agreement with the USA or any other country the UK chooses to engage with.
20. According to paragraph 126 of the UK DPM, it is necessary to amend the 2019 Act to remove the requirement for service to be carried out by the Secretary of State and the Lord Advocate alone and provide that this function can be delegated to a body which has the appropriate infrastructure and controls in place to be able to securely transmit requests and receive data from providers based overseas. Paragraph 127 of the UK DPM indicates that the method of secure transmission has been an area of real difficulty as very few persons or organisations have the capability to effect service in compliance with the necessary security classification and data protection legislation.
21. Paragraph 8 of the LCM indicates that there has been a high level of stakeholder engagement on these amendments and the former Lord Advocate and Crown Office engaged directly with the Home Office for their interests and they were satisfied that the provisions were proportionate.
22. The Committee noted that the amended power appears to enable technical provision necessary to effect service of OPOs in compliance with international obligations. It may be necessary to leave the person authorised to serve the Order (if not the Secretary of State and Lord Advocate) to secondary legislation so that provision can be made on a case-by-case basis to reflect the terms of each bi-lateral agreement reached with another country.
23. The Committee also noted that the negative procedure applies to the exercise by the Lord Advocate of the new powers to make regulations delegating his or her functions in relation to the service of OPOs. As mentioned above, the purpose of these provisions is to ensure technical compliance with international obligations relating to the service of OPOs and therefore the negative procedure appears to provide a proportionate level of scrutiny.
24. **The Committee therefore finds the powers conferred on the Lord Advocate in sections 9(5) and 14(6) of the 2019 Act, as amended by paragraph 4(5) and 5(3) of schedule 5 of the Bill as enacted, to be acceptable in principle, and is content that those powers are subject to the negative procedure.**

Review of powers conferred on UK Ministers in devolved areas not formerly within EU competence

25. Clauses 40 to 42 include provision conferring three powers on UK Ministers in partially devolved areas regarding the extraction of information from digital devices.
26. The Scottish and UK Governments have agreed that these provisions require the consent of the Scottish Parliament, although it appears from the LCM that the Scottish Government does not currently recommend that consent is given for any of these provisions. The Scottish Government's stated intention is to bring forward a supplementary LCM following further negotiations to ensure the Bill takes account of Scotland's distinct position with respect to investigation of deaths.
27. In respect of each of the powers in clauses 40 to 42 of the Bill conferred on the Secretary of State to make regulations in devolved areas, there is no requirement for the consent of Scottish Ministers.
28. Rule 6.11.1(b) and (c) of Standing Orders provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation"; and general questions relating to powers to make subordinate legislation. In Session 5 the Committee considered powers conferred on UK Ministers in devolved areas in UK Parliament Bills relating to EU withdrawal, including the Environment Bill; the Fisheries Bill; Trade Bill; and United Kingdom Internal Market Bill. In Session 6, the Committee has also considered LCMs for the Environment Bill and the Professional Qualifications Bill, which also arise from EU withdrawal.
29. In respect of each of these areas of former EU competence, the Committee has made the following recommendations where there is no requirement for the consent of Scottish Ministers to the exercise of powers by UK Ministers in devolved areas:
 - The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 - Where the powers in the bill are exercised by UK Ministers in devolved areas, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.
 - That powers which are conferred on UK Ministers are exercisable within devolved competence should be subject to a requirement for the Scottish Ministers' consent.
 - As a minimum, it is appropriate that all powers under the bill exercisable by UK Ministers in devolved areas are subject to the process set out in [SI Protocol 2](#).
30. Clauses 40 to 42 are police powers which do not appear to have been formerly within EU competence before the UK fully withdrew from the EU. SI Protocol 2 only applies to regulations made by UK Ministers within devolved competence *in areas*

formerly within EU competence before the UK fully withdrew from the EU.

31. The Committee therefore seeks clarification from the Scottish Government on whether the process for scrutiny by the Scottish Parliament under SI Protocol 2 will apply to the powers in clauses 40 to 42 of the Bill and, if not, how it is envisaged the Parliament will be able to scrutinise the exercise of these three delegated powers by UK Ministers in devolved areas.
32. Accordingly, it will write to the Minister for Parliamentary Business to ask:
 - whether the three powers conferred on the Secretary of State by clauses 40 to 42, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and
 - how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the exercise of these three delegated powers conferred on UK Ministers in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

