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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers provisions in the Bail and Release from Custody (Scotland) Bill after Stage 2



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. This paper considers the delegated powers contained in the Bail and Release from Custody (Scotland) Bill (“the Bill”) following amendments made at Stage 2.
2. The Committee previously reported on the delegated powers provisions at Stage 1 on 10 January 2023, with the report available [here](#).
3. In the Stage 1 report, the Committee was content with the ten powers delegated to Scottish Ministers. Eight powers were agreed unanimously, and sections 8 and 11 by majority.
4. The Bill completed Stage 2 on 17 May 2023. Following Stage 2, six changes have been made to the delegated powers in the Bill. Two existing delegated powers have been revised and four new delegated powers have been added.
5. The Scottish Government has lodged a [supplementary delegated powers memorandum](#) (“supplementary DPM”) covering the delegated powers in the Bill as amended at Stage 2.
6. The Committee is considering the powers under Rule 9.7.9 of the Standing Orders, in relation to any new or substantially altered powers provisions in the Bill as amended.

Overview of the Bill

7. This Scottish Government Bill was introduced by the former Cabinet Secretary for Justice and Veterans, Keith Brown, MSP, on 8 June 2022. The lead committee is the Criminal Justice Committee.
8. According to the Policy Memorandum published by the Scottish Government:
 - ” The provisions of this Bill are intended to introduce a number of reforms designed to deliver on the Scottish Government’s commitment to refocus how imprisonment is used. They are intended to ensure that, as much as possible, the use of custody for remand is a last resort for the court, and to give a greater focus to the rehabilitation and reintegration of individuals leaving custody.
9. The Bill comprises 15 sections divided into 3 parts:
 - Part 1 covers bail law reform including adjustments to the legal framework within which courts make decisions as to whether people accused of criminal offences are remanded in custody or granted bail.
 - Part 2 reforms mechanisms governing release from custody and the support provided to people leaving prison.
 - Part 3 contains some standard ancillary and final matters.

Supplementary Delegated Powers

Section 8 (inserting new section 3C(3A) into the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") – power to release early

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative but may be made affirmative by reason of urgency

Revised or New power: Revised

Provision

10. Section 8 of the Bill amends the Prisoner and Criminal Proceedings (Scotland) Act 1993 to make provision for the early release of prisoners in emergency situations.
11. It provides that the Scottish Ministers may, by regulations, provide for defined groups of persons to be released early from prison (or young offenders institutes). This power can only be exercised by the Scottish Ministers if they are satisfied that it is a necessary and proportionate response to an emergency situation. An "emergency situation" includes the incidence or spread of infection or contamination, or a situation resulting in part of the prison estate being unusable.
12. The purpose and effect of the delegated power has not changed since introduction but the way in which it may be exercised has been altered by amendments made at Stage 2.

Committee Consideration

13. The Committee previously wrote to the Scottish Government regarding this power when it considered the Bill at Stage 1. The issue related to the option to make Regulations subject to the "made affirmative procedure". The made affirmative procedure allows an SSI to be made and come into force even though it has not yet been approved by the Parliament. However, the SSI cannot remain in force beyond a specified period (usually 28 or 40 days) unless it is subsequently approved by the Parliament. It is usually used when the Government requires an urgent change to the law.
14. At introduction, the made affirmative procedure could only be used if regulations provided for the release of a prisoner who had less than 180 days to serve before they were due to be released. If the regulations provided for release of a prisoner with more than 180 days still to serve, the affirmative procedure applied.
15. An amendment was made at Stage 2 to the effect that no prisoner may be released by virtue of regulations made under this section more than 180 days earlier than the Scottish Ministers would otherwise be required to release that person.
16. The Committee's previous questions on section 8 were focused on the use of the made affirmative procedure and whether it met the four principles set out in its report on its previous inquiry into the use of the made affirmative procedure. The

choice of procedure has not changed since then and nor has the justification for taking the power. The amendment restricts the circumstances in which the power can be used. In light of the position previously agreed by a majority of the Committee, it is therefore content with the revision.

17. **The Committee accepts the revised power in section 8 in principle and is content that it is subject to the affirmative procedure but may be subject to the made affirmative procedure in specified circumstances and by reason of urgency.**

Section 10 (inserting new section 34B(4) into the 2003 Act) – throughcare support standards – power to prescribe consultees

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

18. Section 10 of the Bill places a duty on Scottish Ministers to publish standards on the throughcare support to be provided to those leaving custody following a period on remand or imprisonment. It also lists various bodies which the Scottish Ministers must consult when preparing, reviewing, and revising the standards. In addition to those bodies listed on the face of the Bill, at Stage 2 a new power was added which provided that Scottish Ministers must consult persons of a “description prescribed by the Scottish Ministers by regulations”.
19. The new power is therefore a power to specify additional persons or organisations who must be consulted in the preparation, review, and revision of the throughcare standards. Scottish Ministers may also make ancillary provision when using this power.

Committee consideration

20. The Scottish Government addresses this new power at paragraphs 14 to 16 of the supplementary DPM, stating:

- The power to prescribe this consultee is intended to cover Victim Support Organisations and uses the same approach taken to defining such organisations as in Section 11(2) of the Bill (which inserts new section 16ZA(2)(a) and (b) into the Criminal Justice (Scotland) Act 2003).

Scottish Ministers having the power to specify the person or organisation who must be consulted in the preparation, review and revision of these throughcare standards will help to ensure coverage of both local and national organisations.

Providing the power for Scottish Ministers to describe these organisations by regulations allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should the need arise to ensure that the relevant organisations – national and local – continue to be covered by the requirement to consult on these standards.

21. **The Committee accepts the proposed power in principle and is content that it is subject to the negative procedure unless modifying primary legislation, in which case it is subject to the affirmative procedure.**

Section 10 (inserting new section 34B(6) into the 2003 Act - throughcare support standards – power to modify the definition of “support standards”

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or New power: New

Provision

22. As explained above, the Scottish Ministers are under a duty to publish throughcare standards. At Stage 2, an amendment was made which provided that Scottish Ministers must consult a person of a description prescribed by regulations and who is providing “support services” to victims in relation to offences prepared against or in respect of those victims.
23. The new power provides that Scottish Ministers may modify the definition of “support services”. They may make also make ancillary provision when using this power.

Committee consideration

24. The Scottish Government addresses this new power at paragraphs 25 and 26 of the supplementary DPM, stating:

- ”** Allowing Scottish Ministers to modify the definition of ‘support services’ would allow the flexibility to add additional supports that may be identified at a later date. This approach also ensures that the definition of ‘support service’ used in this Bill in sections 10 and 11 remains consistent.

The power to make ancillary provision will ensure that if the definition is changed in a manner that might exclude a victim support organisation already providing support to victims from being consulted on the development of the throughcare standards, that saving or transitional provision can be made to allow that victim support organisation to still be consulted on the standards.

25. **The Committee accepts this new power in principle and is content that it is subject to the affirmative procedure.**

Section 11 (which inserts new section 16D(2)(a) into the 2003 Act - Provision of Information to Victim Support Organisations – power to prescribe who is a “supporter”

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

26. New section 16D applies where the perpetrator has been made subject to a compulsion order and a restriction order. It provides that victims can nominate a “supporter” to receive certain information in relation to the perpetrator either at the same time as the victim or on their behalf. The supporter can also request that information from Scottish Ministers with the victim’s explicit consent. New subsection 16D(2)(a) and (b) gives Scottish Ministers power to prescribe who constitutes a “supporter”.

Committee consideration

27. The Scottish Government addresses this new power at paragraphs 31 to 34 of the supplementary DPM, stating:

28. The Scottish Ministers having the power to specify the person or organisation to whom information may be supplied allows them the ability to restrict the sharing of information about a perpetrator made subject to a compulsion order and restriction order to organisations it considers appropriate to receive it. That includes the organisation's ability to comply with data protection legislation.

Providing the power to the Scottish Ministers to describe these organisations by regulations allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should the need arise to ensure that victims can be provided with appropriate support.

The power to make ancillary provision will ensure that if, for instance, the description of prescribed bodies who can be 'supporters' is changed, any necessary saving and transitional provision can be made.

There may be a need for the further ancillary provisions if there is provision elsewhere which restricts a supporter meeting the prescribed description from receiving information and a change is required in order to facilitate the sharing of this information.

28. **The Committee accepts the power acceptable in principle and is content that it is subject to the negative procedure unless modifying primary legislation, in which case it is subject to the affirmative procedure.**

Section 11 (which inserts new section 17DA into the 2003 Act) - Provision of Information to Victim Support Organisations – power to prescribe who is a “supporter”

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

29. New section 17DA provides that victims where the perpetrator has been made subject to a compulsion order and a restriction order, hospital direction or transfer for treatment direction can nominate a "supporter" to receive the information regarding certain decisions about the perpetrator's treatment.

Committee consideration

30. The Scottish Government addresses this new power at paragraphs 43 of the supplementary DPM, stating that its reasons for taking the power are identical to those outlined at paragraphs 31 – 34 of the supplementary DPM (as quoted above in paragraph 27).

31. **The Committee accepts this new power in principle and is content that it is subject to the negative procedure unless modifying primary legislation, in which case it is subject to the affirmative procedure.**

Section 11 (which inserts new section 18B into the 2003 Act) - Provision of Information to Victim Support Organisations – power to amend information sharing provisions

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

32. This delegated power has been extended so that Scottish Ministers can amend, by order, certain details of the provisions relating to information sharing with victims and, by extension, victim support organisations as provided for by the Bill.

Committee consideration

33. The Scottish Government addresses this amended power at paragraphs 49 to 51 of the supplementary DPM, stating:

- ” Section 11(4D), as introduced by amendment at stage 2, amends section 18B of the Criminal Justice (Scotland) Act 2003 to reflect the new sections of that Act as introduced by this Bill. This extends the existing power of Scottish Ministers to amend, by order, certain details of the provisions relating to information sharing with victims and, by extension, victim support organisations as provided for by this Bill.

This also includes the power to amend the restrictions in relation to the age of the prisoner/perpetrator. For example, currently information cannot be provided about a prisoner/perpetrator if they have not attained 16 years of age. It also includes the power to amend the types of information which can be provided about an individual subject to a compulsion order and restriction order.

Reason for taking power

- ” To provide the ability for the Scottish Ministers to exercise their existing powers to amend by order in relation to new provisions being introduced by this Bill which are equivalent in nature. Those existing powers were added to provide the Scottish Ministers the flexibility to change administrative matters in the scheme without the need for primary legislation.

34. **The Committee accepts this revised power in principle and is content that it is subject to the affirmative procedure.**

