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

Delegated powers in the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill at Stage 1

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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.

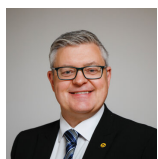


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Introduction

1. At its meetings on 26 Novemberⁱ and 17 Decemberⁱⁱ 2024, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers in the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill ("the Bill") at Stage 1.
2. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
3. This Scottish Government Bill was introduced on 24 September 2024. The lead committee is the Criminal Justice Committee.
4. This is a dual-purpose Bill which makes provision for criminal justice modernisation, and domestic homicide and suicide reviews.
5. Part 1 of the Bill seeks to make permanent some of the temporary justice measures in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 ("the 2022 Act") which were put in place in response to the pandemic. Specifically, it makes provision which:
 - allows for the electronic signing and sending of documents in criminal cases;
 - enables virtual attendance at a criminal court;
 - provides for a national jurisdiction for callings from custody, so that custody cases can be heard in any court in Scotland; and
 - increases the maximum level of fiscal fine to £500 and makes adjustments to the scale of fines.
6. In addition, the Bill makes new provision to:
 - support the use of digital images instead of physical evidence in court; and
 - enable copies to be treated as equivalent to the item copied without the need for additional authentication.
7. Part 2 of the Bill makes provision for a national domestic homicide and suicide review model. The purpose of such reviews is to identify what lessons can be learned following a death where abuse is known or suspected with a view to preventing future abuse and deaths.

ⁱ Stuart McMillan MSP and Jeremy Balfour MSP submitted their apologies for this meeting. Rona MacKay MSP substituted for Stuart McMillan MSP.

ⁱⁱ Jeremy Balfour MSP and Daniel Johnson MSP submitted their apologies for this meeting.

Delegated Powers

8. The Bill confers eight powers to make subordinate legislation on the Scottish Ministers.
9. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.
10. At its meeting on Tuesday, 26 November, the Committee agreed to write to the Scottish Government to query the choice of procedure applicable to two of the powers in the Bill. The Committee was content with all of the other delegated powers in the Bill.
11. The Committee [wrote](#) to the Scottish Government on 2 December and received a [response](#) on 11 December.

Review of relevant powers

Section 5(6)(b) – Power to prescribe digital evidence storage systems

Power conferred on: The High Court of Justiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: Laid, no procedure

Provision

12. Section 5 makes provision to dispense with the requirement to authenticate copy documents under schedule 8 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) where certain conditions are met. One of those conditions is that the document is stored on the “digital evidence storage system” which is defined in subsection (6) as the system operated by Police Scotland known as the Digital Evidence Sharing Capability (“DESC”) or such other digital system as may be prescribed. Paragraph 8 of schedule 8 confirms that “prescribed” means by Act of Adjournal.

Committee consideration

13. This power allows for an alternative digital document storage system to be prescribed in the future, thus “futureproofing” the Bill. It aligns with existing powers granted to the High Court under schedule 8 of the 1995 Act.

14. **The Committee finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.**

Section 6(1)(b) – Increase of fixed penalty limit

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

15. Section 6(1) modifies section 302 of the 1995 Act to provide that the maximum permitted level of fiscal fine which may be offered to an accused person as an alternative to prosecution is £500. It also inserts a new subsection (7B), which provides Scottish Ministers with the power to substitute the sum of £500 for a higher sum by way of regulations.

Committee consideration

16. The 1995 Act already contains a power to alter the maximum available penalty by way of subordinate legislation, but the new power will allow the change to be made on the face of the 1995 Act instead of a separate piece of secondary legislation.

17. The ability to adjust the maximum permitted level of fiscal fines will ensure that the fines remain effective and proportionate over time. The use of the affirmative procedure for this power ensures a high level of parliamentary scrutiny, which is appropriate given the potential impact of changes on individuals who might be subject to fiscal fines. The updated power aligns with the existing power under section 302(7A) of the 1995 Act, which is also subject to the affirmative procedure.

18. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 11(5) – Power to modify list of nominating bodies

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

19. Section 11 provides for the creation of a review oversight committee to secure and oversee the carrying out of reviews into domestic homicides or suicides. It also makes provision in relation to the committee's composition and provides that the Scottish Ministers are to appoint some committee members from nominations received from: (a) a local authority, (b) a health board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978, (c) the chief constable of the Police Service of Scotland, (d) the Crown Office and Procurator Fiscal Service, (e) Community Justice Scotland, (f) Social Care and Social Work Improvement Scotland, (g) the Scottish Social Services Council.
20. Subsection (5) enables the Scottish Ministers to add a person, vary the description of a person, or remove a person on that list by way of regulations. This power is subject to the Scottish Ministers consulting the person in respect of which the changes are being proposed.

Committee consideration

21. The Committee asked the Scottish Government why it considers the negative procedure provides an appropriate degree of scrutiny in relation to this power which permits the amendment of primary legislation.
22. In response, the Scottish Government stresses that this power is administrative in nature and that specification of nominating bodies is a matter which could have been left entirely to regulations. The Scottish Government also provides examples of previous instances where this Committee has been content with the application of the negative procedure to powers which enable the specification of persons or categories of persons.
23. This is a Henry VIII power, which allows for the modification of primary legislation through secondary legislation. Whilst the Committee would usually expect such powers to be subject to the affirmative procedure, that will not always be appropriate. Given that this power only allows for modification of primary legislation

in a limited and technical way, the Committee considers that the negative procedure is sufficient in this case.

24. In light of the Scottish Government's response, the Committee is content with this power in principle and with the choice of the negative procedure.

Section 20(6) – Power to modify list of public authorities required to co-operate

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

25. Section 20 places a duty on named public authorities to co-operate in relation to consideration of a death (i.e. the sift stage) and, where the outcome of the sift is that a review is to be held, the review itself. This includes participating in reviews (where requested to do so) and providing information on request. The public authorities subject to this duty are listed at subsection (5). Subsection (6) enables the Scottish Ministers to add a public authority, vary the description of a public authority, or remove a public authority from that list by way of regulations. Before any regulations are made, subsection (7) requires Scottish Ministers to consult the public authority to which the regulations would relate.

Committee consideration

26. The Committee asked the Scottish Government why it considers the negative procedure provides an appropriate degree of scrutiny in relation to this power, which permits the amendment of primary legislation.

27. In response, the Scottish Government states that a duty of cooperation of this nature and in this context might fairly uncontroversially be imposed on public bodies without limitation. As such, its application only to named bodies, and the possibility of adjusting the public bodies to which it applies, is not something that requires the use of the affirmative procedure. This is particularly so when there is a requirement for prior consultation with the public bodies in question. The Scottish Government also provides examples of previous instances where this Committee has been content with the application of the negative procedure to powers of a similar nature.

28. This is a Henry VIII power, which allows for the modification of primary legislation through secondary legislation. Whilst the Committee would usually expect such powers to be subject to the affirmative procedure, that will not always be appropriate. Given that this power only allows for modification of primary legislation in a limited and technical way, the Committee considers that the negative procedure is sufficient in this case.

29. In light of the Scottish Government's response, the Committee is content with this power in principle and with the choice of the negative procedure.

Section 25(1): Guidance by Ministers**Power conferred on: Scottish Ministers****Power exercisable by: Guidance issued by Scottish Ministers****Parliamentary procedure: None****Provision**

30. Section 25(1) of the Bill contains an implicit power for the Scottish Ministers to issue guidance to the review oversight committee and any case review panel established under section 12 regarding the exercise of their functions under Part 2 of the Bill.

Committee consideration

31. The requirement for the review oversight committee and case review panels to “have regard to” the guidance seeks to ensure that there is a consistent approach to the exercise of their functions. This should help maintain a standard of practice across different cases and panels, promoting fairness and uniformity in the review process. While the guidance must be considered, it does not have the force of law. This means that the committees and panels will be able to adapt their actions to the specific circumstances of each case, while still aligning with the overarching principles and expectations set out by the Scottish Ministers.

32. **The Committee finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.**

Section 27 – Ancillary powers**Power conferred on: Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative****Provision**

33. Section 27 enables the Scottish Ministers, by regulations, to make any incidental, supplementary, consequential, transitional, transitory, or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Regulations under this section may modify any enactment (including the Act resulting from the Bill).

Committee consideration

34. This is a standard ancillary power.

35. **The Committee finds the power acceptable in principle and is content with the choice of procedure.**

Section 28 – Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

36. Some sections of the Bill come into force on whichever is the later of the day after Royal Assent or 1 December 2025. Part 3 of the Bill comes into force on the day after Royal Assent.
37. The other provisions of the Bill will come into force on such day as the Scottish Ministers may by regulations appoint. Regulations under this section may make different provision for different purposes and may include transitional, transitory or saving provision.

Committee consideration

38. This is a standard commencement power.
39. **The Committee finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.**

