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

Management of Offenders (Scotland) Bill: as amended at 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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 25 June 2019, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Management of Offenders (Scotland) Bill as amended at Stage 2.ⁱ The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
2. The Bill was introduced by the then Cabinet Secretary for Justice, Michael Matheson MSP, on 22 February 2018. The Bill completed Stage 2 on 30 April 2019. The lead Committee was the Justice Committee.
3. The Delegated Powers and Law Reform Committee published its Stage 1 Report on the Bill on 22 May 2018 ([25th Report, 2018 \(Session 5\)](#)). The Committee made various recommendations on the delegated powers provisions to the lead Committee. Stage 3 is scheduled for Tuesday 25 June.

ⁱ The Bill, as introduced, is available [here](#). The Bill, as amended, is available [here](#).

Summary of the Bill

4. Part 1 of the Bill (“Electronic Monitoring etc.”) sets out an overarching system of electronic monitoring, consolidating and expanding on provision made in a number of existing enactments.
5. Part 2 (“Disclosure of Convictions”) amends the Rehabilitation of Offenders Act 1974 (the “1974 Act”). A number of changes are made to update, restructure and improve the accessibility of the 1974 Act. The Bill reduces the length of period during which people have to disclose their offending history.
6. Part 3 (“The Parole Board”) amends existing legislation (primarily, the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the “1993 Act”)) relating to parole matters and the Parole Board for Scotland.
7. The Scottish Government has lodged a Supplementary Delegated Powers Memorandum (“Supplementary DPM”) covering the powers in the Bill as amended at Stage 2.ⁱⁱ According to the Supplementary DPM, three new delegated powers have been inserted and one existing power has been revised.

ⁱⁱ The Supplementary Delegated Powers Memorandum is available [here](#).

Timing

8. As noted above, Stage 2 was completed on 30 April 2019 and Stage 3 is scheduled for 25 June. The Supplementary DPM was lodged on 18 June 2019.
9. This timing does not comply with the requirement in Standing Order 9.8.10 that the Supplementary DPM is lodged not later than whichever is the earlier of: (a) the 10th sitting day after the day on which Stage 2 ends; and (b) the end of the second week on which Stage 3 is due to start.

Recommendation

10. **The Committee draws to the Parliament's attention the failure to comply with Standing Orders. Stage 3 proceedings are scheduled for the same day as the Committee has the first opportunity to meet to consider the Supplementary DPM. Accordingly, the Committee is very limited in the scrutiny it can undertake in respect of the new and revised delegated powers in the Bill as amended at Stage 2. The Parliament will also have very little time to consider the Committee's report before Stage 3 proceedings.**

Powers drawn to the attention of the Parliament

Section 7A – Duty to share information before releasing a prisoner on licence

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Negative**

Provision

11. Section 7A of the Bill provides that before exercising their powers to release a prisoner on licence under section 3AA of the 1993 Act, the Scottish Ministers must where reasonably practicable request information relevant to the monitoring of that prisoner from certain specified persons. Those persons are the Scottish Courts and Tribunals Service, the Police Service of Scotland and a relevant local authority (in the exercise of any of its social work services functions). Following receipt of such a request, those persons must provide the requested information within 28 days.
12. The delegated power is contained in section 7A(4). It provides that the Scottish Ministers may by regulations make further provision for the purposes of and in connection with this section. Regulations made under this power are subject to the negative procedure.

Committee consideration

13. The Supplementary DPM summarises this power at paragraphs 3 to 5. It indicates that section 7A was added to the Bill by a non-Government amendment.
14. The Supplementary DPM states that the Government is not clear why the power in section 7A(4) was considered necessary and that, because it is not clear what the power's intended purpose is, it cannot comment on why the negative procedure is appropriate. The Committee was surprised that there was not more detail in the Supplementary DPM.
15. It is not clear why the Supplementary DPM did not set out the purpose of the power in section 7A(4) from the Stage 2 debate. The Stage 2 debate indicates that the amendment seeks to implement a recommendation of Her Majesty's Inspectorate of Prisons for Scotland in its 'Report on the review of the arrangements for home detention curfew within the Scottish Prison Service', which considered the inadequacy of information sharing.ⁱⁱⁱ The stated reason for taking the power is to provide flexibility to the Scottish Ministers to allow them to specify in more detail and keep under review the information required from the prescribed bodies for the purposes of making a decision about whether to grant a home detention curfew.
16. The Supplementary DPM provides no indication of the Scottish Government's position in relation to this provision at Stage 3. It is nevertheless worth noting that a

ⁱⁱⁱ October 2018. Available [here](#). See recommendation 6 on page 10 of the HMIPS report.

Scottish Government amendment has been lodged at Stage 3 to leave out section 7A.

17. The Committee observes that the power to make further provision for the purposes of and in connection with section 7A is particularly wide in its scope. For example, the power in section 7A(4) fails to provide any indication of the sort of further provision that may be made. This contrasts with the powers in sections 8 and 9 of the Bill. Those powers provide examples of, respectively, the types of approved devices that may be prescribed in regulations and the uses of devices and information from those devices that may be prescribed.
18. The Committee also observes that the obligation to request information relevant to the monitoring of the prisoner concerned is potentially very wide ranging. There will be data protection implications involved in sharing such information about the prisoner. The affirmative procedure is considered to be more appropriate for a power of this nature to enable the Parliament to conduct enhanced scrutiny of regulations made under the power.

Recommendation

19. **The Committee draws the Parliament's attention to the comments made in paragraphs 15 to 18 above.**

Section 32A – Excluded sentences: applications for convictions to be treated as spent

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations made by Scottish statutory instrument**
- **Parliamentary procedure: Affirmative**

Provisions

20. Section 32A allows the Scottish Ministers to make regulations for or in connection with the purpose of allowing a person on whom a “relevant sentence” was imposed in respect of a conviction to apply to be treated as a protected person in respect of the conviction and for the conviction to be treated as spent. A relevant sentence includes determinate custodial sentences of greater than 48 months.
21. Section 32B expands on the matters that the delegated power can provide for. This includes, among other things, the process for eligibility, fees, the procedure for determining an application, time limits, reconsideration of determinations and appeals. Under section 32D, regulations made under the power can modify any enactment, including the Rehabilitation of Offenders Act 1974.
22. The affirmative procedure applies to regulations made under this power.

Committee consideration

23. This power is considered at paragraphs 6 to 13 of the Supplementary DPM. The power is taken in the context that section 18 of the Bill extends from a period of 30 months to 48 months the point at which certain custodial sentences become

“excluded sentences” and therefore capable of being spent. Sentences greater than 48 months are excluded sentences and cannot become spent.

24. During Stage 1 some stakeholders considered that people who received sentences greater than 48 months would still be left facing a lifetime of disclosure of their convictions without being able to review whether that was still appropriate.
25. Substantial provision has recently been made on the face of the Age of Criminal Responsibility (Scotland) Act 2019¹⁰ (the “2019 Act”) relating to the establishment of an independent reviewer in relation to the inclusion in an enhanced disclosure or scheme record of police information that relates to behaviour while a person was aged under 12. This includes provision for appeal to the sheriff on a point of law. Likewise, the Disclosure (Scotland) Bill, which was introduced on 12 June 2019, makes detailed provision on the face of that Bill for the review of decisions to disclose childhood convictions, police information, and certain spent convictions by the independent reviewer established under the 2019 Act. This also includes provision for appeal to the sheriff on a point of law.
26. The power in section 32A is substantial in nature and wide in its scope. The Committee welcomes the application of the affirmative procedure to the power to make regulations in section 32A of the Bill as this will afford the Parliament the opportunity to conduct enhanced scrutiny of regulations made under that power.
27. The Committee recognises that the power is taken to allow time for further consultation on the proposals to address the concerns raised at Stage 1. However, the Committee reports that it would have been more appropriate to afford the Parliament more time to consider this significant power, particularly in the context of similar provisions for independent review made on the face of the 2019 Act and the Disclosure (Scotland) Bill.

Recommendation

28. **The Committee draws the Parliament's attention to its concerns regarding this power set out at paragraphs 24 to 27 above.**

Powers with which the Committee is content

29. The Committee considered the remaining delegated powers provisions in the bill-
- Section 32C – Excluded sentences: applications for convictions to be treated as spent
 - Section 9 – Use of devices and information.

Recommendations

30. **The Committee welcomed that the Bill was amended at Stage 2 to apply the affirmative procedure to regulations made under section 9(1) in accordance with the Committee's recommendations.**
31. **The Committee reports that it is content with the delegated powers provisions as set out in paragraph 29 above.**

