Delegated Powers and Law Reform Committee

70th Report, 2014 (Session 4)

Legislative Consent Memorandum on the Serious Crime Bill

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (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; and
   (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.

Membership:

Richard Baker
Nigel Don (Convener)
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Margaret McCulloch
Stuart McMillan (Deputy Convener)
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Delegated Powers and Law Reform Committee

70th Report, 2014 (Session 4)

Legislative Consent Memorandum on the Serious Crime Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 25 November and 2 December 2014, the Committee considered the provisions in the Serious Crime Bill (UK Parliament Legislation) ("the Bill")¹ that confer powers to make subordinate legislation on the Scottish Ministers.

2. The Bill was introduced in the House of Lords on 5 June 2014. It is a UK Government Bill and was introduced by Lord Taylor of Holbeach. It covers a range of matters wider than those before the Committee for delegated powers consideration.

3. The lead Committee in respect of this LCM is the Justice Committee. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

   “That the Parliament agrees that the relevant provisions of the Serious Crime Bill, introduced in the House of Lords on 5 June 2014, relating to amendments to the Proceeds of Crime Act 2002; amendments to the Computer Misuse Act 1990; amendments to the Serious Crime Act 2007 in respect of serious crime prevention orders; the repeal of provisions within the Serious Organised Crime and Police Act 2005 in respect of financial reporting orders; and the amendments to the Prohibition of Female Genital Mutilation (Scotland) Act 2005 to include habitual UK residents, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

4. The Legislative Consent Memorandum² was considered by the Committee under Rule 9B3.6. The Committee is required to consider, and may report to the lead committee on, any provision in a Bill which is subject to a legislative consent memorandum which confers power on the Scottish Ministers to make subordinate

¹ Serious Crime Bill available here: http://services.parliament.uk/bills/2014-15/seriouscrime.html
² Serious Crime Bill Legislative Consent Memorandum available here: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/SeriousCrimeBillLCM.pdf
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legislation. As with bills passed by the Scottish Parliament, the Committee’s role is to consider whether it is appropriate in principle for the power to be delegated to the Scottish Ministers, whether the terms of the power are appropriately drawn and whether the level of scrutiny applied to the exercise of the power is appropriate.

Delegated powers

5. There are 7 clauses in the Bill which confer delegated powers upon the Scottish Ministers, with 9 powers being conferred in total. The relevant clauses are discussed below. There is no delegated powers memorandum available for the Committee’s consideration, although this is normal with UK Bills.

6. At its meeting of 25 November, the Committee agreed to ask for an explanation in relation to aspects of clause 19 of the Bill. The correspondence with the Scottish Government is reproduced at the Annex.

Clause 19: Enforcement of confiscation orders (inserting section 118(2B) in the Proceeds of Crime Act 2002)

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>order</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>affirmative</td>
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Provisions

7. Clause 19 amends section 118 of the Proceeds of Crime Act 2002 (“POCA”) in relation to the enforcement of confiscation orders. Confiscation orders are imposed to enable the recovery of criminal assets following a person’s conviction. Some individuals choose not to pay their confiscation orders and to serve a period of imprisonment (‘default sentence’) instead. Clause 19 provides for a new sliding scale of maximum default sentences applicable to confiscation orders in Scotland, which mirrors the scale being introduced by the Bill in England and Wales. The scale provides for maximum periods of imprisonment of 6 months, 5 years, 7 years and 14 years, depending on the value of the compensation order imposed.

8. New section 118(2B) confers power on the Scottish Ministers to amend the sliding scale so as to remove, alter or replace any entry in it, or to add an entry. Accordingly the Scottish Ministers will have power, by subordinate legislation, to vary the maximum term of imprisonment which may be imposed in respect of a confiscation order of any amount. (The actual term of imprisonment imposed, up to the statutory maxima, will be a matter for the sentencing court). Clause 10 of the Bill confers a similar power on the Secretary of State in respect of the scale which applies in England and Wales.

9. Section 118(2B) also confers power on the Scottish Ministers to provide for minimum periods of imprisonment in respect of amounts ordered to be paid under a confiscation order, and to apply (with or without modifications) any provision of the Criminal Procedure (Scotland) Act 1995 relating to enforcement of fines in consequence of exercising either that power or the power to amend the sliding scale referred to above. All three powers are subject to the affirmative procedure.
Comment

10. The Committee considers that the powers proposed in new section 118(2B) are significant. It has in the past expressed the view that the setting or variation of maximum penalties in respect of offences is a matter for the Parliament rather than for the Scottish Ministers exercising delegated powers.

11. The Committee accordingly asked the Scottish Government why it was considered appropriate for the Scottish Ministers to have an unlimited power to vary, through subordinate legislation, the maximum periods of imprisonment which may be imposed in default of confiscation orders. It also asked why it was considered appropriate for any minimum periods of imprisonment to be determined by the Scottish Ministers through subordinate legislation.

12. The Scottish Government’s response explains that the Proceeds of Crime Act regime concerns a complex mix of reserved and devolved matters. It provides for the confiscation of both the proceeds of reserved crime and of devolved crime. As a result, amendments to the regime are usually made by UK legislation. The Government accordingly considers it appropriate for the Scottish Ministers to have powers, in common with other UK ministers, to vary the maximum periods of imprisonment and to set minimum periods, without having to rely on the making of further UK primary legislation to achieve the same effect.

13. The response also highlights the need, in the Scottish Government’s view, for the confiscation order regime to operate consistently across the UK. From a policy perspective, the Scottish Government wishes to ensure that Scotland takes as strong a line against accused persons who are involved in organised crime as the other UK administrations. It considers that the order-making powers conferred by clause 19 allow the Government to do that efficiently and effectively, subject to the Scottish Parliament’s approval.

14. The Committee notes this explanation. In the circumstances, it finds the powers in section 1182B(a), (b) and (c) of the Proceeds of Crime Act 2002 (as inserted by clause 19 of the Bill) to be acceptable in principle. The Committee is also content that the powers are subject to the affirmative procedure.

Clause 45 – extension of Part 1 of Serious Crime Act 2007 to Scotland

15. Clause 45 gives effect to Schedule 1 of the Bill, which extends (with the necessary modifications) the provisions in respect of serious crime prevention orders (SCPOs) in Part 1 of the Serious Crime Act 2007 (“the 2007 Act”) to Scotland. SCPOs are civil orders which can be made in both the Scottish civil courts and criminal courts.

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3 See the Committee’s 18th report of 2014 on the Housing (Scotland) Bill (paragraph 49) available here: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73598.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73598.aspx) and its 20th report of 2014 on the Tribunals (Scotland) Bill (paragraph 10) available here: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73992.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73992.aspx)
Schedule 1, paragraph 6 (inserting section 4(4A) and (4B) in the 2007 Act (involvement in serious crime: supplementary))

Power conferred on: 
the Scottish Ministers
Power exercisable by: 
order
Parliamentary procedure: 
affirmative

16. Part 1A of Schedule 1 to the 2007 Act (inserted by Schedule 1 to the Bill) sets out a list of what constitutes a “serious offence” in Scotland. This list mirrors the offences applicable in the rest of the UK and includes offences such as drug trafficking, money laundering the proceeds of drug trafficking, counterfeiting and arms trafficking, which are all reserved matters. This list is not exhaustive as the court is allowed to treat offences which are not within the list as being serious offences if it considers them to be sufficiently serious.

17. The Bill amends section 4 of the 2007 Act to insert new subsection (4A), which confers power on the Scottish Ministers to amend by order the list of serious offences in Part 1A of Schedule 1. However, the Scottish Ministers cannot amend the list in relation to an offence which relates to a reserved matter (within the meaning of the Scotland Act 1998) without the consent of the Secretary of State. Any order made by the Scottish Ministers under section 4(4A) is subject to the affirmative procedure.

18. The Committee finds the power in section 4(4A) of the 2007 Act (as inserted by Schedule 1, paragraph 6 of the Bill) to be acceptable in principle, and is content that the power is subject to the affirmative procedure.

Schedule 1, paragraph 8 (inserting section 7(1A) in the 2007 Act (other exceptions))

Power conferred on: 
the Scottish Ministers
Power exercisable by: 
order
Parliamentary procedure: 
negative

19. An SCPO can be imposed on an individual (aged 18 or over), body corporate, partnership or unincorporated association. The Bill amends section 7 of the 2007 Act to confer power on the Scottish Ministers by order (under new subsection (1A)) to expressly exclude the application of SCPOs to persons falling within a specified description. The order-making power is subject to the negative Section 7 of the 2007 Act currently confers similar powers on the Secretary of State and the Department of Justice in Northern Ireland.

The Committee finds the power in section 7(1A) of the 2007 Act (as inserted by Schedule 1, paragraph 8 of the Bill) to be acceptable in principle, and is content that the power is subject to the negative procedure.
Schedule 1, paragraph 20 (inserting new section 27A(7) and (12) in the 2007 Act (powers to wind up companies etc.: Scotland))

Powers conferred on: the Scottish Ministers
Powers exercisable by: order
Parliamentary procedure: negative

20. New section 27A enables the Scottish Ministers to present a petition to the court for the winding up of a company or relevant body, or for the dissolution of a partnership, if the company, relevant body or partnership has been convicted of an offence under section 25 (breach of an SCPO) and the Scottish Ministers consider it would be in the public interest for the company or relevant body to be wound up or the partnership dissolved. The new provisions apply the Insolvency Act 1986 for the purpose of winding up a company, and the Partnership Act 1890 for the purpose of dissolving a partnership.

21. Subsection (7) confers power on the Scottish Ministers by order to provide for the Insolvency Act 1986 to apply (with such modifications as appropriate) for the purpose of winding up a relevant body under section 27A. A relevant body is a building society, incorporated friendly society, registered society under the Cooperative and Community Benefit Societies Act 2014, limited liability partnership or other specified body (see the discussion of subsection (12) below). Any order under section 27A(7) must ensure that the court may make an order to wind up the relevant body only if the body has been convicted of an offence under section 25 in relation to a serious crime prevention order, and the court considers that it is just and equitable for the relevant body to be wound up.

22. Subsection (12) confers power on the Scottish Ministers by order to specify an additional description of person constituting a relevant body for the purposes of section 27A.

23. Orders under subsections (7) and (12) are both subject to the negative procedure.

24. The power in subsection (7) enables technical provision to be made to tailor the operation of the Insolvency Act 1986 to proceedings for the winding up of a relevant body (as opposed to a company). The power in subsection (12) allows the Scottish Ministers to specify new types of organisations which might in the future become subject to SCPOs, to enable the winding up powers to be available in respect of such organisations.

25. The Committee finds the powers in section 27A(7) and (12) of the 2007 Act (as inserted by Schedule 1, paragraph 20 of the Bill) to be acceptable in principle, and is content that the powers are subject to the negative procedure.
Schedule 1, paragraph 21 (inserting new section 29(1ZA) and (3ZA) and amending section 29(4) of the 2007 Act (powers to wind up: supplementary))

Powers conferred on: the Scottish Ministers
Powers exercisable by: order
Parliamentary procedure: negative

26. Paragraph 21 of Schedule 1 amends section 29 of the 2007 Act to confer two additional powers on the Scottish Ministers. It also provides that, in the exercise of certain powers in Part 1 of the 2007 Act, the Scottish Ministers may apply certain enactments with or without modifications.

27. The first power (section 29(1ZA)) enables the Scottish Ministers to make an order making such modifications as they consider appropriate to the application of the Insolvency Act 1986, by virtue of section 27A(2). Section 27A(2) applies the 1986 Act to the winding up of a company which has been convicted of an offence in relation to an SCPO. This section already makes some modifications to the application of that Act, but this power allows the Scottish Ministers to make any further modifications that may be needed.

28. The second power (section 29(3ZA)) enables the Scottish Ministers to make an order to apply, with any necessary modifications, any other enactment in connection with the provisions in section 27A(2) to (4). Section 27A(2) to (4) makes specific provision about the winding up of a company which has been convicted of an offence in relation to an SCPO.

29. Finally, subsection (4) as amended enables the Scottish Ministers to make supplementary or consequential provision which applies (with any necessary modifications) other enactments, when making an order under section 27A(7) (winding up of a relevant body) or section 29(1ZA) (winding up of a company).

30. These powers enable technical provision to be made to tailor the operation of the Insolvency Act 1986, and any other enactment, to winding up proceedings where a petition is presented following an offence in relation to an SCPO. The powers enable existing legislation to be applied to ‘fit’ the new SCPO enforcement regime in Scotland. Similar powers are available to the Secretary of State and the Department of Justice in Northern Ireland.

31. The Committee finds the powers in section 29(1ZA) and (3ZA) of the 2007 Act (as inserted by Schedule 1, paragraph 21 of the Bill), and the extension of the powers in section 27A(7) and 29(1ZA) by section 29(4), to be acceptable in principle, and is content that the powers are subject to the negative procedure.
Schedule 1, paragraph 27 (amending section 40 of the 2007 Act (costs in relation to authorised monitors))

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative

32. Paragraph 27 of Schedule 1 extends existing provision in the 2007 Act about authorised monitors to Scotland. Section 40 of the 2007 Act provides that an SCPO may include a term authorising a “law enforcement agency” (which now includes the chief constable of the Police Service of Scotland) to appoint a person to monitor whether the order is being complied with. Such a person is known as an authorised monitor. Section 40 also contains provision regarding the means by which the costs of authorised monitors will be determined and recovered. The Bill amends section 40(1) to enable the Scottish Ministers, by order, to make provision about the practice and procedure for determining the amount of costs (and any interest) payable in relation to authorised monitors. This may include provision about appeals.

33. Such an order is subject to the negative procedure. Once again, the 2007 Act already confers similar powers on the Secretary of State and the Department of Justice in Northern Ireland.

34. The Committee finds the power in section 40(1) of the 2007 Act (as amended by Schedule 1, paragraph 27 of the Bill) to be acceptable in principle, and is content that the power is subject to the negative procedure.

Clause 77: Commencement
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: laid no procedure

35. Clause 77 provides for commencement of the Act. Clause 77(2) confers on the Scottish Ministers the power to appoint by regulations the day or days on which certain provisions relating to Scottish confiscation proceedings come into force, after consulting the Secretary of State. By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, any such regulations will be subject to the default laying requirement.

36. The Committee finds the power in section 77(2) of the Bill to be acceptable in principle, and is that the power is not subject to Parliamentary procedure.
ANNEX

On 25 November the Committee wrote to the Scottish Government as follows:

At its meeting on Tuesday 25 November 2014, the Delegated Powers and Law Reform Committee considered a Legislative Consent Memorandum in relation to the Serious Crime Bill. The Committee considered each of the seven clauses in the Bill which confer delegated powers upon the Scottish Ministers.

In considering the Bill, the Committee agreed to write to the Scottish Government to seek further explanation as regards the new power conferred under clause 19.

Clause 19 amends section 118 of the Proceeds of Crime Act 2002 ("POCA") in relation to the enforcement of confiscation orders. Confiscation orders are imposed to enable the recovery of criminal assets following a person’s conviction. Some individuals choose not to pay their confiscation orders and to serve a period of imprisonment (‘default sentence’) instead. Clause 19 provides for a new sliding scale of default sentences applicable to confiscation orders in Scotland, which mirrors the scale being introduced by the Bill in England and Wales. The scale provides for maximum periods of imprisonment of 6 months, 5 years, 7 years and 14 years, depending on the value of the compensation order imposed.

New section 118(2B) confers power on the Scottish Ministers to amend the sliding scale so as to remove, alter or replace any entry in it, or to add an entry. Accordingly the Scottish Ministers will have power, by subordinate legislation, to vary the maximum term of imprisonment which may be imposed in respect of a confiscation order of any amount. Clause 10 of the Bill confers a similar power on the Secretary of State in respect of the scale which applies in England and Wales.

Section 118(2B) also confers power on the Scottish Ministers to provide for minimum periods of imprisonment in respect of amounts ordered to be paid under a confiscation order, and to apply (with or without modifications) any provision of the Criminal Procedure (Scotland) Act 1995 relating to enforcement of fines in consequence of exercising either that power or the power to amend the sliding scale referred to above. All three powers are subject to the affirmative procedure.

The Committee has in the past expressed the view that the setting or variation of maximum penalties in respect of offences is a matter for the Parliament rather than for the Scottish Ministers exercising delegated powers.

Accordingly, the Committee asks:

(a) why it is considered appropriate for the Scottish Ministers to have an unlimited power to vary, through subordinate legislation, the maximum periods of imprisonment provided for in the Bill which may be imposed in respect of amounts to be paid under a confiscation order, rather than the maximum periods being determined or varied by Parliament and set out in primary legislation; and
(b) why it is considered appropriate for the minimum period of imprisonment imposed in respect of amounts to be paid under a confiscation order to be subject to determination by the Scottish Ministers through subordinate legislation, rather than being determined by Parliament and set out in primary legislation.

On 26 November the Scottish Government responded as follows:

The Committee’s attention has been drawn to provisions in clause 19 of the Serious Crime Bill.

Clause 19(1)(a) amends section 118 of the Proceeds of Crime Act 2002 (POCA) in relation to the enforcement of confiscation orders, the impact of which will be to ensure that liability to pay a confiscation order will not automatically be extinguished when a period of imprisonment is served in default of payment.

Clause 19(1)(b) amends section 118 of POCA, so as to modify the application of section 219 of the Criminal Procedure (Scotland) Act 1995 in relation to confiscation orders. It provides for a new sliding scale of maximum periods of imprisonment that may be imposed for non-payment of a confiscation order. It enables the Scottish Ministers, by order, to amend the sliding scale (i.e. to remove, alter or replace any entry in it, or to add an entry), and also to provide for minimum periods of imprisonment. As Committee members will be aware, the period of imprisonment would still be at the discretion of the courts (as is currently the case).

The Scottish Government appreciates that the Committee has previously expressed a view that the setting or variation of maximum penalties in respect of offences is a matter for the Parliament, rather than for Scottish Ministers exercising delegated powers. However, clause 19 relates specifically to the enforcement of confiscation orders under POCA, rather than to the enforcement of financial penalties more generally. Although the criminal law is generally devolved, POCA concerns a complex mix of reserved and devolved matters. It provides for the confiscation of the proceeds of both reserved crime (e.g. drug trafficking and money laundering the proceeds of drug trafficking) and devolved crime. Indeed, most confiscation orders are made in respect of the proceeds of drug trafficking. As a result of this, amendments to POCA are generally made by UK legislation.

Accordingly, rather than rely on further UK primary legislation, it is considered appropriate for the Scottish Ministers to have the power (by order) to vary the maximum periods of imprisonment which may be imposed in respect of amounts to be paid under a confiscation order, and also to provide for minimum periods of imprisonment to be imposed in respect of amounts to be paid under a confiscation order. Since the order-making powers are subject to the affirmative procedure, the Scottish Parliament will have the opportunity to properly scrutinize any draft order brought forward by the Scottish Ministers before deciding whether to approve it by resolution.

Clauses 10, 19 and 32 provide the equivalent maximum periods of imprisonment across the UK. The Scottish Government would wish to take the opportunity to
ensure that Scotland is taking as strong a line against accused persons who are involved in organised crime as other administrations in the UK. The order-making powers conferred by clause 19 in the Serious Crime Bill allows us to do this as efficiently and effectively as possible, subject to the Scottish Parliament’s approval.
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