



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **71st Report, 2014 (Session 4)**

### **Prisoners (Control of Release) (Scotland) Bill at stage 1**

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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)  
John Mason  
Margaret McCulloch  
Stuart McMillan (Deputy Convener)  
John Scott  
Stewart Stevenson

**Committee Clerking Team:**

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## Delegated Powers and Law Reform Committee

### 71st Report, 2014 (Session 4)

#### Prisoners (Control of Release)(Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 4 November and 2 December 2014 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Prisoners (Control of Release) (Scotland) Bill at stage 1 (“the Bill”)<sup>1</sup>. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)<sup>2</sup>.

#### OVERVIEW OF BILL

3. This Government Bill was introduced on 14 August 2014, by Kenny MacAskill MSP. The lead Committee is the Justice Committee.
4. Broadly, the Bill will change the law in two areas of prisoner early release. First, section 1 would end the system of automatic early release on licence for certain prisoners at the 2/3rds point of their sentence in the interests of protecting public safety.
5. Second, section 2 would provide the Scottish Ministers with limited flexibility to adjust exact release dates for individual prisoners by up to 2 days, where there exists a need to ensure immediate access for a prisoner to support services on release from custody. This applies to all prisoners, not only “long-term prisoners” serving a sentence of 4 years or more. This is with the aim of facilitating reintegration into the community, and reducing the risk of reoffending.
6. The report of the independent McLeish Prisons Commission in 2008 recommended that steps to end the current system of early release could only be

<sup>1</sup> Prisoners (Control of Release) (Scotland) Bill [as introduced] available here:

[http://www.scottish.parliament.uk/S4\\_Bills/Prisoners%20\(Scotland\)%20Bill/b54s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Prisoners%20(Scotland)%20Bill/b54s4-introd.pdf)

<sup>2</sup> Prisoners (Control of Release) (Scotland) Bill Delegated Powers Memorandum available here:

[http://www.scottish.parliament.uk/S4\\_Bills/Prisoners\\_-\\_control\\_of\\_release\\_-\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Prisoners_-_control_of_release_-_DPM.pdf)

taken once prison numbers are established at a “longer term, lower trend” level, so that capacity in the prison estate is available to deal with the short to medium term impact of making changes to the system of early release. The Policy Memorandum states that, given that the criteria set by the McLeish Commission have not been met and also given wider justice system constraints, the Scottish Government has focussed the reforms to end automatic early release on those who currently receive automatic early release and who are likely to pose the most significant risks to public safety (paragraphs 71/72 of the Policy Memorandum).

## DELEGATED POWERS PROVISIONS

7. At its meeting of 4 November, the Committee agreed to write to the Scottish Government to raise questions on the delegated powers provisions in the Bill. This correspondence is reproduced at the **Annex**.

8. The Committee’s comments, and where appropriate, recommendations on the delegated powers are detailed below.

### **Section 3 – Commencement**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order</b>
<b>Parliamentary procedure:</b>	<b>Laid, no further procedure</b>

#### *Provisions*

9. Section 3(2) provides that the Scottish Ministers may by order bring section 1 and 2 of the Bill into force on an appointed day. (Section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allows different days to be appointed for different purposes).

10. Section 3(3) provides that a commencement order may include transitional, transitory or saving provision. The DPM explains that “a decision will be taken at the time when the commencement order is being developed, but an example of how the power may be used would be to disapply the application of the provisions in section 1 of the Bill to any offenders sentenced before the day of commencement.”

#### *Comments*

11. The Committee accepts (in principle) that transitional, transitory or saving provisions may be needed within a commencement order, in respect of the commencement of sections 1 and 2. The Scottish Government has indicated in the annexed correspondence that a commencement order, in respect of section 1, will also preserve the existing early release provisions in respect of certain offenders, according to the date of their sentence, conviction or commission of the applicable offence (as may be determined). With regards to section 2 it may contain transitional provision concerning offenders who are due to be released on the commencement date or the following day.

12. The Committee considers however that such transitional, transitory or saving provisions will have significant effects on certain persons. In particular in regard to section 1, they will further determine (according to date of sentence,

conviction or commission of offence) which prisoners will have the existing entitlement to the early release provision, and which other prisoners will not have that entitlement. It is possible that the provisions in the order may need consideration in relation to certain rights which are protected by the European Convention of Human Rights, as they will relate to release from detention and sentence, and will effect a difference in treatment between certain offenders.

**13. The Committee considers therefore that where a commencement order includes transitional, transitory or saving provision in terms of section 3(3), it should be subject to Parliamentary scrutiny by the negative procedure.**

**14. Accordingly, the Committee calls on the Scottish Government to amend the Bill at Stage 2 so as to make the power under section 3(2) subject to the negative procedure.**

**Correspondence with the Scottish Government—**

**On 4 November 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:**

**Section 3 – Commencement**

<b>Power conferred on:</b>	<b>Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order</b>
<b>Parliamentary procedure:</b>	<b>Laid, no further procedure</b>

1. Section 3(2) provides that the Scottish Ministers may by order bring section 1 and 2 of the Bill into force on an appointed day. Section 3(3) provides that a commencement order may include transitional, transitory or saving provision.

2. The Delegated Powers Memorandum states that an example of how this power may be used would be to disapply the application of the provisions in section 1 of the Bill to any offenders sentenced before the day of commencement. Paragraph 37 of the Policy Memorandum states that “the reforms will not affect prisoners serving sentences at the time the relevant provisions are brought into force”.

**3. The Committee therefore asks the Scottish Government:**

- **Why it is appropriate that provision to that effect is not made on the face of the Bill, but is better left to provision by order under section 3(3)?**
- **How alternatively might this power be exercised?**

4. The exercise of the power in section 3(3) may have substantive effects on certain individuals (because it could further define which prisoners will be affected by section 1 in particular, but also section 2).

**5. The Committee therefore asks the Scottish Government:**

- **To explain why either the negative or affirmative procedures would not be appropriate for the Parliamentary scrutiny of this power, or whether the Scottish Government could agree to lodge an amendment at Stage 2 of the Bill to adjust the procedure?**
- **If accordingly a higher level of scrutiny ought to apply (negative or affirmative), how would the Scottish Government assess which higher level would be appropriate?**

**On 11 November 2014, the Scottish Government responded to the Committee as follows:**

We have now had an opportunity to consider the points raised in the letter and would respond as follows:-

At paragraph 4 it is asked –

**The Committee therefore asks the Scottish Government:**

- **Why it is appropriate that provision to that effect is not made on the face of the Bill, but is better left to provision by order under section 3(3)?**
- **How alternatively might this power be exercised?**

In response to the first point, it is common for transitional, transitory and saving provisions to be set out in a commencement order, rather than being placed on the face of the Bill. We consider it is more appropriate to do so as it allows the Scottish Government the ability to retain flexibility around the commencement date and the prisoners that the provisions should apply to. It will ensure that any administrative changes necessary are in place prior to the provisions coming into effect.

With regards to the second point of paragraph 4 the Delegated Powers Memorandum has already provided an example of how the power may apply: i.e. dis-applying the application of the section 1 provisions to those sentenced before the commencement date. Alternatively the power could be exercised in respect of section 1 to save the existing early release provision for all offenders convicted before the commencement date or who committed their offence before the commencement date, thereby ensuring that all offenders will know at the point of their sentencing what early release provisions apply to them and therefore when they may anticipate being released from prison.

In respect of the exercise of the discretionary power to release early in section 2, the power may be applied such that transitional and/or saving provision may be required to ensure that the provisions do not apply to those offenders set for release on the commencement date or the day thereafter, as the provisions for an early release of 2 days prior could not be possible to achieve. However it must be stressed that no firm view has yet been reached as to the commencement provisions and their precise workings for either section 1 or 2. This will be further developed as the Bill progresses through the parliamentary process.

At paragraph 6 it was asked –

**The Committee therefore asks the Scottish Government:**

- **To explain why either the negative or affirmative procedures would not be appropriate for the Parliamentary scrutiny of this power, or**

**whether the Scottish Government could agree to lodge an amendment at Stage 2 of the Bill to adjust the procedure?**

- **If accordingly a higher level of scrutiny ought to apply (negative or affirmative), how would the Scottish Government assess which higher level would be appropriate?**

In response to point 1 Scottish Government do not consider that either negative nor affirmative procedure are appropriate for Parliamentary scrutiny of this order. It is unusual for a commencement order to take any procedure (other than laying) and the inclusion of a power to make transitional, transitory and saving provision does not normally cause it to take procedure. It is anticipated that this order will be a straightforward commencement order. It will contain saving and potentially, transitional provision, pertaining to commencement of the Bill only. It will state a date or dates for commencement of the provisions and, in respect of section 1, preserve the existing early release provisions in respect of certain offenders, according to the date of their sentence, conviction or commission of the applicable offence. With regards to section 2 it may contain transitional provision concerning offenders who are due to be released on the commencement date or the following day.

With regard to the second point of paragraph 6 Scottish Government do not consider that negative nor affirmative procedure, are necessary for this commencement order. As I have set out above, it will be a straightforward commencement order, containing simple saving and/or transitional provision and therefore it is proposed that the requirements at section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 will be followed.

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