



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

7th Report, 2012 (Session 4)

Criminal Cases (Punishment and Review) (Scotland) Bill

Published by the Scottish Parliament on 8 February 2012

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.uk or by contacting Public Information on 0131 348 5000.



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(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.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

Chic Brodie
Nigel Don (Convener)

James Dornan (Deputy Convener)
Mike MacKenzie
Michael McMahon
John Pentland
John Scott

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Rob Littlejohn

Support Manager
Daren Pratt



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

7th Report, 2012 (Session 4)

Criminal Cases (Punishment and Review) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 24 January and 7 February 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Criminal Cases (Punishment and Review) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Justice Committee as 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”).

OVERVIEW OF THE BILL

3. The Criminal Cases (Punishment and Review) (Scotland) Bill was introduced in the Scottish Parliament on 30 November 2011. It is a Government Bill which seeks to make provision in two areas.
4. First, it amends the law governing the period of time which prisoners given a discretionary life sentence or order for lifelong restriction (“OLR”) must serve before they become eligible to apply for parole. This part of their sentence is known as the “punishment part” and it is intended to represent the period imposed for the purposes of retribution and deterrence, and to reflect society’s abhorrence of the crime. The remaining part of the sentence reflects the need to protect the public. Once the punishment part has been served, it is for the Parole Board to keep under review the question of whether the prisoner requires to continue to be detained for the protection of the public. If the Board determines that this is no longer necessary, the prisoner will be released on life licence.
5. The Bill also enables the Scottish Criminal Cases Review Commission to determine whether it is appropriate to release information about cases which it has referred to the High Court when those appeals are subsequently abandoned before being determined.

6. In the consideration of the Bill at its meeting on 24 January, the Committee agreed to write to the Scottish Government to raise questions on both of the delegated powers in the Bill.

7. This correspondence is reproduced in the Annexe.

Delegated powers provisions

Section 2 – Ancillary provision

Section 2(1) – power to make supplemental, incidental, consequential, transitional, transitory or saving provision

8. Section 2 confers power to make supplemental, incidental, consequential, transitional, transitory or saving provisions, if the Scottish Ministers consider that it is *necessary or expedient* for the purposes of, or in connection with, section 1.

9. Section 1 of the Bill amends the existing rules applicable to the setting of the punishment part, which are found in Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). It also amends the equivalent rules in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“the 2007 Act”), which is not yet in force but is intended to replace the 1993 Act. Section 2(2) further provides that regulations under section 2 may (*in particular*) modify Part 1 of the 1993 Act or Part 2 of the 2007 Act.

10. The Committee asked the Scottish Ministers whether it was intended that regulations under section 2 might modify any primary legislation, or whether the power was restricted to modification of the two enactments expressly mentioned in subsection (2). It also asked whether the Ministers’ intention was clear from the drafting as it presently stands.

11. In their reply, the Scottish Ministers indicate that they consider regulations made under section 2 may only modify the two named enactments. They point out that, indeed, it is only specified Parts of these enactments which may be amended, and that they contain the provisions which section 1 of the Bill amends.

12. The Ministers also argue that, as the power in section 2 may only be exercised “for the purposes of, or in connection with, section 1 [of the Bill]”, this would prevent modification of any enactment other than the Parts of the 1993 and 2007 Acts which are specified in subsection (2). They advise that they do not consider there to be any other legislation in the subject area which would ever require to be amended using the power.

13. However, the Ministers appear to concede that it is at least arguable that an interpretation other than their favoured one is possible, and that it may theoretically be possible to modify other enactments, subject always to the test set out in subsection (1): any provision made must be necessary or expedient for the purpose of or in connection with the changes to the rules on setting punishment parts made by section 1.

14. The Committee takes the view that it is undesirable for there to be two competing potential views on the scope of this power, and if this is considered by the Scottish Government to be a real possibility then it may be something which it wishes to review. Nevertheless, the Committee recognises that the scope of the power is appropriately limited by subsection (1).

15. Given the effect that provisions made under this power could have on individual cases, and that the power can be used to modify primary legislation, the Committee considers that the affirmative procedure is an appropriate level of scrutiny.

16. The Committee therefore draws to the attention of the lead Committee the response of the Scottish Government in relation to the effect of section 2(2).

17. The Committee considers that the effect of this power is sufficiently significant that the affirmative procedure is appropriate.

Section 5 – Commencement

Section 5(3) – commencement and ancillary provision on commencement

18. Section 5 provides a power to commence sections 1 to 4. Sections 5 and 6 come into force on the day after Royal Assent. The power to commence includes the power to make transitional, transitory or saving provision.

19. An order made under section 5, whether simply commencing provisions, or whether also making transitional, transitory or saving provision, is only required to be laid before the Parliament. It is not subject to further parliamentary scrutiny.

20. The Committee asked the Scottish Ministers what sort of transitional, transitory or saving provision they envisaged might be required, and whether this could be complex or cause practical problems in implementation.

21. The Scottish Ministers explain that they do not, at this stage, envisage making substantial transitional, transitory or savings provisions using this power. They advise that, if such provisions are needed for Part 1 of the Bill, they are likely to be made under the power in section 2 (and so be subject to the affirmative procedure). Furthermore, they consider it unlikely that any provisions of this type will be needed for the commencement of Part 2 of the Bill.

22. However, the Scottish Ministers state that they wish to have the power in case any unexpected ancillary provision is needed in connection with commencing Part 2 of the Bill. They also indicate that, if straightforward provisions are needed for Part 1, they could be included. Given the immediately preceding view that ancillary provision for Part 1 is *likely* to be made under section 2, the Committee assumes that this power would only be relied upon for minor matters in relation to Part 1.

23. The Committee, having considered this explanation from the Scottish Government, is content with the order making power under section 5, which

provides for commencement and ancillary provision on commencement, and is content that it is not subject to parliamentary procedure beyond the default laying requirement.

ANNEXE

Scottish Government Response to Subordinate Legislation Committee

Subordinate Legislation Committee comments on section 2 – ancillary provision

1. The Committee asked the Scottish Government to confirm:-
 - Whether it is intended that regulations under section 2 may modify any primary legislation, or whether it is intended that they may only modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons Scotland Act 2007; and
 - Whether this is clear from section 2(2) as presently drafted.

Scottish Government response

2. It is the Scottish Government's position that regulations made under section 2 of the Bill will only be able to modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007.

3. Those Acts are mentioned expressly in section 2(2) because those are the ones the Bill is seeking to amend in the first place. The references to the two Acts are very specific. They refer to single Parts of those Acts, not the whole of each Act. Accordingly, our view is that such a narrow specificity would tend, on a normal reading, to exclude any other Act, or Part of an Act, from modification.

4. Further, the words "for the purposes of or in connection with section 1" in section 2(1) tie the power closely to the amendments already being made by the Bill. If another Act cannot be reasonably stated to relate sufficiently to that purpose, then in our view this would exclude modification, even if it could be argued theoretically that the specific references to single Parts in section 2(2) do not exclude modification of another Act or Part. In this regard, it is important to note that we do not consider that there is any further legislation in the relevant subject area that would ever require to be amended using this power.

5. We would therefore contend that it is clear from the present drafting approach that the powers contained in section 2 are limited in their scope.

Subordinate Legislation Committee comments on section 5 – commencement and ancillary provision on commencement

6. Further, the Committee asked the Scottish Government what sort of provision is envisaged may be required and whether this could be complex or cause practical problems in implementation.

Scottish Government response

7. Part 1 of the Bill deals with a complex area of law. It is likely that any substantial transitional, transitory or saving provisions in connection with Part 1 will be made under the power in section 2 of the Bill and that the relevant instrument(s) will therefore be subject to the affirmative procedure.

8. It is unlikely that any transitional, transitory or saving provision will be required to commence Part 2 of the Bill, as this creates new, stand alone provisions.

9. The power in section 5(3) is, however, considered desirable so as to allow any unexpected ancillary provision in connection with the commencement of Part 2 to be included within a commencement order. A commencement order could also include any straightforward transitional, transitory or saving provision in connection with the commencement of Part 1 which it was not for any reason thought appropriate to include within section 2 regulations.

Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

Published in Edinburgh by APS Group Scotland

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

Printed in Scotland by APS Group Scotland

ISBN 978-1-4061-8335-1
