

CRIMINAL VERDICTS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Non-Government Bills Unit on behalf of Michael McMahon MSP. Its purpose is to assist consideration by the Delegated Powers and Law Reform Committee, in accordance with Rule 9.6.2 of the Parliament's Standing Orders, of provisions in the Criminal Verdicts (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. This short Bill comprises two elements: firstly it replaces the three verdicts which are currently available in criminal trials with two, the not proven verdict being removed. Secondly, it amends the law concerning the size of the majority required for a jury to return a verdict of guilty in all criminal trials.

3. The Bill's core elements are taken forward by means of insertions to the Criminal Procedure (Scotland) Act 1995, which represents the principal statutory reference point for procedural matters concerned with the criminal law of Scotland.

Rationale for subordinate legislation

4. The Bill contains two powers to make subordinate legislation which are delegated to the Scottish Ministers. These powers are new, and no existing powers are amended or repealed. The powers are explained in detail in the following paragraphs, but in explaining if and how provision should be set out in subordinate legislation rather than on the face of the Bill the member has had regard to –

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the Bill's core provisions and making proper use of Parliamentary time;
- this being a member's Bill and in consequence the relatively better position of the Scottish Ministers, when compared with an individual member, in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision to ensure that where a need is identified to address any matter associated with the effective operation of the Bill this can readily be taken forward.

Delegated powers

Section 4 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: generally negative resolution of the Scottish Parliament (but affirmative procedure to apply where amending an Act)

Provision

5. Section 4 enables the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision. This can be done where the Scottish Ministers consider such action to be appropriate, whether for the purposes of, in consequence of, or for giving full effect to, any provision made by or under the new Act (subsection 1). An order made under the power can be used to modify any enactment, with the exception however of the new Act. The power can be used to make different provision for different purposes (subsection 3). The negative procedure applies for orders made under section 4, unless the order making power is used to amend the text of an Act. In such circumstances, the affirmative procedure is to apply.

Reason for taking power

6. It is possible that the Scottish Ministers may wish to make (or may consider that there is a need to make) ancillary provisions in connection with the new legislation, in particular when establishing arrangements for the operation of sections 1 and 2.

7. As with any new legislation, it is possible that there may be a requirement for consequential provisions in order to assist preparations for the significant changes which the Bill makes, in terms of reducing the number of available verdicts in criminal proceedings, and amending existing provisions relating to jury majorities. Changes might also conceivably be required to other related legislation. Similarly, there may be a need for transitional provisions etc, as the revised provision which the Bill makes in regard to criminal verdicts come into place. This order making power is therefore considered necessary to provide for flexibility in those areas.

8. This subordinate legislation making power has been provided for within the Bill to avoid any later need for primary legislation to deal with such matters. That might, otherwise, have been required even where the subject matter is of no major consequence, yet being concerned with a

matter which is clearly within the scope and policy intentions of the Bill. It would not in such circumstances be an efficient or effective use of Parliamentary resources to have to proceed by way of primary legislation. It is therefore considered appropriate for suitable provision, and adopting a relatively standard form, to be made within the Bill itself.

Choice of procedure

9. It may be noted firstly that the section 4 order making power is limited insofar as it can only be used to make provisions of an ancillary nature which the Scottish Ministers consider appropriate for the purposes of, or in consequence of, or for giving full effect to, the Bill or any provision made by or under it. That represents an important restriction on the use of the power, which can only be exercised in relation to the narrow and specific subject matter which is dealt with in this Bill.

10. Exercise of the order making power set out in section 4 will normally be by means of the negative procedure. So, where the power is exercised so as deal with something other than an amendment to primary legislation, it would be subject to the negative procedure. That, it is considered, would provide a sufficient, and appropriate level of scrutiny where the power is exercised in that manner.

11. Where however the power set out in section 4 is used to amend the text of an Act (whether by way of adding to the existing text, or replacing or omitting text) the exercise of it is to be subject to the affirmative procedure. Plainly, if this power were to be used to amend existing primary legislation then it is appropriate that exercise of it should be subject to the more rigorous form of Parliamentary scrutiny afforded by the affirmative procedure. That is accordingly provided for, under reference to the provision made at section 4(4).

Section 5 –Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Order to be laid before Parliament (subject to section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Provision

12. Section 5(1) of the Bill provides for sections 3, 4 and 6, together with section 5 itself, to come into force on the day after Royal Assent. Section 5(2) provides that sections 1 and 2 are to come into force 12 months from Royal Assent or, alternatively, on such earlier day as the Scottish Ministers may by order appoint.

Reason for taking power

13. The “default” position is that sections 1 and 2, which represent the Bill’s operative provisions, are to come into force 12 months from Royal Assent. The order making power contained within section 5(2) enables however the Scottish Ministers to bring those sections into

force at an earlier date, should they choose to do so. It may be that the Scottish Ministers will consider that any preparations necessary to bring the Bill fully into force can be dealt with sooner, and this power provides them with the flexibility to do so.

Choice of procedure

14. In accordance with what is now the usual approach for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

This document relates to the Criminal Verdicts Bill (SP Bill 42) as introduced in the Scottish Parliament on 27 November 2013

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