



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

**53rd Report, 2013 (Session 4)**

**Criminal Justice (Scotland) 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:**

Christian Allard  
Richard Baker  
Nigel Don (Convener)  
Mike MacKenzie  
Margaret McCulloch  
John Scott  
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## Delegated Powers and Law Reform Committee

### 53rd Report, 2013 (Session 4)

### Criminal Justice (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 24 September and 29 October 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Criminal Justice (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 Bill was introduced by the Scottish Government on 20 June 2013. The Justice Committee is the lead Committee.
4. The Bill implements various recommendations made in Lord Carloway’s Review of Scottish Criminal Law and Practice, published in November 2012 and Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure, published in June 2010. The Bill also takes forward a number of the Scottish Government’s justice priorities.

#### DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers in the Bill.
6. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

<sup>1</sup> Criminal Justice (Scotland) Bill [as introduced] available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd.pdf)

<sup>2</sup> Criminal Justice (Scotland) Bill Delegated Powers Memorandum available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Criminal\\_Justice\\_Bill\\_-\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal_Justice_Bill_-_DPM.pdf)

Section 28(3)(a) – Power to prescribe the form of an application for authorisation for the police to question a person about an offence

Section 66 (new section 71C(6) of the 1995 Act) – Power to prescribe the form, content and manner of lodging the written record of the compulsory business meeting

Section 67 (new section 83B(1)(a) of the 1995 Act) – Power to provide the form of the minute continuing a trial diet or adjourned diet from sitting day to sitting day

Section 88 – Power to make ancillary regulations

Section 90 – Commencement

7. At its meeting of 24 September the Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex.

8. In light of the written responses received by the Committee, it agreed that it did not need to draw the Parliament’s attention to the following delegated power:

Paragraph 4(1) of the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 (as inserted by section 87 and schedule 3 to the Bill)

9. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

**Section 34(1)(a) and section 34(2) – Power to make further provision in relation to support for vulnerable persons**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>affirmative procedure</b>

10. Section 33 of the Bill makes provision for vulnerable persons who are held in police custody. Section 33(5)(a) of the Bill defines the term “mental disorder” for the purposes of section 33 by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). While the Scottish Ministers have power under section 34(1)(a) of the Bill to amend section 33(1)(c), there is no power to amend the specific definition of the term “mental disorder”.

11. The Committee accordingly wrote to the Scottish Government to ask whether Ministers considered it necessary to take a power to amend the definition of the term “mental disorder” should it become necessary to do so in the future. The Committee considered that circumstances might arise that could render the definition of that term unworkable in the context in which it is used, for example, where the definition of the term in the 2003 Act is itself amended.

12. In its response, the Scottish Government explained that it did not consider that the definition of the term mental disorder would require to be amended in the

near future. It also explained, however, that it was recognised that circumstances could arise which might render it necessary to amend that definition. The Scottish Government accordingly agreed to consider bringing forward an amendment at Stage 2 in order to take a power to enable Ministers to amend the definition in future.

**13. The Committee welcomes the Scottish Government’s commitment to consider bringing forward an amendment to the Bill at Stage 2 in order to allow for the definition of the term “mental disorder” to be amended.**

**Section 85(4) – Power to modify subsections (1) to (3) of that section**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>negative procedure</b>

14. Sections 83 and 84 of the Bill provide respectively for the general aggravation of an offence by its having a connection with people trafficking activity and the aggravation of a specific people trafficking offence where there has been an abuse of a public position. Section 85(1) to (3) of the Bill define the terms “a people trafficking offence”, “a public official” and “an international organisation” respectively for the purposes of the Bill. Section 85(4) grants power to the Scottish Ministers to modify sections 85(1) to (3) by regulations. Section 85(5) provides that those regulations are to be subject to the negative procedure.

15. The Committee wrote to the Scottish Government to seek an explanation as to why the power in section 85(4) of the Bill was drawn in such wide terms given that it conferred authority upon Ministers to “modify” the definitions in section 85(1) to (3) without further specification as to how the power would be exercised. The Committee also asked the Scottish Government why it was considered appropriate for the exercise of a power to make textual amendments to primary legislation to be subject to the negative procedure.

16. In its response to the first part of the Committee’s question, the Scottish Government explained that the power in section 85(1) to (3) is limited to allowing for the relevant definitions to be amended if necessary. The power would not be used for any other purpose. Taking the Scottish Government’s response into account, the Committee considers that while the power could in theory be drawn more narrowly, its scope is acceptable. The Committee agrees that the power will require to be exercised in the context of sections 83 and 84 of the Bill. Any exercise of the power for a purpose other than modifying the specified definitions would not be permissible. The Committee is accordingly content with the scope of the power in section 85(4).

17. In relation to the second part of the Committee’s question, the Scottish Government has agreed to bring forward an amendment at Stage 2 to make the exercise of the power in section 85(4) subject to the affirmative procedure. The Committee welcomes this commitment by the Scottish Government, and considers that affirmative procedure affords the Parliament a more appropriate level of scrutiny over the exercise of the power, given that it enables textual amendments to be made to primary legislation.

18. **The Committee is content with the scope of the power in section 85(4) of the Bill.**

19. **The Committee welcomes the Scottish Government's commitment to bring forward an amendment at Stage 2 of the Bill to make the exercise of the power in section 85(4) subject to the affirmative procedure.**

#### **Section 86 – Use of live television link**

<b>Power conferred on:</b>	<b>the Lord Justice General</b>
<b>Power exercisable by:</b>	<b>direction</b>
<b>Parliamentary procedure:</b>	<b>none</b>

20. Section 86(1) of the Bill inserts new sections 288H – 288K into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new provisions allow the court to determine that a detained person is to participate in a specified court hearing by use of a live television link. In making such a determination, the court is to have regard to any representations made by the parties as well as the interests of justice.

21. The new section 288(J)(1) of the 1995 Act, as inserted by section 86(1) of the Bill, provides that the Lord Justice General may, by directions, specify types of hearing in which a detained person may participate by live television link. Under section 288(J)(2), such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate.

22. The power to make directions under the new section 288J of the 1995 Act was not addressed in the DPM. The Committee therefore wrote to the Scottish Government to seek an explanation as to why the power was to be exercisable by direction - which would not be subject to parliamentary procedure or scrutiny - as opposed to by subordinate legislation, which would at the least be laid before the Parliament. The Committee also asked the Scottish Government whether it was intended that directions made in the exercise of this power would be published.

23. In its response, the Scottish Government considers that the function of specifying types of hearing is essentially operational in nature and is consistent with the Lord Justice General's overarching duty to make and maintain arrangements for securing the efficient disposal of court business in terms of section 2 of the Judiciary and Courts (Scotland) Act 2008. The Scottish Government also explains that decisions on specifying hearings, or revoking or varying previous directions, will require to be made on the basis of a variety of considerations which may change over time and that on some occasions, a direction specifying a type of hearing may require to be made at short notice.

24. While the Committee accepts that the function of specifying hearings is properly one to be exercised by the courts as opposed to the Scottish Government, it does not share the Scottish Government's view that this function is purely operational in nature for two reasons. Firstly, a court will only be empowered to make a determination as to whether a hearing should be conducted

by live television link once directions are made by the Lord Justice General. That is because a determination under the new section 288H can only be made in relation to a “specified hearing”. A specified hearing is defined in the new section 288K of the 1995 Act (as inserted by the Bill) as a hearing of a type specified in directions having effect for the time being under the new section 288J.

25. The scheme of appearance by television link is therefore predicated upon the exercise of the direction-making power in section 288J. For that reason, the Committee considers that this function is a significant legal function, as opposed to a purely operational one, as the relevant provisions of the Bill cannot take effect in a practical sense until directions are made.

26. Secondly, the Committee considers that participation in a court hearing via a live television link alters the character of that hearing in a manner which has the potential to impinge upon the convention rights of those involved, unless there are sufficient safeguards in place to protect those rights. The Committee therefore considers that the Parliament has an interest in having an overview of the arrangements which are being made. In particular, the Committee considers it important that all parties are afforded fair notice of a specification of a particular type of hearing under the new section 288J. If, as the Scottish Government has indicated may happen, a direction specifying a type of hearing is made at short notice, parties may be denied that fair notice, which could mean that they have insufficient opportunity to prepare representations to present to the court when it makes a determination under section 288H. The Committee considers that this would be unacceptable, and of potential detriment to the rights of those involved, including the rights of the detained person.

27. The Committee further considers that information as to the types of hearing that are specified for the purposes of the new section 288H ought to be available publicly in advance of the specification taking effect, and that the current practice of publishing court directions *after* they are made is insufficient to meet this requirement. The Committee considers that the making of subordinate legislation, which would require at the least to be laid before the Parliament before it could come into force, would better achieve the requirement of publicity which the Committee considers to be an essential protection for the rights of persons who may be affected where the court determines that a hearing is to be conducted using a live television link.

**28. The Committee therefore accepts the principle that the specification of hearings in which an accused person may be required to participate by live television link is a matter which should be regulated by the Lord Justice General as head of the Scottish court service. However, the Committee considers that the Parliament retains a separate interest in the exercise of this particular function. It is not persuaded that the function should be exercised without affording notice to the Parliament and the public in advance. Accordingly the Committee draws the power in section 288J(1) of the Bill to the attention of the Parliament and recommends that the Scottish Government consider bringing forward an amendment at Stage 2 to make the power to specify types of hearings which may be conducted by live television link exercisable by way of subordinate legislation to which section**

**30 of the Interpretation and Legislative Reform (Scotland) Act 2010 would apply.**

**ANNEX**

**Correspondence with the Scottish Government**

**On 24 September 2013, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:**

**Section 34(1)(a) and (b) and Section 34(2) – Power to make further provision in relation to support for vulnerable persons**

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

1. Section 33(5)(a) of the Bill defines the term “mental disorder” by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003. While the Scottish Ministers will have power under section 34(1)(a) of the Bill to amend section 33(1)(c), there is no power to modify the definition of “mental disorder” in section 33(5)(a). The Committee considers that it could become necessary to alter that definition in the future, for example in the event of changes to the Mental Health (Care and Treatment) (Scotland) Act 2003 definition by reference to which the term is defined in the Bill.

**2. The Committee therefore asks the Scottish Government whether it considers it necessary to take a power to amend the definition of the term “mental disorder” in section 33(5)(a) of the Bill and, if not, how the Scottish Government would propose to amend that definition in the future, should it become necessary to do so (for example when exercising the power to amend section 33(1)(c))?**

**Section 85 – Power to modify subsections (1) to (3) of that section**

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

3. Sections 83 and 84 of the Bill provide respectively for the general aggravation of an offence by its having a connection with people trafficking activity and the aggravation of a specific people trafficking offence by the abuse of a public position. In both cases, the court must take the aggravation into account in determining the appropriate sentence and, where the sentence imposed is different from that which would have been imposed had the offence not been aggravated, stating the extent of, and the reasons for, that difference.

4. Sections 85(1) to (3) of the Bill define the terms “a people trafficking offence”, “a public official” and “an international organisation” respectively for the purposes of sections 83 and 84. Section 85(4) grants power to the Scottish Ministers to

modify sections 85(1) to (3) by regulations. Section 85(5) provides that those regulations are to be subject to the negative procedure.

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

- **Why the power in section 85(4) of the Bill is drawn in such wide terms? In particular, the Committee seeks an explanation as to why the power does not include greater specification as to the manner in which the provisions in primary legislation to which it refers may be modified.**
- **Whether it considers that the affirmative procedure may afford the Parliament a more appropriate level of scrutiny over the exercise of this power, considering that it enables the Scottish Ministers to make textual amendments to primary legislation?**

**Section 86 – Use of live television link**

<b>Power conferred on:</b>	<b>the Lord Justice General</b>
<b>Power exercisable by:</b>	<b>direction</b>
<b>Parliamentary procedure:</b>	<b>none</b>

6. Section 86(1) of the Bill inserts new sections 288H – 288K into the Criminal Procedure (Scotland) Act 1995. The new provisions allow the court to determine that a detained person is to participate in specified court hearings by use of a live television link.

7. The new section 288J(1), as inserted by section 86(1) of the Bill provides that the Lord Justice General may, by directions, specify types of hearing in which a detained person may participate by live television link. Such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate.

**8. The Committee asks the Scottish Government:**

- **Why it is considered appropriate for the power in section 86(1) of the Bill to be exercisable by directions which will not be subject to any level of parliamentary scrutiny?**
- **Whether it is considering publishing the directions to be issued by the Lord Justice General?**

**Power to prepare the constitution of the new Police Negotiating Board for Scotland**

9. Part 6 of the Bill establishes the Police Negotiating Board for Scotland (“the PNBS”). The PNBS makes representations to the UK and Scottish Governments in respect of police hours of duty, leave, pay and allowances, pensions and uniforms.

10. Paragraph 4(1) of the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 provides that it is for the Scottish Ministers to prepare the constitution for the PNBS. Under paragraph 4(2), the constitution must regulate the procedure for the PNBS to reach agreement on representations it makes to the Scottish Ministers. Paragraph 4(3) lists a number of matters which the constitution of the PNBS as prepared by the Scottish Ministers may refer to, including membership, internal organisation and procedures.

**11. The Committee asks the Scottish Government:**

- **Why is it considered appropriate that the power to prepare the constitution of the PNBS is not to be exercisable through the making of subordinate legislation, and therefore subject to parliamentary scrutiny?**
- **How is it intended that this power be exercised, i.e. what matters in addition to those already prescribed in the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 are to be addressed in the constitution of the PNBS?**

**On 3 October 2013, the Scottish Government responded as follows:**

**1. The Committee asks the Scottish Government whether it considers it necessary to take a power to amend the definition of the term “mental disorder” in section 33(5)(a) of the Bill and, if not, how the Scottish Government would propose to amend that definition in the future, should it become necessary to do so (for example when exercising the power to amend section 33(1)(c))?**

The Scottish Government thanks the Committee for raising this question. Although it is not considered likely that the definition in section 33(5)(a) of the Bill will require to be amended in the near future, the Scottish Government recognises that circumstances may arise which render the definition of “mental disorder” inapposite in the context of the Bill. We will therefore consider further whether to bring forward an amendment at Stage 2 conferring a power to amend.

It should be noted that a similar power may be required in section 25(2)(b) as the same definition of “mental disorder” is used in that section. If the definition is changed in section 33, section 25 should also be amended to mirror this.

**2. The Committee asks the Scottish Government:**

- **Why the power in section 85(4) of the Bill is drawn in such wide terms? In particular, the Committee seeks an explanation as to why the power does not include greater specification as to the manner in which the provisions in primary legislation to which it refers may be modified.**

The Government does not share the Committee's view that the power in Section 85(4) is drawn in wide terms. The power simply allows for the modification of definitions relevant to sections 83 and 84. Those are the operative sections, the power is limited to defining what is meant in those sections by the expressions "people trafficking offence" and "public official".

- **Whether it considers that the affirmative procedure may afford the Parliament a more appropriate level of scrutiny over the exercise of this power, considering that it enables the Scottish Ministers to make textual amendments to primary legislation?**

The Government is grateful to the Committee for raising the question of appropriate procedure and given all the circumstances has reflected on this. The Government recognises that whilst it is intended that this power shall be primarily used where other legislation has amended the definitions and inadvertently failed to correspondingly update section 85, it is accepted that it may also be used to amend the definitions where court practice and procedure in such cases dictate this is necessary. Accordingly in the former example, Parliament will probably have been given greater scrutiny of the amendment elsewhere. However, it is recognised that in cases of the latter example, the Government will be seeking to redefine the circumstances in which the people trafficking aggravations apply (albeit in a limited way) and this could amount to a significant change to the terms of the legislation which Parliament agreed to. On this basis, having further considered, the Government is content to confirm that in response to the Committee's concern, it will bring forward a Stage 2 amendment to make section 85(4) power subject to affirmative procedure.

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

- **Why it is considered appropriate for the power in section 86(1) of the Bill to be exercisable by directions which will not be subject to any level of parliamentary scrutiny?**

The function to be conferred on the Lord Justice-General is essentially operational in nature, and is therefore considered to be consistent with the Lord Justice-General's overarching responsibility for making and maintaining arrangements for securing the efficient disposal of business in terms of section 2 of the Judiciary and Courts (Scotland) Act 2008. Decisions specifying hearings, or revoking or varying previous directions, will require to be made on the basis of a variety of considerations. These include the relevant features of different types of hearing, the availability of television link facilities at various courts and places of detention, and the facilities available to allow for confidential communications between persons appearing and their legal representatives. Operational experience gained from the developing use of television links will also have to be considered and acted upon. It is considered that the Lord Justice-General is best placed to assess these matters and to discharge the function in a manner consistent with the interests of justice.

In view of the number of criminal courts, the number of places of detention and the variety of types of hearing that might potentially be conducted by television

link, directions may require to be made fairly frequently as the use made of the technology develops. On occasions a direction may also have to be made at short notice. In both respects it is considered that the function would not be well suited to the procedure and timescales associated with the promulgation of Acts of Adjournal.

- **Whether it is considering publishing the directions to be issued by the Lord Justice General?**

There is a standard procedure for publishing directions. Once made, the directions are forwarded to the Scottish Court Service for publication on its website. They are also intimated in the offices of court, circulated to legal publications (including Greens etc.), to the Law Society, Faculty of Advocates and Judicial Institute. The Government did not consider it was necessary to include provision about publication as directions made under these provisions will be published according to this procedure.

#### **4. The Committee asks the Scottish Government:**

- **Why is it considered appropriate that the power to prepare the constitution of the PNBS is not to be exercisable through the making of subordinate legislation, and therefore subject to parliamentary scrutiny?**

The constitution of the current PNB deals with the procedural minutiae of day to day internal administration and process. It is not subordinate legislation in the Westminster Parliament. The Scottish Government regards that as proportionate and sensibly reflects the nature of the procedural detail with which the constitution typically deals. Our starting point is therefore that the PNBS constitution, dealing with the same order of detail, is not something that ought automatically to be made a statutory instrument simply because it can be; a balance has to be struck and, for the reason below, we think that balance rests on the side of the PNBS constitution being made by Ministers after discussion with those who will make up its members.

The PNBS is intended to continue the work the PNB does in Scotland at present with as few changes as practicable to reflect that it is intended to continue the status quo ante for Scotland. The constitution will be set out by Scottish Ministers following consultation with the organisations represented on the Board. This allows it to be flexible and to adapt quickly to changes in the policing landscape. The same approach is used for the current PNB, which allowed for the Scottish Standing Committee to be established and for changes to be made to take account of the introduction of the Scottish Police Authority and the Police and Crime Commissioners in England and Wales. It is the intention of all members of the PNB Scotland Standing Committee that the PNBS be more collaborative than the current PNB. We therefore need the processes and procedures set out in the constitution to be flexible, allowing changes to be made to ensure that we have the correct formal structures in place to allow agreements to be made between the two sides of PNB but which do not impede agreement through open discussion.

- **How is it intended that this power be exercised, i.e. what matters in addition to those already prescribed in the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 are to be addressed in the constitution of the PNBS?**

The provisions set out in schedule 2A cover the principal areas to allow for the organisation of the PNBS. They also give flexibility for the specific processes and procedures to be set out by Scottish Ministers following consultation with the organisations represented on the Board. An example of the processes that could be agreed under paragraph 4(3) of schedule 2A would be the formation and organisation of sub-groups or technical working groups, such as are set out within the current PNB constitution. An examination of the current constitution of the PNB gives a clear picture of what the PNBS constitution is likely to include and paragraph 4 of schedule 2A has been drafted deliberately to give further specification of the content of the constitution than the Police Act 1996 prescribes for the PNB constitution at present.

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