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Delegated Powers and Law Reform Committee

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.

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Introduction

1. At its meetings on 1 and 29 September 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Community Justice (Scotland) Bill at Stage 1 (“the Bill”)\(^1\). 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\(^2\)
Overview of the Bill

3. The Bill was introduced by the Cabinet Secretary for Justice on 7 May 2015. Currently, eight Community Justice Authorities ("CJAs") are responsible for ensuring that there is a co-ordinated approach to the local delivery of offender services. A 2006 Order (SSI 2006/182) created the CJAs with functions to plan, monitor and report on the delivery of community justice services.

4. The membership of each CJA has been appointed from within the membership of the relevant local authorities in the area of the CJA. This is in accordance with detailed arrangements set out in the 2006 Order.

5. In general terms, the Bill establishes a new model for the delivery and oversight of community justice services in Scotland. Various bodies – including public, private and third sector organisations – are involved in the strategic and operational planning and delivery of services for offenders in the community. The Bill aims to provide a more robust framework to support the work of these bodies. This is to be achieved through:

   • the abolition of the eight CJAs;
   • the creation of Community Justice Scotland with responsibility for oversight and assurance to Scottish Ministers; and
   • the introduction of a detailed local planning model for community justice services.
Delegated Powers Provisions

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

- Sections 7(1)(a) and (b) – Directions and guidance
- Section 11(2) – Accounts
- Section 12(3) – Community justice partners
- Section 17(1) – Preparation of community justice outcomes improvement
  plan
- Section 20(1)(a) – Reports on performance in relation to community justice
  outcomes
- Section 21(1) – Guidance in relation to community justice outcomes
  improvement planning
- Sections 23(3) and (4) – Monitoring of performance in relation to
  community justice outcomes
- Section 25(3) – Annual report on performance in relation to community
  justice outcomes
- Section 26(6) – Ability of Community Justice Scotland to develop and
  arrange services
- Section 29(2)(d) and (5) – Innovation, learning and development activity
- Section 35(1) – Ancillary provision
- Section 36 – Commencement
- Schedule 1, paragraph 3(5) – Community Justice Scotland
- Schedule 1, paragraph 11(4) – Committees

7. At its meeting on 1 September, the Committee agreed to write to the Scottish
Government to raise questions on the remaining delegated powers in the Bill. This
correspondence is reproduced at the Annexe.
Delegated Powers and Law Reform Committee  
Community Justice (Scotland) Bill at Stage 1, 55th Report, 2015 (Session 4)

Recommendations

8. The Committee’s comments and recommendations on the remaining delegated powers in the Bill are detailed below.

Section 3(4) and (5) – Functions of Community Justice Scotland

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<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<td>Power exercisable by:</td>
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Provision

9. Section 3(4) makes provision for the Scottish Ministers to confer additional functions on, or transfer another person’s functions to, Community Justice Scotland (“CJS”). There is also power to make changes to the body’s functions in relation to community justice. Power is also conferred to remove or transfer functions that have been conferred on, or transferred to, the body under regulations previously.

10. Before making regulations, the Scottish Ministers must consult CJS and anyone else they consider appropriate. Section 3(5) provides that regulations made under section 3(4) may modify any enactment.

Comment

11. The Committee sought an explanation of the following matters, in relation to the powers in section 3(4)(c) and (5)—

   (a) Why, specifically, is the power to make changes to the main functions of CJS as listed in section 3(1) appropriate, and how might the Scottish Government exercise this power to modify that subsection?

   (b) Which functions of CJS described in section 3(1) and elsewhere in the Bill are functions “in relation to community justice” which may be changed by regulations? Would it be clearer if the provision set out which functions described in the Bill could be changed, or could not be?

12. On question (a) above, the response to the Committee explains that, while the Scottish Government has set out the functions of CJS in the Bill carefully, it is recognised that once the body is operational, it may be necessary to make changes to its functions in light of operational experience.

13. The response states further: “The Government recognises that it cannot foresee precisely how the new arrangements under the Bill will work in the longer term, and the power is necessary to allow adjustments to the main functions of
Community Justice Scotland so that it remains relevant and effective in its role. For example it may become evident that the particular emphasis on the needs of offenders, within the function of promoting and supporting improvement in the quality and range of provision of community justice, could change over time, perhaps with regard to particular groups of offenders. The power therefore allows flexibility to change the detail of the function, but the function itself will remain.”

14. On question (b) above, the response clarifies that section 3(4)(c) permits a change to any function of CJS, and so the limitation “in relation to community justice” affects what a function may be changed to. Accordingly the power cannot be used to change a function of CJS to such an extent that it no longer relates to community justice. By way of example, it would not be possible for the function of informing Ministers in section 3(1)(b) to be changed to include informing Ministers on matters that did not relate to community justice, e.g. general housing provision.

15. The Committee accepts the clarification which has been provided, as to the provision in section 3(4)(c) that changed functions must be “in relation to community justice”.

16. The Committee accepts the powers in section 3(4) and (5) in principle, and that the exercise of the powers is subject to the affirmative procedure. The Committee however draws to the attention of the Justice Committee that the powers include a general power to make changes to the functions of Community Justice Scotland (provided that the changed functions relate to community justice).

17. The Committee also draws attention to the Scottish Government’s explanation in the Annexe, as to why this general power is considered to be appropriate.
1 The Community Justice (Scotland) Bill as introduced is available at the following website: http://www.scottish.parliament.uk/S4_Bills/Community%20Justice%20(Scotland)%20Bill/b68s4-introd.pdf [Accessed September 2015]
2 The Community Justice (Scotland) Bill Delegated Powers Memorandum is available at the following website: http://www.scottish.parliament.uk/S4_Bills/DPM_-_Final_version.pdf [Accessed September 2015]
Annexe

Correspondence with the Scottish Government—

On 2 September 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 1 September and seeks an explanation of the following matters:

Section 3 – Functions of Community Justice Scotland

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

2. Section 3(4) makes provision for the Scottish Ministers to confer additional functions on, or transfer another person’s functions to, Community Justice Scotland (CJS). There is also power to make changes to the body’s functions in relation to community justice. Power is also conferred to remove or transfer functions that have been conferred on, or transferred to, the body under regulations previously.

3. Before making regulations, the Scottish Ministers must consult CJS and anyone else they consider appropriate. Section 3(5) provides that regulations made under section 3(4) may modify any enactment.

4. The Committee asks the Scottish Government, in relation to the powers in section 3(4)(c) and (5):

(1) Why, specifically, is the power to make changes to the main functions of CJS as listed in section 3(1) appropriate, and how might the Scottish Government exercise this power to modify that subsection?

(2) Which functions of CJS described in section 3(1) and elsewhere in the Bill are functions “in relation to community justice” which may be changed by regulations? Would it be clearer if the provision set out which functions described in the Bill could be changed, or could not be?

On 15 September 2015, the Scottish Government responded as follows:

“The Scottish Government thanks the Committee for its letter of 3 September seeking an explanation of “why, specifically, is the power to make changes to the main
functions of CJS as listed in section 3(1) appropriate, and how might the Scottish Government exercise this power to modify that subsection?”

It may be helpful if I explain that the Bill sets out a framework for the co-ordination and management of community justice services in Scotland and the role played by Community Justice Scotland in that. While the Scottish Government has set out those functions in the Bill carefully, it is recognised that once Community Justice Scotland is operational, it may be necessary to make changes to its functions in light of operational experience.

The power is therefore appropriate when viewed in the context of those functions as set out in the Bill. The Government recognises that it cannot foresee precisely how the new arrangements under the Bill will work in the longer term and the power is necessary to allow adjustments to the main functions of Community Justice Scotland so that it remains relevant and effective in its role. For example it may become evident that the particular emphasis on the needs of offenders, within the function of promoting and supporting improvement in the quality and range of provision of community justice, could change over time, perhaps with regard to particular groups of offenders. The power therefore allows flexibility to change the detail of the function, but the function itself will remain.

The Committee also sought an explanation of “which functions of CJS described in section 3(1) and elsewhere in the Bill are functions “in relation to community justice” which may be changed by regulations? Would it be clearer if the provision set out which functions described in the Bill could be changed, or could not be?”

Section 3(4)(c) permits a change to any function of Community Justice Scotland, the limitation “in relation to community justice” affects instead what a function may be changed to. Accordingly the power cannot be used to change a function of Community Justice Scotland to such an extent that it no longer relates to community justice. By way of example it would not be possible for the function of informing Ministers in section 3(1)(b) to be changed to include informing Ministers on matters that did not relate to community justice, e.g. general housing provision.”