Delegated Powers and Law Reform Committee

44th Report, 2013 (Session 4)

Legislative Consent Memorandum on the Anti-social Behaviour, Crime and Policing Bill

Published by the Scottish Parliament on 18 September 2013
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
Stewart Stevenson (Deputy Convener)
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meeting on 17 September 2013, the Committee considered the provisions in the Anti-social Behaviour, Crime and Policing Bill ("the Bill") that confers powers to make subordinate legislation on the Scottish Ministers.

2. The Anti-social Behaviour, Crime and Policing Bill was introduced in the House of Commons on 9 May 2013. It is a UK Government Bill and is sponsored by the Home Secretary, Theresa May.

3. A Legislative Consent Memorandum ("LCM") has been lodged in relation to the Bill. The draft of the motion which will be lodged by Cabinet Secretary for Justice is:

   “That the Parliament agrees that the relevant provisions of the Anti-social Behaviour, Crime and Policing Bill, introduced in the House of Commons on 9 May 2013, relating to the abolition of the Police Negotiating Board; dangerous dogs law; and witness protection law; so far as these matters fall within the legislative competence of the Scottish Parliament or alter the functions of Scottish Ministers, should be considered by the UK Parliament.”

4. This Legislative Consent Memorandum was considered by the Committee under Rule 9B3.6. The Committee is required to consider, and may report to the lead committee on, any provision in a Bill which is subject to a legislative consent memorandum which confers power on the Scottish Ministers to make subordinate legislation. As with bills passed by the Scottish Parliament, the Committee’s role is to consider whether it is appropriate in principle for the power to be delegated to the Scottish Ministers, whether the terms of the power are appropriately drawn and whether the level of scrutiny applied to the exercise of the power is appropriate.

1 Anti-social Behaviour, Crime and Policing Bill available here: http://services.parliament.uk/bills/2013-14/antisocialbehaviourcrimeandpolicingbill.html

2 Anti-social Behaviour, Crime and Policing Bill Legislative Consent Memorandum available here: http://www.scottish.parliament.uk/LegislativeConsentMemoranda/Anti-SocialBehaviourBillLCM.pdf
Powers to make subordinate legislation

5. The Committee identified the following provision in the Bill which confers delegated powers conferred on the Scottish Ministers.

Clause 99(2) – Whether a dog is a danger to public safety
Power conferred on: The Scottish Ministers
Exercised by: Order
Parliamentary Procedure: Negative

Background

6. Section 1(3) of the Dangerous Dogs Act 1991 (“the 1991 Act”) provides that no person shall have in his or her possession or custody any type of dog to which that section applies. Section 1 applies to pit bull terriers, Japanese tosas and any other type of dog designated by order made by the Secretary of State which appears to be bred for fighting, or to have the characteristics of a type of dog bred for fighting. Any person who contravenes the prohibition in section 1 commits an offence and may be liable to imprisonment.

7. The Secretary of State is required to make a scheme under section 1(3) for payment to the owners of prohibited breeds of dog who arrange for them to be destroyed before the appointed day of sums specified in or determined under the scheme in respect of those dogs and the cost of their destruction.

8. The Secretary of State also has power, by virtue of section 1(5) of the 1991 Act, to create a scheme of exemption whereby, upon the meeting of certain conditions specified in that scheme, the section 1(3) prohibition on keeping certain types of dog bred for fighting does not apply. Schemes under both section 1(3) and section 1(5) are currently contained in the Dangerous Dogs Compensation and Exemption Schemes Order 1991 which applies on a UK-wide basis.

9. The powers to make schemes under sections 1(3) and 1(5) of the 1991 Act are conferred on the Secretary of State. Those powers are, however, exercisable in and as regards Scotland by the Scottish Ministers. This is as a result of section 53(1) of the Scotland Act 1998 which provides that functions of the Secretary of State, insofar as they are exercisable within devolved competence, are exercisable by the Scottish Ministers.

Delegated power

10. Clause 99(2) of the Bill inserts a new section 1(6A) into the 1991 Act to the effect that Ministers have express power to include, in a scheme made under either section 1(3) or 1(5) of that Act, provision requiring a court to consider whether a person is a fit and proper person to be in charge of a dog.

11. The LCM explains that the section 1(3) and (5) powers are being modified in this way as a response to a 2012 High Court judgement in England where it was recognised that the court was not permitted to consider the character of the owner
of a dog when considering whether that dog posed a risk to public safety in terms of section 4 of the 1991 Act. The amendment to the section 1(3) and 1(5) order-making powers proposed in Clause 99(2) of the Bill forms part of a suite of amendments to the 1991 Act which are intended to address that issue in express terms. It allows the Scottish Ministers to include particular provision in any Scottish scheme drawn up under section 1(3) or 1(5) requiring a court to consider whether a person is a fit and proper person to be in charge of a dog.

Comment
12. The amendment to the powers in section 1(3) and 1(5) of the 1991 Act made by Clause 99(2) of the Bill is not a complete conferral of a new power upon the Scottish Ministers, but may be considered as a specific extension to an existing power, which is the power to create compensation and exemption schemes. The Scottish Ministers already have the power to create such schemes under the 1991 Act via order subject to the negative procedure.

13. The current powers are drafted in wide terms, specifically the power in section 1(5) which provides for an exemption scheme to contain such arrangements (including provision for the payment of charges or fees) as the Scottish Ministers consider appropriate. The insertion of a new subsection (6A) into section 1 of the 1991 Act simply specifies that schemes drawn up by the Scottish Ministers under sections 1(3) or 1(5) may include provision requiring a court to consider whether a person is a fit and proper person to be in charge of a dog.

14. The Bill makes no other change to the powers, the exercise of which will remain subject to Parliamentary scrutiny under the negative procedure. On that basis, the Committee reports that it is content with the extension to the powers under sections 1(3) and 1(5) of the 1991 Act made by Clause 99(2) of the Bill.

15. The Committee reports that it is content with the extension to the Scottish Ministers’ existing powers to make subordinate legislation under sections 1(3) and 1(5) of the Dangerous Dogs Act 1991. The Committee is also content that subordinate legislation made in exercise of those powers will continue to be subject to the negative procedure.

16. The Committee therefore reports to the lead committee that it is content with the delegated power in the Bill.
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