



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

60th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill as amended at stage 2

Published by the Scottish Parliament on 4 December 2013

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Pàrlamaid na h-Alba

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:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
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60th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

1. At its meeting on 3 December 2013, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Victims and Witnesses (Scotland) Bill as amended at Stage 2 (“the Bill”)¹. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. The Bill was introduced in the Scottish Parliament by the Scottish Government on 6 February 2013.
3. The Bill has two main, general objectives. First, there are reforms to the justice system relating to victims and witnesses. The reforms relate mainly to the criminal system rather than civil. Second, the establishment of a National Confidential Forum (NCF) which will hear testimony from adults who were placed in institutional forms of care as children.
4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its [20th report of 2013](#).
5. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”)².

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers provisions which had been amended or added at stage 2. The Committee’s comments on these delegated powers are considered below.

¹ Victims and Witnesses (Scotland) Bill (as amended at stage 2) available here: [http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20\(Scotland\)%20Bill/b23as4-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23as4-amend.pdf)

² Victims and Witnesses (Scotland) Bill Supplementary Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Victims_and_Witnesses_Bill_-_SDPM.pdf

Section 2(4)(b) – Standards of Service

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

7. Section 2 imposes a duty on certain persons to set and publish standards of service relating to (i) the carrying out of functions in relation to victims and witnesses and (ii) the procedure for making and resolving complaints. This applies to the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service, the Scottish Court Service, and the Parole Board.

8. Amendments at Stage 2 moved references to the functions of the Lord Advocate and the Scottish Ministers covered by the duty to set standards of service, from subsection (2) to subsection (3).

9. Section 2(4) gives the Scottish Ministers an order-making power to modify the list of persons to whom the duty applies. Amendments at Stage 2 have extended that power to allow Ministers to also modify sections (1), (3) or (5), if necessary or expedient as a consequence of a modification to subsection (2).

10. The Committee finds the power in section 2(4)(b) to be acceptable in principle, and is content that it is subject to the affirmative procedure.

Section 2A(4) – Reports

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

11. This section was added at Stage 2. Subsection (2) imposes a duty on the persons mentioned above who require to set and publish standards of service, to prepare and publish a report within 12 months of initially publishing their standards. Then, on an annual basis, a report assessing how standards have been met, how they intend to continue to meet them, any modifications made during the reporting period, and any proposed modifications they intend to make during the following reporting period.

12. Section 2A(4) gives the Scottish Ministers a power to prescribe by regulations information, in addition to that set out in subsection (3), which is to be included in the report.

13. The Committee finds the power in section 2A(4) to be acceptable in principle, given that it is limited to allowing the Ministers to specify only additional information to be provided in reports, beyond the matters set out in subsection (3). As the power is limited to providing information in reports, the Committee considers the negative resolution procedure appropriate for scrutiny of the regulations.

Section 2B- Rules: review of decision not to prosecute

Power conferred on:	The Lord Advocate
Power exercisable by:	Rules (published, but not in the form of Scottish statutory instrument)
Parliamentary procedure:	None

14. This section has been added at Stage 2. By section 2B(1), the Lord Advocate must make and publish the rules about the process for reviewing, on the request of a person who is, or appears to be, a victim in relation to an offence, a decision of the prosecutor not to prosecute a person for the offence. The “prosecutor” may be the Lord Advocate, Crown Counsel or the procurator fiscal.

15. Section 2B(2) provides that the rules in particular may make provision in connection with the circumstances in which reviews may be carried out; the manner in which a request for review must be made; the information to be included in a request; the matters to be taken into account by the Lord Advocate when carrying out reviews; and the process to be followed by the Lord Advocate when carrying out reviews.

16. This power is designed to implement Article 11 of the EU Victims Directive. The proposed rules would concern the internal procedural process of review by the Lord Advocate of decisions not to prosecute.

17. The Committee finds the power in section 2B to be acceptable in principle, and is content that it is not subject to Parliamentary procedure.

Section 2C – Restorative Justice

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

18. This section was inserted into the Bill by way of a non-Government amendment in the name of Alison McInnes MSP at Stage 2.

19. Section 2C provides that the Scottish Ministers *must* make provision, by way of regulations, for the referral of a victim and a person who has or is alleged to have committed an offence to “restorative justice” services. The regulations must, in particular, make provision for the circumstances where such a referral may be appropriate and the procedure and conditions for such a referral.

20. “Restorative justice” is defined as any process whereby the victim and a person who has or is alleged to have committed an offence are enabled, where they freely consent, to participate actively in the resolution of matters arising from an offence through the assistance of an impartial third party (subsection (4)).

21. The power concerns referral of persons to restorative justice processes, without for instance providing that the regulations may set out any substantive implications for a victim or an offender (or alleged offender). The Committee therefore considers the negative to be an acceptable level of scrutiny of the regulations.

22. The Committee finds the power in section 2C to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 3(5) – Disclosure of information about criminal proceedings

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure

23. In the Bill as introduced, section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Section 3(2)(a) specifies that a person who appears to be the victim of an offence or alleged offence is a “requester” under subsection (1).

24. An amendment at Stage 2 has inserted subsection (2)(aa), to provide that, where the death of the person in subsection (2)(a) was or appears to have been caused by the offence or alleged offence, a prescribed relative of that person is also a requester under subsection (1).

25. Section 3(5) allows the Scottish Ministers to prescribe by order those to be regarded as a relative under subsection (2)(aa).

26. The SDPM explains that, rather than set out a definitive list of those to be regarded as relatives for this purpose, it is considered appropriate to provide for the detail in subordinate legislation. This will allow some flexibility to modify the definition in future, without amending primary legislation.

27. The Committee finds the power in section 3(5) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 5A(4) – Certain medical examinations: gender of medical examiner

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure

28. This section, which was inserted at stage 2, places a duty on a constable to inform alleged victims of certain offences, who have reported the offence to the police, that they may request that their medical examination be carried out by a registered medical practitioner of a specified gender. The constable must also

inform the registered medical practitioner of any such request. This applies to various offences listed in Schedule 3 to the Sexual Offences Act 2003.

29. Section 5A(4) gives the Scottish Ministers an order-making power to specify descriptions of other persons to be included in the reference to “registered medical practitioner”.

30. The SDPM explains that while these examinations will ordinarily be carried out by registered medical practitioners (fully registered persons under the Medical Act 1983, who hold a licence to practise under that Act), other healthcare professionals may, in the future, also be qualified to undertake such examinations. This power would provide the flexibility to reflect such changes in practice.

31. The Committee finds the power in section 5A(4) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 19(7) – Victim statements

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Negative procedure (affirmative, where the order amends or repeals any part of an Act)

32. Section 19(7) was inserted into the Bill at Stage 2. This inserts new subsections (13) to (16) into section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”), with regard to victim statements.

33. Subsection (13) allows the Scottish Ministers to prescribe, by order, the form and manner in which victim statements can be made. Subsection (14) allows the Scottish Ministers, when making such an order, to include such consequential, incidental or supplementary provision as is considered appropriate- and to modify any enactment.

34. Subsection (15) provides that an order under subsection (13) can be made to have effect for a period of time as specified in the order. Subsection (16) provides that an order under subsection (13), which applies for a period as specified in subsection (15), can apply to a specific geographic area or areas.

35. The intention is to allow alternative formats of victim statement to be piloted, and then extended more widely if appropriate. The power will allow for limited pilots to be conducted, and for wider changes to be implemented as necessary, without further primary legislation. It will allow for flexibility in the types of victim statements, and for the length and location of the pilot scheme to be varied.

36. The Committee finds the power in section 19(7) to be acceptable in principle, being restricted in scope to the form and manner of victim statements, and matters supplemental or consequential on that. It is also content that the power is subject to the negative procedure, and the affirmative procedure where an order amends or repeals any part of an Act.

**Section 21 (new section 253B of the Criminal Procedure (Scotland) Act 1995)
- The Restitution Fund**

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	Affirmative procedure

37. The new section 253B, to be inserted into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries. Subsection (5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Restitution Fund. Subsection (6) grants the Scottish Ministers an order-making power to make further provision relating to the administration of the Fund, including specification of eligible persons and provision regarding the making of payments, the keeping of financial and other records and the making of reports to the Scottish Government.

38. The new section sets out the purpose of payments out of the Restitution Fund. This is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

39. At Stage 2, a minor amendment was made to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the administration of the Restitution Fund, in addition to the establishment and maintenance of the fund.

40. There is also a minor amendment to subsection (6), so the purpose of the order-making power is stated in the introductory text explicitly to be to make further provision about the administration of the Fund.

41. The Committee finds the amendments to the powers in section 21 (new section 253B(5) and (6) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that the powers are subject to the affirmative procedure.

Section 22 (amended section 253G(3) and (4) of the 1995 Act) – The Victim Surcharge Fund

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations
Parliamentary procedure:	Negative procedure

42. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund.

43. Subsection (3) of new section 253G, as introduced, provided that Scottish Ministers must establish and maintain the Victim Surcharge Fund for the purposes of securing the provision of support services for persons who have been the victims of crime. Amendments were made at Stage 2 in the new section 253G(3),(4) and (8) to refer to a person who is, or appears to be, the victim of crime and the prescribed relatives of such persons, so that support services can be secured for victims, those appearing to be victims, and prescribed relatives of such persons. The extension of support services and fund payments to relatives, both of victims and those appearing to be, are therefore proposed as changes of policy.

44. New section 253G(8) allows the Scottish Ministers to prescribe by regulation those to be regarded as a relative under the subsections (3) and (4). Amendments at Stage 2 also introduced a new subsection (9) - which provides that the regulations under subsections (3), (4) and (8) are subject to the negative procedure.

45. The SDPM explains that it has been considered appropriate to provide in subordinate legislation for the detail of who is a “prescribed relative” for these purposes. This allows the Scottish Ministers the flexibility to modify the definition.

46. Given the proposed policy changes that the fund will be extended to relatives of victims, and also of those appearing to be victims at the time, the Committee accepts that this power has a fairly narrow application in relation to section 22.

47. The Committee therefore finds the power in section 22 (amended section 253G(3) and (4) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that it is subject to the negative procedure.

Section 22 (new section 253G(5) and (6) of the 1995 Act) – The Victim Surcharge Fund

Powers conferred on:	The Scottish Ministers
Powers exercisable by:	Order and regulations
Parliamentary procedure:	Affirmative procedure

48. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund. Subsection 253G(5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Victim Surcharge Fund.

49. Subsection (6) grants the Ministers powers to manage the Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

50. A minor amendment was made at Stage 2 to subsection (5). This reflects that the functions of the Scottish Ministers, which may be delegated by order, include

the *administration* of the Fund, in addition to the establishment and maintenance of the fund.

51. The provision in subsection (6) was also amended, so that the purpose of the order-making power is stated explicitly in the introductory words i.e. that further provision may be made about the *administration* of the Fund. This has been viewed as a drafting improvement.

52. A further omission in subsection (6) at Stage 2 has narrowed the scope of the powers to a degree. In the Bill at introduction, the order-making power could be used to make provision specifying persons or classes of person to, or in respect of, whom payments may be made out of the fund. It was considered that the restrictions on the face of the Bill relating to the persons to whom payments can be made (in subsection (4) of 253G) were sufficient and such provision was unlikely to be required.

53. Subsection (6), as introduced, provided that the further provision for the establishment, maintenance and operation of the Surcharge Fund would be by *order*. In contrast, new section 253F(2) (also inserted into the 1995 Act by section 22 of the Bill), provided that Scottish Ministers may prescribe by *regulations* the offences, sentences and circumstances to which the victim surcharge is applicable. Subsection (6) was amended at Stage 2 to enable the Scottish Ministers to exercise these powers together, by regulations.

54. The changes made at Stage 2 cover relatively minor amendment to the powers in relation to the Victim Surcharge, or deal with technical and drafting matters.

55. The Committee therefore finds the amendments to the powers in section 22 (new section 253G(5) and (6) of the Criminal Procedure (Scotland) Act 1995) to be acceptable in principle, and is content that the powers are subject to the affirmative procedure.

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

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ISBN 978-1-78392-305-2
