Delegated Powers and Law Reform Committee

7th Report, 2015 (Session 4)

Supplementary Legislative Consent Memorandum on the Serious Crime 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:

Nigel Don (Convener)
John Mason (Deputy Convener)
Margaret McCulloch
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth Anderson

Support Manager
Daren Pratt
Supplementary Legislative Consent Memorandum on the Serious Crime Bill

The Committee reports to the Parliament as follows—

1. At its meeting on 20 January 2015, the Committee considered provisions in the Serious Crime Bill (UK Parliament Legislation) (“the Bill”)¹ that confer powers to make subordinate legislation on the Scottish Ministers.

2. The Bill was introduced in the House of Lords on 5 June 2014. It is a UK Government Bill and was introduced by Lord Taylor of Holbeach.

3. The Committee previously considered a Legislative Consent Memorandum (LCM) in respect of the Bill at its meeting on 24 November 2014 and published its report on 2 December². A number of amendments have since been tabled by the UK Government. The Scottish Parliament’s consent is being sought for amendments relating to prevention of the use of communication devices by prisoners. This created the requirement for a Supplementary Legislative Consent Memorandum (LCM).

4. The lead Committee in respect of this Supplementary LCM is the Justice Committee. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

   “That the Parliament agrees that the amended provisions of the Serious Crime Bill introduced in the House of Lords on 6 June 2014, relating to the prevention or restriction of use of communications devices by prisoners, so far as these matters fall within the competence of the Scottish Parliament, should be considered by the UK Parliament.”

5. The Supplementary LCM³ was considered by the Committee under Rule 9B3.6. The Committee is required to consider, and may report to the lead

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¹ Serious Crime Bill available here: [http://services.parliament.uk/bills/2014-15/seriouscrime.html](http://services.parliament.uk/bills/2014-15/seriouscrime.html)
³ Serious Crime Bill Supplementary Legislative Consent Memorandum available here: [http://www.scottish.parliament.uk/LegislativeConsentMemoranda/SeriousCrimeLCM.pdf](http://www.scottish.parliament.uk/LegislativeConsentMemoranda/SeriousCrimeLCM.pdf)
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.

Delegated power

6. The amendment for which legislative consent is sought confers a delegated power which engages the Committee’s remit.

New clause 11: Prevention or restriction of use of communication device by prisoners etc.

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

Provision

7. The clause enables the Scottish Ministers, by regulations, to confer power on sheriff courts to make a telecommunications restriction order. A telecommunications restriction order is an order requiring a communications provider to take the action specified in the order for the purpose of preventing or restricting the use of communication devices by persons detained in prisons or young offenders institutions.

8. “Communication device” is defined and essentially includes mobile telephones, their component parts and associated articles such as disks. A “communications provider” means a person providing a service that consists in the provision of access to, and of facilities for making use of, any telecommunication system.

9. Any regulations which the Scottish Ministers make conferring this power on the sheriff court must include provision about certain things, as follows (sub-clause (3)):

(a) Provision specifying who may apply for a telecommunications restriction order. The current policy intention is that only the Scottish Ministers will be able to apply for an order in relation to Scotland. However if in the future it was considered appropriate for other bodies such as crime detection or prevention agencies to have this capability, the regulations would be able to specify those bodies;

(b) Provision requiring notice of an application for an order to be given, and provision conferring rights on persons to make representations. The question of which persons should receive notice and have the right to make
representations to the court is left to the Scottish Ministers, to be
determined in the regulations;

(c) Provision specifying the matters which the court must be satisfied about
before it makes an order. This will presumably relate to evidence of the use
of a particular mobile phone in a prison or institution. There may be other
matters relevant to the court's consideration which provision will be made
about but these are not discussed in the LCM;

(d) Provision about the duration of orders. The clause expressly enables
Ministers to provide that an order may be of indefinite duration.

(e) Provision about variation, extension and discharge of orders, and provision
about appeals.

10. Sub-clause (4) lists a number of matters which the Scottish Ministers may
make provision about in the regulations. Whether or not to do so is at the
Ministers' discretion. These matters include:

(a) Providing for a telecommunications restriction order to specify that a
requirement of the order is not to apply in certain circumstances. The LCM
explains (at paragraph 12(f)) that it may be appropriate to have provision in
an order about the circumstances in which a communications provider must
take steps to re-establish operation of the device. The Scottish Government
explains that this is designed to deal with cases where it emerges that an
error has been made and the wrong phone has been disconnected. A quick
way of enabling re-connection of that phone is considered appropriate,
without the need for an application to the court for variation of the order. It
would appear that sub-clause (4)(a) is included to enable provision to be
made for that purpose;

(b) Provision about the costs of, and time limits for, complying with an order,
and about the expenses of legal proceedings;

(c) Provision about enforcement of orders. The clause expressly enables
Ministers to create offences in connection with enforcement. The LCM
explains that it is currently intended that enforcement will be by way of
proceedings for contempt of court and, as such, express provision will not
be required. However the power to create offences is being taken to ensure
that alternative options are available, should the need arise. Members will
note that there is no limit on the penalties which may be imposed for any
offences created under the regulations;

(d) Enabling different provision to be made in the regulations for different
purposes, and enabling ancillary provision to be made, including
modification of primary legislation.

Comment

11. The Committee finds the proposed power to be acceptable in principle, and is
content that the power is subject to the affirmative procedure. However the
Committee notes that the power (in sub-clause (4)(d)) enables the Scottish Ministers to create offences for the purpose of enforcing telecommunications restriction orders, without limit as to the penalty which may be imposed.

12. The Committee takes the view that in principle it is not appropriate for Parliament to confer powers on the Scottish Ministers to create offences and penalties in subordinate legislation without specifying a limit on the penalties which could be imposed. It takes the view that the setting of maximum penalties (whether financial or relating to imprisonment) is in principle a matter for Parliament which should not be delegated.\(^4\) The Committee considers that these principles apply irrespective of whether the power is conferred on Ministers by a UK Bill or by a Scottish Parliament Bill.

13. The Committee also takes the view that the proposed power does not enable the Scottish Ministers to make regulations conferring discretion on the sheriff court regarding matters such as the accessibility of court documents in proceedings for a telecommunications restriction order, the holding of hearings in private, or matters relating to the mode of proof or to evidence in such hearings. As such, there appears to be a discrepancy between the scope of the power and the policy intention as stated in paragraph 12(c) to (e) of the Supplementary LCM).

14. The Committee accordingly finds the power proposed in tabled amendment New Clause 11 to be acceptable in principle, and is content that the power is subject to the affirmative procedure. However the Committee draws the terms of the proposed power to the attention of the lead Committee in respect that:

(i) the power enables the Scottish Ministers to create offences for breach of telecommunications restriction orders, without specifying the maximum penalty which may be imposed for any offences created; and

(ii) there is an apparent discrepancy between the scope of the power and the stated policy intention in the Supplementary LCM.

\(^4\) See the Committee’s 20\(^{th}\) report of 2014 on the Tribunals (Scotland) Bill (paragraph 10) available here: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73992.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/73992.aspx)
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