



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

20th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill

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The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

- (a)
 - (i) subordinate legislation laid before the Parliament;
 - (ii) any Scottish Statutory Instrument not laid before the Parliament but classed as general according to its subject matter;

and, in particular, to determine whether the attention of 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;

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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Jim Eadie
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

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Daren Pratt



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Subordinate Legislation Committee

20th Report, 2013 (Session 4)

Victims and Witnesses (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 26 February and 19 March 2013 the Subordinate Legislation Committee considered the delegated powers provisions in the Victims and Witnesses (Scotland) Bill at Stage 1 (“the Bill”)¹. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders. The report will also be submitted to the Health and Sport Committee, as the secondary committee for the Bill.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF THE BILL

3. The Victims and Witnesses (Scotland) Bill was introduced in the Scottish Parliament by the Scottish Government on 6 February 2013.
4. The Bill has two main, general objectives. First, there are reforms to the justice system relating to victims and witnesses (sections 1 to 25). 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.
5. In the consideration of the DPM at its meeting on 26 February, the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced in the Annex.

¹ The Victims and Witnesses(Scotland) Bill is available here:
[http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20\(Scotland\)%20Bill/b23s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Victims%20and%20Witnesses%20(Scotland)%20Bill/b23s4-introd.pdf)

² The Victims and Witnesses (Scotland) Bill delegated Powers Memorandum is available here:
http://www.scottish.parliament.uk/S4_Bills/Victims_and_Witnesses_Bill_DPM_-_Final.pdf

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers in the Bill.

7. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 1(4) – General principles

Section 2(4) – Standards of Service

Section 2(6) – Standards of service

Section 3(7) – Disclosure of information about criminal proceedings

Section 4(2) –Interviews with children: guidance

Section 4(4) –Interviews with children

Section 5(7) and (8) – Certain sexual offences: victim’s right to specify gender of interviewer

Section 6(b) – Vulnerable witnesses: main definitions

Section 8(b) – Child and deemed vulnerable witnesses: standard special measures

Section 15 – Temporary additional special measures

Section 17(b) – Power to prescribe further special measures

Section 18(c) – Vulnerable witnesses: civil proceedings

Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995) – Restitution order where conviction of police assault, etc.

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

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

Section 24(d) – Oral representations to the Parole Board for Scotland

Section 27(2) (inserting paragraph 2(1)(c) of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) – Selection of persons to the membership selection panel for the National Confidential Forum (“the NCF”)

Section 29 – Ancillary provision

8. The Committee’s comments and, where appropriate, recommendations on the remaining delegated powers are detailed below.

Section 22 (inserting new section 253F of the 1995 Act) – Victim Surcharge

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

Provision

9. Section 22 makes significant provision to establish a victim surcharge, and a Victim Surcharge Fund. This is achieved by adding sections 253F to 253J into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The court must impose a victim surcharge on offenders who are subject to any sentence which is prescribed by the Scottish Ministers by regulations made under this section, except where a restitution order under section 21 is imposed.

10. The provision for surcharge shall apply where a person is convicted of an offence (other than one prescribed by Ministers), the court does not make a section 21 restitution order, and the court imposes a sentence, or sentence of a class, which is one of those prescribed by regulations by Ministers. The regulations will therefore define the circumstances to which the surcharge applies. So the potential scope in terms of offenders to whom this will apply is much wider than for “restitution orders”.

11. The Policy Memorandum indicates that the Scottish Government’s current intention is that the surcharge would apply to impose an additional penalty in cases of sentence by fine, and if successful the surcharge would be extended to other types of sentence (paragraphs 127 to 131 of the Memorandum). Only one surcharge is payable if there is a conviction for 2 or more offences in the same proceedings. (Table 2 on page 27 of the Policy Memorandum sets out a possible model for amounts of surcharge, depending on the level of fine for an offence.)

12. The Scottish Ministers will be able to specify different levels of surcharge amount for different types of offence or offender, in the regulations. The court (as well as passing any appropriate sentence for the offence) must order the person to pay the surcharge amount as would be prescribed by the regulations, subject to further exceptions which can be prescribed.

13. Amounts of surcharge are paid to a Victim Surcharge Fund, also established by section 22. The Fund is established and maintained by Ministers for the purpose of securing the provision of support services for victims of crime (in general).

14. “Support services” are defined as any type of service or treatment which is intended to benefit the physical or mental health or well-being of a victim. How the Fund operates in detail will be specified by order. This includes the specification of which victims (or classes of victims) can receive payments and how payments are to be made.

Comment

15. The Committee sought further explanation from the Scottish Government as to the proposed scope of the powers to prescribe in regulations the amount/s of the victim surcharge, and the criminal sentences to which it will apply. The Committee asked why is it considered necessary or appropriate that the scope of the powers in the new section 253F(1), (2) and (5) is as wide as enabling any level of victim surcharge amount/s to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount/s being prescribed by the Bill.

16. The Committee also drew attention to the statement in the DPM that the Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine (paragraph 69). As further consideration shall be required in advance of putting the proposed details into regulations, with consultation with the appropriate persons and bodies, the Committee asked whether on consideration section 22 should be amended, to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made.

17. The Government's response to the Committee has confirmed that while the initial intention is to apply the surcharge to fines, it could be rolled out to other forms of sentence in the future. It is considered more straightforward and appropriate to set maximum amounts for the surcharge in subordinate legislation. A comparison is drawn with the approach used in England and Wales, where applicable sentences and maximum amounts are set by subordinate legislation under section 161A and 161B of the Criminal Justice Act 2003. There would be difficulties in specifying the maximum amount/s without also specifying in the Bill which sentences they would apply to.

18. The Committee does not view the provisions which apply in England and Wales as persuasive in this context, so far as section 22 proposes separate (and not identical) victim surcharge arrangements for Scotland.

19. In relation to consultation, the Scottish Government undertakes in response to the Committee to consult those bodies affected by the proposed regulations under section 22 as a matter of course, before laying draft regulations in the Parliament. Given that the regulations are proposed to be subject to the affirmative procedure, the Committee accepts that explanation and undertaking.

20. The Committee accepts that section 22 sets out the proposed structure for a victim surcharge, and that the proposals to come forward in due course as to the amount or amounts of surcharge, and the sentences to which it will apply, are policy matters. In the view of the Committee, whether the powers should be given to Ministers to specify those amounts and sentences by regulations rather than by making provision (or initial provision) in the Bill is a matter of policy for determination by the Parliament, and should not be prejudged by this Committee.

21. The Committee however draws to the attention of the lead committee that the powers proposed in the new section 253F(1), (2) and (5) of the 1995

Act as inserted by section 22 of the Bill are wide, so far as they enable the Scottish Ministers to prescribe in regulations any amounts of victim surcharge to be ordered by the court, and in relation to any sentences so prescribed. The DPM confirms that the initial policy intention is limited to imposing the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine.

22. The Scottish Government has undertaken to consult those bodies which may be affected by the regulations to be made under section 22, before draft regulations are laid in the Parliament for approval. The Committee recommends that this is done, both for the initial draft regulations and any future modifications to them.

Section 27(2) (paragraph 7 of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) – Eligibility to participate in the National Confidential Forum

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

Provisions

23. Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). Schedule 1A makes further provision in relation to the National Confidential Forum (NCF). It is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in that Act.

24. Paragraph 7 of the new schedule 1A makes provision for eligibility to participate in the NCF. Any person aged 18 years or over and who was placed in institutional care as a child for any length of time, and who is no longer in care, may apply to provide testimony.

25. “Institutional care” for these purposes is defined in paragraph 7(3) of the new schedule. It means a care or health service which meets the conditions in paragraph 7(4) “and otherwise is of a description or type prescribed by order made by the Scottish Ministers.”

26. The conditions set out in that subparagraph (4) cover a type of care or health service which (a) was provided to children in Scotland at some time; (b) provided by a body corporate or unincorporated; and (c) which included residential accommodation for the children placed in care. The institutional care for these purposes will not include services provided at premises used wholly or mainly as a private dwelling (DPM, paragraph 83).

Comment

27. The Committee queried with the Scottish Government a matter in connection with the drafting of the power to make an order, as explained above. It queried whether it could be clearer if the Scottish Ministers are under a duty to make an order under subparagraph (3), or have a discretion to do so.

28. The response to the Committee (at paragraph 18 to 21) confirms that the intention is that the Ministers are under a duty to make the order. In the view of the Scottish Government, the drafting clearly provides for this “as the order is required to give meaning to “institutional care”. “If no order is made then there is no description or type of institutional care”.

29. The Committee notes that this power to make an order will define “a description or type” of care or health service which meets the 3 conditions as set out in the new paragraph 7(4) of schedule 1A. The narrower the description prescribed by order, the narrower the description of “institutional care” for the purposes of the persons who are eligible to participate in the NCF.

30. The Committee would welcome if the Scottish Government could consider, following this report, if the new paragraph 7(3) could clarify further that the Scottish Ministers are under a duty to make an order. Paragraph 7(4) sets out that an order, once made, must prescribe a description of care or health service which meets the conditions in that subparagraph. Paragraph 7(3) provides that “institutional care “ means a care or health service which meets the conditions in subparagraph (4) “and otherwise is of a description or type” prescribed by order. This might be interpreted as an additional provision, that if and when an order is made, the description or type of service will be defined, beyond the criteria which are already set out in subparagraph (4).

31. The Committee also recommends that the Scottish Government considers another point on the clarity of this power. Paragraph 7(3) refers to “a description *or* type” of care or health service prescribed by order. The Government’s response states that wording is intended. Paragraph 7(4) however refers to a “description *of* type”.

32. The Committee would welcome if the Scottish Government could consider further if the power contained in section 27(2) (inserting paragraph 7(3) to (5) of new schedule 1A to the Mental Health (Care and Treatment) (Scotland) Act 2003) could clarify further that the Scottish Ministers are intended to have a duty to make an order. An order will provide further definition of “institutional care” for the purposes of those who will be eligible to participate in the National Confidential Forum.

33. The Committee also notes that there is a discrepancy between the reference to “description *or* type” of care or health service to be prescribed by order, in the new paragraph 7(3) and the reference to “description *of* type” in paragraph 7(4).

Section 30 – Commencement

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Parliamentary procedure:	None

34. The general provisions in sections 28 to 30 come into force on the day after Royal Assent. There is also a usual form of commencement power, to bring into force the other provisions in the Bill on an appointed day/s, by order.

35. Section 30(3) proposes that a commencement order may contain transitory, transitional or savings provisions. No Parliament procedure will attach to such provisions (apart from the laying of the order and consideration by this Committee). The DPM does not explain why this is appropriate.

36. In particular, this Bill makes a complex series of amendments to the Criminal Procedure (Scotland) Act 1995 in relation to court procedures for vulnerable witnesses. It may be surmised that any ancillary provisions proposed to be made upon the commencement of specific provisions of the Bill could be either complex, or have significant implications for persons affected by the provisions. It may be appropriate therefore that the negative procedure attaches to any such provisions, so that Parliamentary procedure applies and the Parliament has the ability to annul provisions by resolution, should it so determine.

Comment

37. The Scottish Government indicates to the Committee that it does not envisage that complex or significant transitional provisions would be made under the commencement powers, relying instead on the powers to make ancillary provisions contained in section 29(4). (Those powers are subject to the negative procedure, or the affirmative procedure where an order contains provisions that textually amend an Act.) The Government undertakes however to consider this further, before the completion of Stage 1.

38. While there may be no present intention to make any ancillary provisions in a commencement order, the Committee considers that an appropriate Parliamentary procedure should be applied to such provisions, given that it is proposed the Scottish Ministers should have the power to make such provisions.

39. The Committee recommends accordingly that the negative procedure should apply where a commencement order under subsection (2) of section 30 makes ancillary provisions as provided for by subsection (3). The Scottish Government has undertaken to consider this further before the completion of Stage 1. The Committee asks for further comment on this in the Scottish Government's response to this report.

Correspondence with the Scottish Government

On 26 February, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

Section 8(b) – Child and deemed vulnerable witnesses: standard special measures

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Procedure:	Affirmative

1. Section 271H(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) specifies a range of special measures that may be used to assist vulnerable witnesses to give their evidence to the court. Section 8(a) amends the definition of “*standard*” special measures.

2. Section 8(b) allows the Scottish Ministers to modify section 271A(14) which sets out the standard special measures, so as to add new ones, or amend or delete the existing ones. It also enables the modification of the procedures for use of these measures, in consequence of a change to the measures (new section 271A(15) of the 1995 Act).

3. The Committee asks the Scottish Government:

- In relation to the power in section 8(b), whether this power could be drawn more narrowly, to allow for the updating of, or addition to, the current list of “standard special measures” for vulnerable witnesses contained in subsection (14) of section 271A of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed?
- Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?

Section 17(b) – Power to prescribe further special measures

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order
Procedure:	Affirmative

4. As above, subsection (1) of section 271H of the 1995 Act specifies a range of 6 special measures that may be used to assist vulnerable witnesses to give their evidence to the court.

5. Section 17(b) will allow the Scottish Ministers to add new special measures to section 271H(1) or to amend or delete existing special measures, and also to modify the procedures for use of the special measures in consequence.

6. The Committee asks the Scottish Government:

- In relation to the power contained in section 17(b), whether this power could be drawn more narrowly to allow for updating of, or addition to, the current list of special measures for vulnerable witnesses set out in subsection (1) of section 271H of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed?
- Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?

**Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995)
– Restitution order where conviction of police assault, etc.**

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

7. Section 21 provides that, instead of, or in addition to, any sentence for the offence which the court can currently pass, the court may order a person convicted of assaulting or impeding police officers or police staff to pay a sum under a “restitution order” made by the court.

8. The Committee asks the Scottish Government:

- In relation to the power in section 21 (inserting section 253A(3) of the Criminal Procedure (Scotland) Act 1995), why it is proposed that the power to vary the maximum amount of restitution payment that may be ordered by a court should be exercisable in the form of regulations rather than order, given that an order is the usual form used to prescribe the level of a maximum amount, without other substantive provisions?

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

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Procedure: Affirmative

9. In connection with restitution order payments as above, any amounts are to be paid on to the Scottish Ministers. Ministers shall establish and maintain a Restitution Fund, to secure the provision of support services for persons who have been the victims of a police assault.

10. Subsection (6) allows the Scottish Ministers to make further provision about the Fund, including in connection with its operation, administration, records and reports to the Scottish Government.

11. The Committee asks the Scottish Government for explanation of the following matter:

- The Delegated Powers Memorandum indicates that there could possibly be a requirement in future to exercise the powers to make urgent changes in the operation or administration of the Restitution Fund (paragraph 65). In that case could the application of the affirmative procedure raise any difficulties, for instance if any changes required to be approved urgently by the Parliament during the summer recess? If the “emergency affirmative” procedure was applied to the exercise of the power to make orders, could this resolve any such difficulties?

Section 22 (inserting new section 253F of the 1995 Act) – Victim Surcharge

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

12. Section 22 makes significant provision to establish a victim surcharge, and a Victim Surcharge Fund. This is achieved by adding sections 253F to 253J into the 1995 Act. The court must impose a victim surcharge on offenders who are subject to any sentence which is prescribed by the Scottish Ministers by regulations made under this section, except where a restitution order under section 21 is imposed.

13. The Committee asks the Scottish Government:

- (a) Why is it considered necessary or appropriate that the scope of the powers in the new section 253F(2) and (5) is as wide as enabling any level of victim surcharge amount/s to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount/s being prescribed by the Bill?
- The Scottish Government is asked to consider whether the scope of these powers could be drawn more narrowly, to reflect the initial policy intentions. The Delegated Powers Memorandum explains these as – “The Scottish Government intends to impose the surcharge on those sentenced to a court fine in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine...”
- (b) Given that statement in the Delegated Powers Memorandum, it is noted that further consideration shall be required in advance of putting the proposed details into regulations, and it is assumed that consultation will be needed with the appropriate persons and bodies on those details.

- The Scottish Government is asked to consider whether section 22 should be amended to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made?

Section 27(2) paragraph 7 of new schedule 1A – Eligibility to participate in the National Confidential Forum

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

Section 27(2) inserts schedule 1A into the Mental Health (Care and Treatment) (Scotland) Act 2003. Schedule 1A makes further provision in relation to the National Confidential Forum. It is inserted into the 2003 Act because the Forum is to operate as part of the Mental Welfare Commission, provision in respect of which is set out in that Act.

14. The Committee asks the Scottish Government:

- In relation to the power contained in section 27(2) (inserting subparagraph (3) of paragraph (7) of schedule 1A to the 2003 Act) whether it is intended that the Scottish Ministers are under a duty to make an order under that subparagraph, or have a discretion to do so. Accordingly, the Scottish Government are asked to consider whether this should be made clearer?

The drafting of the powers in sections 1 to 5, 6(b), 8(b), 17 and 24(d)

15. Sections 1 to 5, 6(b), 8(b), 17, and 24(d) of the Bill have varying drafting methods for the powers to modify the list of persons etc. contained in each section, which is either “the Scottish Ministers may by order/regulations modify subsection (X)” or “the Scottish Ministers may be order/regulations modify the definition of “qualifying person” (for example) in subsection (X)”.

16. Each of those sections contains powers to modify a list of persons, types of information, etc. provided for in a particular subsection. For some sections the power is drafted as a power to *modify the definition (or description) of* “qualifying person” (for example) in the relevant subsection. For others the power is framed simply as a power to modify the subsection (for example, in section 2(4)).

17. The Committee notes that currently in the Water Resources (Scotland) Bill as amended at Stage 2, section 3(2) specifies that the Scottish Ministers may by regulations *modify the list* in subsection (1) *by (a) adding a public body, (b) updating or removing an entry.*”

18. The Committee asks the Scottish Government:

- Could a consistent drafting method be used in the sections of the Bill referred to above, to make clear that the power is to modify a list of persons, etc., in the relevant subsection and to specify how the modification can be done?

Section 30 – Commencement

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order made by Scottish statutory instrument
Parliamentary procedure:	None

19. The general provisions in sections 28 to 30 come into force on the day after Royal Assent. There is also a usual power to bring into force the other provisions in the Bill on days which will be appointed by order.

20. Section 30(3) proposes that a commencement order may contain transitory, transitional or savings provisions. No Parliamentary procedure will attach to such provisions (apart from the laying of the order and consideration by this Committee).

21. The Committee asks the Scottish Government:

- In relation to the power in section 30(3) to make transitional, transitory or savings provisions in a commencement order, why it has been considered appropriate that no Parliamentary procedure will apply to the making of such provisions.

In particular, the Bill makes a complex series of amendments to various provisions of the 1995 Act in relation to court procedures in the interests of vulnerable witnesses. It may be assumed that any such ancillary provisions added to a commencement order could potentially be either complex, or have significant implications for the persons affected by the provisions. The Scottish Government is asked to consider whether the negative procedure could be more suitable for scrutiny of ancillary provisions which are added to a commencement order, given that this would be consistent with the application of the negative procedure to the ancillary powers in section 29?

The Scottish Government responded as follows:

Section 8(b) - Child and deemed vulnerable witnesses: standard special measures

Section 17(b) - Power to prescribe further special measures

The Committee asked:

- In relation to the powers in section 8(b) whether this power could be drawn more narrowly, to allow for the updating of, or addition to, the current list of standard special measures for vulnerable witnesses contained in subsection (14) of section 271A of the Criminal Procedure (Scotland) Act 1995, rather than enabling the removal of a measure currently listed .
- Alternatively, if the power to remove any measure currently listed is required in consequence of an updating of (or addition to) the measures, could the power reflect that?

Identical questions were asked in respect of Section 17(b) which provides a power to prescribe further special measures.

More narrowly drawn powers in these sections would be contrary to our policy intention. We are keen that these powers should allow the Scottish Ministers to add new special measures and amend or delete existing special measures as well as modify the procedures to be used. Having this flexibility will allow Ministers, with Parliament's consent, to remove any existing special measures. The need to do this may arise because, for example, changes in technology or improvements in how courts operate may make a current special measure redundant or inappropriate, even if amended. It may also be necessary to replace an existing special measure with a new special measure.

We do not envisage these powers being used on a regular basis but consider it important to maintain this flexibility in the Bill.

Section 21 (new section 253A of the Criminal Procedure (Scotland) Act 1995 - Restitution order where conviction of police assault etc.

Section 21 provides that, instead of, or in addition to, any sentence for the offence which the court can currently pass, the court may order a person convicted of assaulting or impeding police officers or police staff to pay a sum under a "restitution order" made by the court.

The Committee asked the Scottish Government:

- In relation to the power in section 21 (inserting section 253A(3) of the Criminal Procedure (Scotland) Act 1995), why it is proposed that the power to vary the maximum amount of restitution payment that may be ordered by a court should be exercisable in the form of regulations rather than order, given that an order is the usual form used to prescribe the level of a maximum amount, without other substantive provisions?

The power to vary the maximum amount of the restitution payment is not the only power the Scottish Ministers propose to take through the Bill, in relation to restitution orders. Section 21 of the Bill also proposes to insert 253B(5) and (6) into the 1995 Act, which grant powers to deal with other aspects of the management of the Fund, and its potential delegation. These powers are to be exercised by regulations. In stipulating that the power in the proposed section 253A(3) should be exercised by regulations, rather than by order, the Scottish Ministers sought to ensure that changes to the maximum amount of the restitution payment could be made in the same instrument, if that were felt desirable, as other changes to the operation of the Fund permitted by the provisions of the Bill.

Section 21 (new section 2538 of the Criminal Procedure (Scotland) Act 1995 – The Restitution Fund

Subsection (6) allows the Scottish Ministers to make further provision about the Fund, including in connection with its operation, administration, records and reports to the Scottish Government.

The Committee asked the Scottish Government:

- The Delegated Powers Memorandum indicates that there could possibly be a requirement in future to exercise the powers to make urgent changes in the operation or administration of the Restitution Fund (paragraph 65). In that case could the application of the affirmative procedure raise any difficulties, for instance if any changes required to be approved urgently by the Parliament during the summer recess? If the "emergency affirmative" procedure was applied to the exercise of the power to make orders, could this resolve any such difficulties?

The indication in the Delegated Powers Memorandum that there could be a requirement to make urgent changes explained the Government's view that it should be possible to make such changes in subordinate legislation, rather than requiring primary legislation every time they might be required.

However, the Committee raises the valid point that the affirmative procedure is not, itself, the procedure which would allow the most rapid and urgent change to the management of the Fund. As the Memorandum indicated, a balance must be struck between flexibility and proper Parliamentary scrutiny. It is very likely that changes will occasionally be required at short notice. However, the notice is unlikely to be so short as to preclude affirmative procedure. In this respect it is noteworthy that the requirement on the Scottish Ministers to pay amounts received into the Fund, in new section 2538(2) is not subject to a time limit. Therefore, if for any reason the Fund became inoperable in its then current form, the Scottish Ministers would not need to transfer monies to it until such time as any problems were overcome. This would allow for time to make regulations by affirmative procedure, even if the requirement to make them arose during recess.

Section 22 (inserting new section 253F of the Criminal Procedure (Scotland) Act 1995- Victim Surcharge

The Committee asked:

- Why it is considered necessary or appropriate that the scope of the powers in the new section 253F(2) and (5) is as wide as enabling any level of victim surcharge amount(s) to be prescribed to be payable by different descriptions of offender, or different circumstances, without any maximum (or initial maximum) amount(s) being prescribed by the Bill?
- The Scottish Government is asked to consider whether the scope of these powers could be drawn more narrowly, to reflect the initial policy intentions. The Delegated Powers Memorandum explains these are - "The Scottish Government intends to impose the surcharge on those sentenced to a court find in the first instance, and to set out a tiered scale of surcharge amounts, linked to the amount of the fine .."
- Given that statement in the Delegated Powers Memorandum, it is noted that further consideration shall be required in advance of putting the proposed details into regulations, and it is assumed that consultation will be needed with the appropriate persons and bodies on those details.
- The Scottish Government is asked to consider whether section 22 should be amended to include a requirement for the Scottish Ministers to consult appropriate persons and bodies having an interest in the regulations under the section, before they are made?

While our initial intention is to apply the surcharge to fines, the surcharge could be rolled out to other forms of sentence in the future. Accordingly, it is more straightforward and considered more appropriate to set maximum amounts for the surcharge in subordinate legislation. This is the approach used in England and Wales whereby applicable sentence and maximum amounts are set by subordinate legislation under section 161A and 161B of the Criminal Justice Act 2003. Essentially, it would be difficult to specify a maximum amount of surcharge in the Bill without specifying in the Bill which sentences it would apply to.¹⁶ In relation to consulting on regulations proposed under section 22, we would consult those bodies affected as a matter of course before bringing any regulations to Parliament. We do not consider any statutory requirement to consult is necessary in this section.

Section 27(2) paragraph 7 of new schedule 1A - Eligibility to participate in National Confidential Forum

The Committee asked the Scottish Government:-

- "In relation to the power contained in section 27(2) (inserting subparagraph (3) of paragraph (7) of schedule 1A to the 2003 Act) whether it is intended that the Scottish Ministers are under a duty to make an order under that subparagraph, or have a discretion to do so. Accordingly, the Scottish Government are asked to consider whether this should be made clearer? "

It is confirmed that the intention is that the Scottish Ministers are under a duty to make the order. We consider that the Bill as drafted clearly provides for this as the order is required to give meaning to "institutional care".

To be an "eligible person" under paragraph 7(2) of new schedule 1A, a person must have been in "institutional care". In paragraph 7(3) "institutional care" is a care or health service, which meets the conditions in paragraph 7(4) and conforms to what is in the order. If no order is made then there is no description or type of institutional care. The Bill provisions will, therefore, not have effect as there will be no eligible persons.

Paragraph 7(4) provides that the order under 7(3) "must prescribe a description or type of care or health service which ". It then goes on to set out the parameters within which the order can prescribe a description or type of care or health service.

It is clear that paragraph 7(4) cannot stand alone without the order to give meaning to "institutional care".

The drafting of the powers in section 1 to 5, 6(8), 8(b), 17 and 24(d)

The Committee asked:

- Could a consistent drafting method be used in the sections of the Bill referred to above, to make clear that the power is to modify a list of persons, etc., in the relevant subsection and to specify how the modification can be done.

We are of the view that the drafting is consistent and the differences between modifying a subsection and modifying a special part of a subsection are all deliberate. Sections 1(4), 2(4), 3(7)(b), 4(4),5(7), 6(b), 8(b) and 17(b) all allow Ministers to modify a subsection. Generally this is in order to add to, or amend, a list.

Subsection 3(7)(a) allows Ministers to modify the definition of "qualifying person" in section 3(5). To allow Ministers to modify subsection (5) would mean allowing modifications of "qualifying information" as well and that is not our policy intention. Section 24(d) allows Ministers to modify the description of convicted person specified in subsection (1)(b) of the amended section 17 of the 2003 Act. Subsection (1)(b) creates a right to make oral representations to the Parole Board - the descriptions of "convicted person" are only one aspect of that subsection. By restricting the power to modify subsection 1(b) we are ensuring that the right to make oral representations cannot be changed but the description of "convicted person" can.

Section 30 - Commencement

The Committee asked:

- In relation to the power in section 30(3) to make transitional, transitory or savings provisions in a commencement order, why it has been considered appropriate that no Parliamentary procedure will apply to the making of such provisions.
- In particular the Bill makes a complex series of amendments to various provisions of the 1995 Act in relation to court procedures in the interests of vulnerable witnesses. It may be assumed that any such ancillary provisions added to a commencement order could potentially be either complex, or have significant implications for the persons affected by the provisions. The Scottish Government is asked to consider whether the negative procedure could be more suitable for the scrutiny of ancillary provisions which are added to a commencement order, given that this would be consistent with the application of the negative procedures to the ancillary powers in section 29?

Section 30(3) would allow Ministers to make transitional provisions for certain sections of the Bill at the time those sections come into force. While we would not envisage complex or significant transitional provisions being made under the section 30(3) power (relying instead on section 29(4)) we are happy to reflect further on the Committee's comments on this section before the completion of Stage 1.

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