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Convener of the Delegated Powers and Law
Reform Committee

November 2023

Victims, Witnesses, and Justice Reform (Scotland) Bill at Stage 1 – Delegated Powers

Dear Convener,

Thank you for your letter of 27 October about two of the delegated powers in the Victims, Witnesses, and Justice Reform (Scotland) Bill (“the Bill”). This letter responds to each of the Committee’s queries in turn.

Section 55(2): Sexual Offence Court procedure

The Committee queried the scope of section 55(2) of the Bill which gives the Scottish Ministers the power, by regulations, to make further provision for the procedure which applies to proceedings in the Sexual Offences Court (“the Court”). Specifically, the Committee asked whether any consideration had been given to alternative drafting of these provisions which would restrict the Scottish Ministers to making changes in procedure that are required as a result of ‘inconsistencies and ambiguities’, rather than enabling them to make substantive changes to procedure.

Section 55(1) of the Bill applies the procedure of the High Court of Justiciary, as set out in the Criminal Procedure (Scotland) Act 1995, to proceedings in the Court (so far as it is consistent with provision made by or under the Bill). As set out in the Delegated Powers Memorandum, the power in section 55(2) is needed because it is possible that unforeseen difficulties may arise from the approach taken in section 55(1) that need to be rectified. The details of these unanticipated issues are by their very nature unknown, and at this stage I do not think it prudent to restrict the regulation making power only to ‘inconsistencies or ambiguities’, recognising that there is a degree of subjectivity inherent in those terms. As we don’t yet know what changes might be needed, we cannot with confidence characterise these as ‘inconsistencies or ambiguities’. Ultimately, my goal is to support the operation of the Court by ensuring that the Scottish Ministers have a clear and effective regulation-making power to quickly rectify matters should that be required; one that is balanced with an appropriate level of parliamentary oversight given it is subject to the affirmative procedure.

Amending the power in subsection (2), to restrict it to only being used to remedy inconsistencies and ambiguities, may mean that there will be changes and improvements

identified during implementation which cannot be put in place without further primary legislation, which would lead to significant delays in establishing the Court.

Section 65(1): Pilot of single judge rape trials

The Committee noted that MSPs may consider the power in section 65(1) too broad, and asked whether more work could be done during the Bill's passage to enable additional detail – such as the specified criteria and time period – to be set out on the face of the Bill.

I recognise that there is an appetite for more information on how the pilot will operate, and I am keen to provide that where we can during the timescales of the parliamentary process, and without overly restricting the scope for key stakeholders to meaningfully influence the content of regulations under section 65(3).

As the Policy Memorandum for the Bill sets out, a cross-sector working group on the pilot was established as part of the governance arrangements for implementing Lady Dorrian's Review, and it made recommendations on some key aspects of the pilot, including case criteria. It recommended that the pilot should encompass:

“all cases of rape or attempted rape, whether that is rape under common law or under section 1 or section 18 of the Sexual Offences Scotland Act 2009, indicted on or after the commencement date of the pilot, in which there is a single complainer and the charge of rape or attempted rape is the only or principal charge on the indictment, (allowing for minor or evidential charges or dockets in addition to the principal charge). The pilot will not include indictments which also include charges of murder or attempted murder.”

The working group recognised that more work would be needed to refine the case criteria, and to consider other operational matters like the duration of the pilot. It recommended further cross-sector collaboration on these issues.

Since the Bill was introduced, the Scottish Government has been working with justice partners to examine these questions in greater detail. It is my intention that this work will enable us to propose amendments to the Bill at Stage 2 to set out additional key information on the operational parameters of the pilot, providing MSPs with more clarity. I also look forward to hearing the Criminal Justice Committee's views on the pilot, which will inform the approach we take at Stage 2. And I remain committed to working with, and formally consulting, partners across the sector on the detail of the regulations themselves, as required by section 65(3) of the Bill.

Finally, the Committee asked whether the Scottish Government considered that the power in 65(1) had been drafted in such a way that it could be exercised more than once, and whether that had been the intention of the drafting.

I can confirm that the power has intentionally been drafted to allow it to be exercised more than once. In theory, it would be possible for it to be used to run more than one pilot, but that is not the intention of the Scottish Government. However, we are mindful that procedural reasons might arise that mean new regulations are needed to support the operation of the pilot. An example of this could be if there are technical issues with the regulations that establish the pilot, or if there is a desire to conclude the pilot earlier than originally planned. In these scenarios, it is likely that new regulations would be needed, and that is why the power has been intentionally drafted so that it may be used more than once. Any such further use of the power to make new regulations would also be subject to the affirmative procedure, ensuring Parliamentary scrutiny.

ANGELA CONSTANCE