

Bail and Release from Custody (Scotland) Bill [As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Bail and Release from Custody (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Section 8: Power to Release Early

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative but may be made affirmative by reason of urgency

Revised or New power: Revised

This document relates to the Bail and Release from Custody (Scotland) Bill (SP Bill 16A) as amended at stage 2

Provision

4. The purpose and effect of the power delegated by the provision made by this section has not changed and is set out in the Delegated Powers Memorandum accompanying the Bill on introduction. But the way in which it is exercised has been altered by amendments made to the Bill at Stage 2.

5. At introduction, the made affirmative procedure could only be used if the regulations did not provide for the release of a prisoner more than 180 days earlier than the Scottish Ministers would otherwise be required to release the person. There was no time limit for release of prisoners if the affirmative procedure was used. New subsection 3C(3A) was introduced to the Bill by way of Stage 2 amendment and provides that regardless of whether the affirmative or made affirmative procedure is used, a prisoner may not be released by virtue of regulations made under new section 3C of the 1993 Act more than 180 days earlier than the Scottish Ministers would otherwise be required to release that person. An amendment to new section 3D(2) was made in consequence to this.

6. Section 3C was further amended at Stage 2 to extend the Governor veto at section 3C(4)(b). This veto will now apply where the Governor considers the individual would pose an immediate risk of harm to an identified group of people if released. This is in addition to the existing veto which applies where the Governor considers the individual would pose an immediate risk of harm to a specific individual if released under this power.

7. The section was also amended to extend the existing list of statutory exclusions provided at section 3C(5) to include prisoners serving sentences following conviction under the Domestic Abuse (Protections) (Scotland) Act 2021.

Reason for taking power

8. The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

Choice of procedure

9. The choice of procedure has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

10. The amendments made at Stage 2 have strengthened the existing safeguards to the use of this power and will help reduce the risk to the public if the power is ever exercised by the Scottish Ministers, whichever procedure is used.

Section 10: Throughcare Support

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

11. As detailed in the Delegated Powers Memorandum which accompanied this Bill at introduction, Section 10(2) of the Bill amends the Community Justice (Scotland) Act 2016 by inserting new sections 34B and 34C. Section 34B places a duty on the Scottish Ministers to publish standards on the throughcare support to be provided to those leaving custody following a period of remand or imprisonment following conviction.

12. This overarching duty remains unchanged but the way it is exercised has been amended. At Stage 2, new section 34B(4) was amended to add additional bodies which the Scottish Ministers must consult in the preparation, revision and review of the standards.

13. That included the addition of new subsection 34B(4)(ga)(i) and (ii) which provides that the Scottish Ministers must consult a person (i) of a description prescribed by the Scottish Ministers by regulations, and (ii) who is providing support services to victims in relation to offences perpetrated against or in respect of those victims.

Reason for taking power

14. The power to prescribe this consultee is intended to cover Victim Support Organisations and uses the same approach taken to defining such organisations as in Section 11(2) of the Bill (which inserts new section 16ZA(2)(a) and (b) into the Criminal Justice (Scotland) Act 2003).

15. Scottish Ministers having the power to specify the person or organisation who must be consulted in the preparation, review and revision of these throughcare standards will help to ensure coverage of both local and national organisations.

16. Providing the power for Scottish Ministers to describe these organisations by regulations allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should the need arise to ensure that the relevant organisations – national and local - continue to be covered by the requirement to consult on these standards.

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Choice of procedure

17. New subsection 34B(10) provides that regulations under subsection 34B(4)(ga)(i) which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure, otherwise they are subject to the negative procedure.

18. It is considered appropriate that the regulations made using this power are subject to negative procedure unless they make ancillary provision which modifies primary legislation, in which case they will be subject to affirmative procedure.

19. The description of which organisations Scottish Ministers are required to consult in the preparation etc of these standards will be mainly technical as there is no widely used definition of a victim support organisation elsewhere in Scottish legislation. For example, the negative procedure would allow for flexibility to amend the description of organisations in the event of an organisation changing their name. The affirmative procedure would not be appropriate in that instance.

20. When primary legislation is modified by ancillary provision made in regulations under this power, it is considered appropriate to give greater Parliamentary scrutiny to those regulations by use of the affirmative procedure.

Section 10: Throughcare Support

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or New power: New

Provision

21. As noted above, the overarching duty placed on the Scottish Ministers by this section has not changed and is set out in the Delegated Powers Memorandum accompanying the Bill on introduction and at paragraph 13 above.

22. As also noted above, at Stage 2, section 34B(4) was amended to add additional bodies which Scottish Ministers must consult in the preparation, revision and review of the standards.

23. That included the addition of new subsection 34B(4)(ga)(i) and (ii) which provides that Scottish Ministers must consult a person (i) of a description prescribed by the Scottish Ministers by regulations, and (ii) who is providing support services to victims in relation to offences perpetrated against or in respect of those victims.

24. New subsection 34B(6) provides a definition of 'support services' that a person or organisation is required to be providing to a victim in order that Scottish Ministers are required to consult with them on the preparation, review and revision of the throughcare

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standards. Section 34B(8) provides that Scottish Ministers may, by regulations, modify the definition of 'support services'. Section 34B(9) Regulations under this section may include incidental, supplementary, consequential, transitional, transitory or saving provisions and may also modify enactments (including this Act).

Reason for taking power

25. Allowing Scottish Ministers to modify the definition of 'support services' would allow the flexibility to add additional supports that may be identified at a later date. This approach also ensures that the definition of 'support service' used in this Bill in sections 10 and 11 remains consistent.

26. The power to make ancillary provision will ensure that if the definition is changed in a manner that might exclude a victim support organisation already providing support to victims from being consulted on the development of the throughcare standards, that saving or transitional provision can be made to allow that victim support organisation to still be consulted on the standards.

Choice of procedure

27. It is considered appropriate that regulations made using this power are subject to the affirmative procedure given that this is a power to amend primary legislation. The use of affirmative power here would mirror associated provision section 16ZA(6) of the Criminal Justice (Scotland) Act 2003 as introduced by section 11 of this Bill.

Section 11: Provision of Information to Victim Support Organisations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

28. Section 11(2A) was added to the Bill by Stage 2 amendment and introduces a new section 16D to the Criminal Justice (Scotland) Act 2003. That new section 16D provides that victims where the perpetrator has been made subject to a compulsion order and a restriction order can nominate a 'supporter' to receive the information described in section 16C of the 2003 Act in relation to the perpetrator either at the same time as the victim or on their behalf. The supporter can also request that information from Scottish Ministers with the victim's explicit consent.

29. New subsection 16D(2)(a) and (b) provides that the 'supporter' is a person of a description prescribed by the Scottish Ministers by regulations, and providing support services to the victim in relation to the offence in respect of which the perpetrator has

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been made subject to a compulsion order and a restriction order. The definition of 'support services' has the same meaning as in section 16ZA(5) of the 2003 Act (as introduced by section 11(2) of this Bill).

30. This mirrors the provisions for the equivalent power in new section 16ZA of the 2003 Act which are described in the Delegated Powers Memorandum which accompanied the Bill at introduction.

Reason for taking power

31. The Scottish Ministers having the power to specify the person or organisation to whom information may be supplied allows them the ability to restrict the sharing of information about a perpetrator made subject to a compulsion order and restriction order to organisations it considers appropriate to receive it. That includes the organisation's ability to comply with data protection legislation.

32. Providing the power to the Scottish Ministers to describe these organisations by regulations allows for flexibility in ensuring the description of such persons or organisations can be efficiently amended should the need arise to ensure that victims can be provided with appropriate support.

33. The power to make ancillary provision will ensure that if, for instance, the description of prescribed bodies who can be 'supporters' is changed, any necessary saving and transitional provision can be made.

34. There may be a need for the further ancillary provisions if there is provision elsewhere which restricts a supporter meeting the prescribed description from receiving information and a change is required in order to facilitate the sharing of this information.

Choice of procedure

35. It is considered appropriate that regulations made using this power are subject to negative procedure unless they make ancillary provision which modifies primary legislation, in which case they will be subject to affirmative procedure.

36. The new section 11(2A) of the Bill, as introduced by Stage 2 amendment, sets out the key aspects of this measure such as the fact that information can be shared, the purpose for which it can be shared and the limits of with whom the information can be shared (the person must be providing support services (defined in the Bill) to the victim in relation to the offence perpetrated against them).

37. The description of which persons are to receive the information will be mainly technical as there is no widely used definition of a victim support organisation elsewhere in Scottish legislation. In order to be included in the description of persons set out in regulations, the organisations will be required to be delivering 'support services' as defined in the Bill.

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38. For example, the negative procedure would allow for flexibility to amend the description of organisations in the event of an organisation changing their name. The affirmative procedure would not be appropriate in that instance.

39. As these regulations will also not amend primary legislation, it is considered that the negative procedure is appropriate. When primary legislation is modified by ancillary provision made in regulations under this power it is considered that it is appropriate to give greater Parliamentary scrutiny to those regulations by use of the affirmative procedure.

Section 11: Provision of Information to Victim Support Organisations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative, unless modifying primary legislation in which case subject to the affirmative procedure

Revised or New power: New

Provision

40. Section 11(4A) was added to the Bill by Stage 2 amendment and introduces a new section 17DA to the Criminal Justice (Scotland) Act 2003. That new section 17DA provides that victims where the perpetrator has been made subject to a compulsion order and a restriction order, hospital direction or transfer for treatment direction can nominate a 'supporter' to receive the information described in section 17B of the 2003 Act in relation to certain decisions about the perpetrator's treatment either at the same time as the victim or on their behalf. The supporter can also request that information from Scottish Ministers with the victim's explicit consent.

41. New subsection 17DA(2)(a) and (b) provides that the 'supporter' is a person of a description prescribed by the Scottish Ministers by regulations, and is providing support services to the victim in relation to the offence in respect of which the perpetrator has been made subject to a hospital direction, a transfer for treatment direction, or, as the case may be, a compulsion order and a restriction order. The definition of 'support services' has the same meaning as in section 16ZA(5) of the 2003 Act (as introduced by section 11(2) of this Bill).

42. This mirrors the provisions for the equivalent power in new section 16ZA of the 2003 Act which are described in the Delegated Powers Memorandum which accompanied the Bill at introduction.

Reason for taking power

43. The reasons for taking the power are as described at paragraphs 31-34 above.

Choice of procedure

44. As noted at paragraphs 35-39 above, it is considered appropriate that regulations made using this power are subject to negative procedure unless they make ancillary provision which modifies primary legislation, in which case they will be subject to affirmative procedure.

45. The new section 11(4A) of the Bill, as introduced by Stage 2 amendment, sets out the key aspects of this measure such as the fact that information can be shared, the purpose for which it can be shared and the limits of with whom the information can be shared (the person must be providing support services (defined in the Bill) to the victim in relation to the offence perpetrated against them).

46. The description of which persons are to receive the information will be mainly technical as there is no widely used definition of a victim support organisation elsewhere in Scottish legislation. In order to be included in the description of persons set out in regulations, the organisations will be required to be delivering 'support services' as defined in the Bill.

47. For example, the negative procedure would allow for flexibility to amend the description of organisations in the event of an organisation changing their name. It is not considered that the affirmative procedure would be appropriate in that instance.

48. As these regulations will also not amend primary legislation, it is considered that the negative procedure is appropriate. When primary legislation is modified by ancillary provision made in regulations under this power it is considered that it is appropriate to give greater Parliamentary scrutiny to those regulations by use of the affirmative procedure.

Section 11: Provision of Information to Victim Support Organisations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or New power: Revised

Provision

49. Section 11(4D), as introduced by amendment at stage 2, amends section 18B of the Criminal Justice (Scotland) Act 2003 to reflect the new sections of that Act as introduced by this Bill. This extends the existing power of Scottish Ministers to amend, by order, certain details of the provisions relating to information sharing with victims and, by extension, victim support organisations as provided for by this Bill.

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50. This also includes the power to amend the restrictions in relation to the age of the prisoner/perpetrator. For example, currently information cannot be provided about a prisoner/perpetrator if they have not attained 16 years of age. It also includes the power to amend the types of information which can be provided about an individual subject to a compulsion order and restriction order.

Reason for taking power

51. To provide the ability for the Scottish Ministers to exercise their existing powers to amend by order in relation to new provisions being introduced by this Bill which are equivalent in nature. Those existing powers were added to provide the Scottish Ministers the flexibility to change administrative matters in the scheme without the need for primary legislation.

Choice of procedure

52. It is considered appropriate that regulations made using this power are subject to the affirmative procedure given that this is a power to amend primary legislation. This is an extension of the existing power under section 18B of the 2003 Act.

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