



The Scottish Parliament

Subordinate Legislation Committee

Criminal Justice and Licensing (Scotland) Bill

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The Committee reports to the Parliament as follows—

Introduction

1. At its meetings on 5 May¹, and 26 May² 2009 the Subordinate Legislation Committee considered the delegated powers provisions in the Criminal Justice and Licensing (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.³
3. The Committee's correspondence with the Scottish Government is reproduced in the Annex.

Delegated Powers Provisions

4. The Committee considered each of the delegated powers provisions in the Bill.
5. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 5, 12(2)(a), 13(2), 14 (inserted sections 227A(8), 227B(2), 227E(6), 227J(3), 227O(1), 227Z(2), 227ZD(6), 227ZG, 227ZH(4) and (5) and 227ZJ(2)), 19 (inserted section 9B(5)), 30(3) (inserted section 1A(3)(c)), 31(4) (inserted subsection (4B)(c)), 57(3) (inserted section 113A(4)(c)), 59 (inserted section 18B(6)), 66(1) (inserted section 271U(3)), 72(7) (inserted section 40A(4)), 79(2) and (3) (inserted sections 113BA(1) and 120ZB(2A)), 81(1), 86(9)(b), 114(1) and (3)(c), 126(2)(e) (inserted paragraph (h)), 148(1) and schedule 1 paragraph 2(3) and schedule 1 paragraph 4.

¹ [Official Report 5 May](#)

² [Official Report 26 May](#)

³ [Delegated Powers Memorandum](#) ('DPM')

Section 14 (Community payback orders) (inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement)

6. New sections 227I to 227O of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) concern the “unpaid work or other activity requirement” which may be imposed on an offender in a community payback order. Section 227I(1) defines “unpaid work or other activity requirement” as a requirement that the offender must, for a specified number of hours, undertake unpaid work or another activity. Section 227I(3) sets minimum and maximum hours which may be specified in an unpaid work or other activity requirement; namely at least 20 hours, and not more than 300 hours.

7. The effect of the power at section 227I(6) is that the Scottish Ministers may vary by order the minimum and maximum numbers of hours of unpaid work or other activity which may be specified in the requirement. They may also vary the number of hours at which a requirement is considered to be level 1 or level 2. (Level 1 being a requirement to work for 100 hours or less, level 2 more than 100 hours.)

8. The Committee asked why this power could not be expressed as a power to vary within defined maximum and minimum limits. The response indicates that the Government will bring forward Stage 2 amendments to provide limits to the extent to which the minimum and maximum hours stated can be varied, and to provide limits to the extent to which the “100” figure can be varied. The Committee welcomes this undertaking in relation to the extent of this delegated power. The Government does not indicate in its response the likely range of the limits that will be in such amendments. However, given that finite limits shall be put in the Bill, the actual limits themselves may be considered a policy matter for the lead committee and Parliament.

9. While the Committee is of the view that generally modifications amending the text of the Act should be subject to affirmative resolution procedure, this is not an absolute rule and in this case the power is to be quite strictly defined, so far as it only allows changing the minimum and maximum number of hours in the requirement, and the “100” figure which distinguishes a level 1 requirement from level 2.

10. Accordingly, the Committee is content with the exercise of the power being subject to negative procedure.

11. The Committee welcomes the confirmation provided by the Government in its response that it shall bring forward amendments at Stage 2, to provide limits to the extent to which the minimum and maximum number of hours stated in section 227I(3) can be varied, and to provide limits to the extent to which the “100” figure in section 227I(4) and (5) can be varied.

Section 14 (Community payback orders) (New section 227K(3) – power to vary the limits of the balance of activity within the unpaid work or other activity requirement)

12. Section 227K deals with the split of hours between unpaid work and other activity in relation to an unpaid work and other activity requirement. It will be for the responsible officer (an officer of the relevant local authority) to specify the allocation of activity between unpaid work activity and other activity. This is subject to subsection (2) - the number of hours allocated to undertaking an activity other than unpaid work must not exceed whichever is the lower of, 30% of the total number of hours specified in the requirement, and 30 hours. This means that the number of hours allocated to non-work activity cannot exceed 30 hours. Subsection 227K(3) permits the Scottish Ministers to amend subsection (2) by regulations subject to negative procedure.

13. The Committee asked for further explanation as to why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b) and given that this is a “Henry VIII power” how negative procedure can be justified.

14. The response confirms that the Government proposes to bring forward amendments at Stage 2 to address the issues raised in the Committee’s questions. The reply also confirms that the amendments will apply affirmative resolution procedure to these powers.

15. The Committee welcomes the Government’s confirmation that it shall bring forward amendments at Stage 2 to vary the powers as drafted in section 14 (so far as inserting new section 227K(3) of the 1995 Act). The Committee understands this to mean that instead of the power permitting the amendment of subsection (2) in any respect, it shall be a power to specify different figures in subsection (2)(a) or (b). The Committee notes that the response also confirms that the amendments at Stage 2 shall provide for the application of affirmative resolution procedure, rather than negative procedure.

Section 14 (Community payback orders) (Inserting section 227ZB(12) – power to vary the maximum number of months in which a restricted movement requirement can have effect

16. Section 227ZB(9) restricts the maximum period for which a restricted movement requirement can have effect. The period must not exceed whichever is the lesser of—

(a) the period for which the supervision requirement has effect, and

(b) the period of 12 months. So the maximum period for which a restricted movement requirement can have effect is 12 months. A supervision requirement may be between 6 months, and not more than 3 years.

17. The power at section 227ZB(12) permits the Scottish Ministers to substitute the number of months specified in subsection (9)(b) with another number of

months. This allows Ministers to vary (up or down) the maximum number of months in which a restricted movement requirement can have effect.

18. A related provision is section 227ZD(4)(b), which provides that a restricted movement requirement “has effect for such period of not more than 12 months as is specified.” The Scottish Ministers’ have power at section 227ZD(6) to modify section 227D(4)(b).

19. The Committee asked for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government was asked why the maximum is specified in two places, with a separate power to change each figure, rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. The Committee considered that the provision of two separate powers gives rise to the risk that they may not be used to maintain parity.

20. This power has significant consequences, in that it will affect the duration of the period in which an offender can be subject to restrictions on his or her movement under a restricted movement requirement. The response confirms that it is intended there is a single overall maximum period of 12 months for which a restricted movement requirement may last.

21. The response confirms that the Government accepts the Committee’s concerns and will address the issue raised by the Committee’s question, by amendment at Stage 2.

22. The Committee welcomes the Government’s confirmation in relation to the delegated powers specified in section 14 of the Bill (inserting new section 227ZB(12) of the 1995 Act) that it shall bring forward amendments at Stage 2 to address the issue raised by the Committee’s question. This would provide for a single overall maximum period of 12 months for a restricted movement requirement (subject to the ability to modify that period by affirmative regulations).

Section 18(2)(a)(iii) of the Bill (so far as amending section 4(1) of the Custodial Sentences and Weapons (S) Act 2007– power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of that Act

23. Section 18(2) introduces various revised definitions of sentences for the purposes of Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007. The Committee understands that Part 2 of the 2007 Act has still to be commenced. The 2007 Act’s existing regime for offender release depends on whether an individual is serving a “custody-only” sentence (less than 15 days), or a “custody and community sentence” (15 days or more).

24. The amendments in section 18(2) remove the 15 day period which is specified in the 2007 Act for the purposes of defining custody-only and custody and community sentences. The 15 days is replaced with a “prescribed period”, defined as “such period as the Scottish Ministers may by order specify”.

25. The amendments in section 18 also replace the “custody-only sentence” with a “short-term custody and community sentence”. A revised section 5 of the 2007 Act is inserted at section 18(3) of the Bill. It replaces the unconditional release of custody-only prisoners on completion of their prison term. Under that revised provision, short-term custody and community prisoners will generally be released on a short-term community licence on completion of one-half of their sentence.

26. The amendment at section 18(2)(a)(iii) empowers the Scottish Ministers to specify the prescribed period for the purposes of defining, and distinguishing between, short-term custody and community sentences, and custody and community sentences. Previously the relevant time period (15 days) had been specified on the face of the Custodial Sentences and Weapons (Scotland) Act 2007. This time period has significant consequences, as different release regimes flow from a prisoner being categorised as serving a short-term custody and community sentence; or a custody and community sentence.

27. The Committee understands that the distinction between the two types of sentence can impact on the length of time an offender spends in prison. In the case of a short-term custody and community sentence a prisoner is released, subject to licence conditions, on serving one half of his sentence. In the case of a custody and community sentence, release on serving one half of a prison sentence is not automatic – it depends on a number of other requirements being met.

28. The Committee asked questions on the scope of this power, particularly why the delegated power requires to be drawn as wide as to enable any period at all to be substituted for the period of 15 days in the existing legislation. The Committee accepts the further explanation offered by the Government on this apparently significant power. Any future decision on a change to this period involves matters of sentencing policy, and therefore the Committee considers that the responses on this power should be drawn to the attention of the Justice Committee.

29. The Committee considers that it is appropriate this power is subject to affirmative procedure. The power may have significant effects, and it will textually amend the Act.

30. The response also confirms that the Government is considering if the scope of this power could be narrowed by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. The Committee agreed to re-visit the provisions after the Bill has been amended at Stage 2.

31. The Committee reports to the lead committee, in relation to the delegated power in section 18(2)(a)(iii) of the Bill—

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**

- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**
- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Paragraphs 10(3) and (4) of Schedule 2 (amending section 55 of the 2007 Act) – Power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

32. The Delegated Powers Memorandum explains that a person under 21 cannot be sentenced to imprisonment, but will instead be sentenced to a period of detention. The provisions in Part 2 (confinement and release of prisoners) operate by reference to the term of imprisonment that a person is sentenced to, so do not apply to people under 21. Section 55 of the 2007 Act sets out how Part 2 is to apply to people under 21. The reason for taking this power is to allow the Scottish Ministers to take account of changes in the length of a period of imprisonment that determines when a sentence of imprisonment is a custody and community sentence, and when it is a short-term custody and community sentence.

33. The questions raised here were similar to those raised in relation to section 18(2)(a)(iii) of the Bill, above.

34. The Government provided a similar response as for section 18(2)(a)(iii) of the Bill.

35. **Therefore, the Committee reports to the lead committee—**

- **that the Government has indicated in its response that it will reconsider whether the power requires to be taken to prescribe *any* new period of custody, instead of 15 days, for the purposes of that section, and will consider whether the scope of this power could be narrowed by setting minimum or maximum limits;**
- **otherwise, the Committee draws its questions and the Government responses on the scope of, and reasons for, this delegated power to the lead committee in connection with its consideration of the Bill;**
- **the Committee is content that this power shall be subject to affirmative resolution procedure.**

Section 70(3) (inserted section 26G(1))-power to amend list of persons mentioned in section 26C(2)of the Public Finance and Accountability (Scotland) Act 2000 by adding or removing a public body and to modify the application of new Part 2A of that Act to a public body so added

36. Section 70(3) of the Bill inserts a substantial new Part (Part 2A, encompassing inserted sections 26A to G) into the Public Finance and

Accountability (Scotland) Act 2000 ('the 2000 Act') in relation to data matching. This covers such matters as the power to carry out data matching exercises; voluntary disclosure of data to Audit Scotland; power to require disclosure of data; disclosure of results of data matching; publication of reports on data matching, and provisions for a data matching code of practice.

37. It was accepted that there may, from time to time be a need to adjust the list set out in section 26C(2), whether to add a public body to it, or to remove a person from it, and the Committee recognises that it would be considered desirable to be able to do so by means of subordinate legislation.

38. The Committee noted the list to be of some importance, in respect that persons (or public bodies) named on it may be required by Audit Scotland to disclose data to them for the purposes of a data matching exercise. That being so, the Committee raised the issue of whether it would be appropriate that the exercise of a power to add a public body to the list, or to remove persons from it, should be subject to more rigorous parliamentary scrutiny than that afforded by negative procedure. The Committee questioned whether a higher level of scrutiny might be required where the power is used to modify the application of Part 2A to the body specified. The power to modify is not restricted to administrative matters. On one view, the power could be used to amend the purposes for which the data matching is to be conducted set out in section 26A(3).

39. In addition, very limited justification had been provided within the DPM in respect of the related power, under section 26G(2) for such an order to include incidental etc. provision as the Scottish Ministers may think fit. It was stated that this is required to give flexibility 'so that appropriate arrangements can be made for particular bodies'. The provision itself is quite a wide one and the Committee asked why an unlimited power to modify Part 2A in respect of new bodies added to the list was necessary. It sought clarification of the reason for there being provision for an order under inserted section 26G(1) being able to include such incidental etc. provision as the Scottish Ministers think fit and how that ancillary power might be used. The Committee also sought clarification as to the choice of procedure, and in particular why negative procedure had been preferred to affirmative.

40. The response seeks to justify the use of negative procedure on the grounds of the narrowness of the power. It has been provided in order to allow for additional public bodies to be added in future. The response goes on to emphasise that it can apply to a limited range of bodies. It can apply only to those whose functions are of a public nature, or include such functions, but which are not such as to be automatically covered by virtue of having their accounts added by the Auditor General. Accordingly, in view of that narrowness, the Government considered that negative procedure was appropriate.

41. The Committee sought clarification as to why it was considered that there was a need for an unlimited power to modify Part 2A of the Act (which deals with 'data matching'). The question also noted and sought comment on the apparent ability of the provision to modify the purposes for which data matching may be conducted.

42. The response indicates that this is required for reasons of flexibility and also so that appropriate arrangements can be made for particular bodies. The response goes on to acknowledge the power which exists, to modify Part 2A, so that data cannot be used for certain data matching circumstances.

43. It was also noted that the limited range of bodies in respect of which the power could be used are stated as being those which are effectively at the fringes of the public sector. These are bodies with functions of a public nature, or including such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. For such bodies the full data matching provisions might not be appropriate.

44. However, in the absence of a power to be able to modify the application of Part 2 in regard to a body which has been added to it, and which has only limited public functions, such a body might be unwilling to come within the scope of section 26C. Reliance might therefore require to be made on data being provided under section 26B, under which disclosure is only on a voluntary basis.

45. It was noted that there may be circumstances where it would be preferable by means of section 26G, to add a body to the list of those required to disclose data to Audit Scotland. It was also acknowledged that it may be appropriate to have the flexibility to be able to modify Part 2A in relation to such bodies, given that the full data matching functions might not be appropriate.

46. The Committee also asked why it is thought necessary for provision for an order under inserted section 26G(1) being able to include such incidental etc. provisions as the Scottish Ministers think fit. And, with further reference to that matter, the Committee sought further explanation as how and in what circumstances the ancillary power under section 26G(2) might require to be used.

47. The Government responded that provision has been made for reasons of flexibility. Adding a body to the list of those under section 26C which are required to disclose data involves a disapplication of the 'normal' restrictions on disclosure of data. The power to make incidental or consequential provision could therefore be useful to remove any apparent inconsistencies in other legislation or instruments.

48. The Committee concluded that the further information provided by the Government was of assistance in terms of setting out why powers in this particular form have been taken and how they might be used. In relation to procedure, having regard to the narrowness of the power and in terms of the limited range of bodies which might be affected, the Committee agreed that negative procedure should provide an appropriate level of scrutiny. Similarly, the Committee is satisfied with the further justification provided in relation to the power for an order to include incidental provision etc.

49. It was considered that some reassurance could therefore be taken from the response in relation to why the provision is in the terms set out, and in regard to how the Government would envisage this power being used. The power to modify could, on the face of it, be used in order to expand the purposes for which data matching could be conducted in relation to new bodies, as well as limiting those

purposes as the Government suggests. However, this might represent an unusual use of the power given that it would go beyond the primary scheme set out in the Bill itself. As such it would at least attract comment and negative procedure would allow Parliament the remedy of annulment.

50. Having obtained further explanation and justification from the Government, the Committee finds the proposed power under section 70(3), in regard to inserted section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000, to be acceptable in principle, and also that it is subject to negative resolution procedure.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice or for wrongful detention prior to the acquittal or a decision to take no proceedings or discontinue proceedings

51. Section 82(1)(a) inserts a new subsection (1A) into section 133 of the Criminal Justice Act 1988 ('the 1988 Act'). Section 133 currently provides for a statutory scheme of compensation for miscarriages of justice. In addition to the statutory scheme an *ex gratia* scheme covering other types of cases has operated for a number of years. The *ex gratia* scheme operates under the prerogative and has not been subject to statutory or parliamentary control. The intention of this provision is to put the *ex gratia* scheme on a statutory footing and to combine it with the statutory scheme under section 133.

52. The Policy Memorandum states that no changes are proposed to the scope of the *ex gratia* scheme other than to place it on a statutory footing and to combine it with the scheme under section 133. However, no details of the *ex gratia* scheme are given in the DPM or in the Explanatory Note.

53. In order to take a view, the Committee asked for an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements. Given that the scope of the existing statutory scheme was set out in primary legislation the Committee also asked the Scottish Government to explain why it was considered necessary to use delegated powers for the extended scheme.

54. Details of the *ex gratia* scheme are given in the first two paragraphs of the Scottish Government's response. Although the DPM states (para. 89) that the intention is to put the *ex gratia* scheme on a statutory footing, the third paragraph of the response acknowledges that the power is not limited to this.

55. The response states that the provisions of the existing statutory scheme are required to meet international obligations. The inference is that these obligations cannot be changed and that flexibility (with respect to the provisions of the existing statutory scheme) is not required. However, in placing the *ex gratia* scheme on a statutory basis, the Scottish Ministers wish to retain flexibility in terms of what any new provisions may provide (in so far as they go beyond the international obligations as reflected in the provisions of the existing statutory scheme). The

response points out that an order making power will allow for flexibility while at the same time introducing an element of parliamentary control which is currently absent.

56. The committee is content with the principle of putting the ex gratia scheme on a statutory basis. This allows for Parliamentary accountability. However, the Scottish Government acknowledged in its response that the power goes beyond what is required to put the ex gratia scheme on a statutory basis. The Committee considers that the power is too wide. The Scottish Government claim that flexibility is required, but the Committee considers that there has been no adequate justification of the breadth of the power and of the need for the power to go beyond what is required to put the ex gratia scheme on a statutory basis.

57. As the question of whether there should be wider compensation schemes of this kind is essentially a policy matter the Committee simply draws this issue to the attention of the lead committee and of the Parliament.

58. The Committee draws to the attention of the lead committee and of the Parliament that the proposed power goes beyond what is strictly necessary to achieve the objective stated in the Scottish Government's Delegated Powers Memorandum, namely to put the ex gratia scheme on a statutory basis, and that, in the opinion of the Committee, no adequate justification has been given by the Scottish Government for the power to extend the scheme beyond that currently operating.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

59. Section 133(4) of the Criminal Justice Act 1988 ('the 1988 Act') provides that where the Scottish Ministers determine that there is a right to compensation for a miscarriage of justice, the amount of the compensation shall be assessed by an assessor appointed by the Scottish Ministers. Section 134(4A) specifies certain matters which an assessor is required to have regard to in assessing the amount of compensation payable. The new section 133(4B) requires an assessor to have particular regard to any guidance issued by the Scottish Ministers.

60. The committee asked whether the guidance to be issued under this new sub-section should be laid before Parliament, and whether such provision is or is not appropriate given Parliament's interest in ensuring the independence of assessors and the proper use of public funds.

61. The Government responded that it does not consider that a statutory requirement to lay guidance before the Parliament is necessary, but gave a commitment that any such guidance will be laid before Parliament.

62. The Committee welcomes the commitment from the Scottish Government that any guidance issued under this power will be laid before the Parliament. The Committee finds the proposed power acceptable in principle and that it is subject to no parliamentary procedure.

Section 115 – Power to establish rules of court in relation to Part 6

63. Part 6 of the Bill creates a statutory regime for disclosure in criminal proceedings. Section 115 enables the High Court to make rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to Part 6 of the Bill by Act of Adjournal. Para. 99 of the DPM explains that rules of court will be required in relation to how certain provisions are given effect to and to provide forms for applications and other court documents required under Part 6.

64. The Committee was concerned that the power was potentially too wide in scope, having regard to the manner in which the power is expressed. It was not clear that the power was restricted to making rules of court or regulating practice and procedure in relation to criminal proceedings in which part 6 is engaged.

65. The Committee asked the Scottish Government why the power was an open one and was not restricted to regulating practice and procedure in relation to criminal proceedings or otherwise clearly restricted to matters for which the courts are responsible.

66. The response acknowledged that the provision does not 'mirror' section 305 of the Criminal Procedure (Scotland) Act 1995, as stated in the DPM. Having regard to the terms of section 305(1)(a) and (b) the committee was surprised that it was considered necessary and appropriate to create a new power. The Scottish Government had considered whether or not section 305 was sufficient for their purposes but had taken the view that it was not. No explanation was given for the Scottish Government taking this view. It was unclear to the committee why section 305 is not sufficient or why there was a need to create a new power.

67. As presently expressed, the Committee remains concerned that the power in section 115 could permit matters addressed by Act of Adjournal to stray beyond the realms of criminal procedure into areas of substantive law. Had the words 'in relation to criminal procedure' appeared at the end of section 115, the committee would have been content with the power as expressed.

68. The Committee takes the view that the Scottish Government has not justified the width of the power, particularly given that it is intended that rules are to be made by the High Court without any form of parliamentary procedure or control and that there is no restriction on the exercise of the power by reference to criminal procedure.

69. The Committee draws the breadth and scope of the proposed power to the attention of the lead committee and of the Parliament. The Committee considers that insufficient justification has been given by the Scottish Government for the need for a power in these terms, or why the scope of the proposed power should not be limited to matters of criminal practice or procedure or other matters within the remit of the High Court given that this is a power which is not subject to parliamentary procedure.

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

70. This provision enables the Scottish Ministers to set mandatory conditions which are applicable to licences granted under the Civic Government (Scotland) Act 1982. Local authorities are the licensing authorities under the 1982 Act in relation to a number of activities listed in that Act. These include taxis, second hand dealers, knife dealers, metal dealers, street traders, markets, public entertainment, window cleaners and sex shops.

71. The Committee noted that it is the Government's intention that the power to prescribe mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005, but that new section 3A(3) provides for such orders to be subject to annulment. The committee therefore sought clarification on this matter.

72. The Government confirmed that this was an error and that they will bring forward an amendment to remedy this at Stage 2.

73. The Committee welcomes the Government's undertaking to bring forward an amendment at Stage 2 which will require the power setting mandatory conditions in respect of licences under the Civic Government (Scotland) Act 1982 to be subject to affirmative procedure.

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 -Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

74. Section 129(4) introduces a new section 27A(1) into the Licensing (Scotland) Act 2005 which confers on the Scottish Ministers the power to prescribe by regulations the matters in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation.

75. There was no justification provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. The Scottish Government was asked to explain why this cannot be achieved through primary legislation alone.

76. The Government informed the committee that it intends to bring forward a separate Bill to take forward alternative measures on alcohol. The Government will therefore seek to remove section 129 at Stage 2. The Committee is content for present purposes to note the intention to remove this power and to return to the Bill after Stage 2.

77. The Committee draws the attention of the lead committee to the Government's confirmation that it intends to remove section 129 at Stage 2.

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

78. Section 140 provides a power for the Scottish Ministers to make regulations imposing and setting out the detail of a social responsibility levy. Under the levy charges are to be imposed on the persons mentioned in subsection (2) for the purposes set out in subsection (3). The Explanatory Notes state that (para 592) “money raised by the charge will be for the local authorities to use in contributing towards the cost of dealing with the adverse effects of the operation of those businesses, for example extra policing or street cleaning or furthering the licensing objectives [under the 2005 Act].” Subsection (4) sets out in more detail what the regulations may include.

79. The Scottish Government was asked why it is not considered appropriate for the general principles of the proposal to be set out in primary legislation leaving only administrative detail for subordinate legislation.

80. Again, the Government confirmed that it will remove section 140 at Stage 2. While the Committee’s concerns with the proposed approach remain unanswered, the Committee is content to note the intention to remove this power and to return to the Bill after Stage 2.

81. The Committee draws the attention of the lead committee to the Government’s confirmation that it intends to remove section 140 at Stage 2.

Section 146(1) – Power to make supplemental, incidental or consequential provision appropriate for the purposes of, or in connection with the Bill

Section 147 – Power to make transitory, transitional and saving provision necessary or expedient for the purposes of, or in connection with, the coming into force of any provisions in the Bill

82. Section 146(1) confers on the Scottish Ministers a power to make by order such supplemental, incidental, or consequential provision as they consider appropriate for the purposes of, or in connection with, giving full effect to any provision of the Bill. Section 146(2) provides that the power extends to the modification of any enactment.

83. Section 147(1) confers on Scottish Ministers a power to make by order such transitory, transitional and saving provision as they consider necessary or expedient in connection with, the coming into force of any provisions in the Bill. Section 147(2) provides that the power extends to the modification of any enactment.

84. In each case section 143(4) provides that an order under either section which makes textual amendments to an Act is subject to affirmative procedure. Otherwise the power is subject to negative procedure.

85. In this Bill the normal group of ancillary powers has been split in two. Section 146 contains the ancillary powers which may make additional provision which could augment the provisions in the Bill or the subordinate legislation made under

the Bill permanently. Section 147 deals with the ancillary powers which are intended to make temporary provision of a transitional or transitory nature or which save the existing law as required.

86. The committee accepts the Government's argument that ancillary powers are necessary in a substantial Bill like this. Given the breadth and complexity of the measures in this Bill, it is to be anticipated that not every fine detail of what is required to integrate these new provisions fully with the existing law may have been identified. The Committee agrees that it would not be sensible to require further primary legislation in order to deliver minor additional measures which are subsequently found to be necessary in order for the Bill to work properly or to have full effect.

87. However, the Committee also considers that the availability of ancillary powers should not be taken for granted. Their scope and the manner in which they can be used should still be tested on the merits of each case, as should the Parliamentary procedure to which they should be subject. Care should be taken to ensure that they are appropriate for the individual Bill concerned according to its scope, complexity and the sensitivity of the subject matter.

88. Having accepted that ancillary powers are necessary here, the Committee noted that the Government seeks the ability to use them to modify enactments. It is proposed that only textual amendments will be subject to affirmative procedure. As this Bill concerns provisions relating to criminal justice which frequently affect the liberty of persons and have the potential to impact significantly on the individual. In this context the Government was asked to explain why it is not thought appropriate to provide that any modification of the statute book in this context should not be subject to affirmative procedure.

89. In relation to section 146 the Committee welcomes the Government's undertaking to bring forward an amendment so that the exercise of ancillary powers under section 146 that make consequential, incidental or supplementary provision will be subject to affirmative procedure in any case where enactments are modified whether by textual amendment or otherwise.

90. In relation to section 147, the Government explained that it has reviewed its position and considers that given that these ancillary powers are temporary in nature, where they make modifications which do not textually amend acts then they will remain subject to negative procedure.

91. These kinds of powers are by their nature intended to have only temporary effect. However, measures in the area of criminal justice can have significant effects on individuals and their rights and liberty. Transitional provisions which deal with the application of the new measures to cases in progress when provisions are commenced could have a significant impact on accused persons.

92. There may be occasions when temporary provision is made as a textual amendment but it may be more likely to be made by modification which "sits" in separate subordinate legislation – and which would not attract affirmative procedure.

93. The Committee accepts that providing a subjective test in section 147 of “significance” or other similar description would introduce unwanted uncertainty and therefore accepts the Government’s proposal but on the understanding that the Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals’ rights or liberty.

94. The Committee welcomes the Government’s undertaking to amend section 146 so as to provide that any modification of enactments is subject to affirmative procedure.

95. The Committee accepts section 147 and that only textual amendments will be subject to affirmative procedure but on the understanding that the Committee would expect the Government to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals’ rights or liberty.

Response from Scottish Government

Criminal Justice and Licensing (Scotland) Bill at stage 1

Section 14 (Community payback orders) so far as inserting section 227I(6) of the Criminal Procedure (Scotland) Act 1995 – power to vary the minimum and maximum hours of unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the scope of the power requires to be drawn to permit any variation of either the minimum and maximum hours stated in section 227I(3), and the “100” figure in section 227I(4) and (5), rather than a power to vary within defined maximum and minimum limits

SG response

We accept the Committee’s observations and will bring forward amendments at Stage 2 to provide limits to the extent to which the minimum and maximum hours stated in section 227I(3) can be varied and to provide limits to the extent to which the “100” figure in section 227I(4) and (5) can be varied.

- given that this is a Henry VIII power and such a power where justifiable would usually be exercisable by affirmative procedure –particularly where concerned with levels of maximum penalty – why it is justifiable that negative resolution procedure should apply here?

SG response

We consider that the variation of the number of hours within the defined minimum and maximum number of hours is a matter of detail which is unlikely to require a debate. However, the negative procedure instrument would still afford the Parliament the opportunity to debate variations if they had objections.

Section 14, so far as inserting section 227K(3) of the Criminal Procedure (S) Act 1995 – power to vary the limits of the balance of activity within the unpaid work or other activity requirement

The Committee asks the Scottish Government to provide further explanation of the following—

- why the power is required to amend subsection (2) in any respect instead of a power to specify different figures in subsection (2)(a) or (b); and

SG response

We accept the Committee's observations and will bring forward amendments at Stage 2 to provide that these powers, as to be amended, will be exercisable by affirmative resolution procedure.

- given that this is a Henry VIII power enabling amendment of primary legislation which affects a type of sentencing why negative procedure is considered appropriate rather than affirmative procedure.

SG response

Variation of the existing balance between the unpaid work and other activity requirement components of the order is a matter of detail and it was not considered that a debate in the Parliament would be required. However, the use of negative procedure still affords the Parliament the opportunity to debate any variation that they were opposed to.

Section 14, so far as inserting section 227ZB(12) of that 1995 Act – power to vary the maximum number of months in which a restricted movement order can have effect

The Committee asks for confirmation whether the intention is that there is a single overall maximum period of 12 months for which a restricted movement requirement may last (subject to the ability to modify that period). If that is the case, the Scottish Government is asked why the maximum is specified in two places with a separate power to change each figure rather than providing the maximum in one place only – albeit that cross-reference to the maximum may be appropriate elsewhere. Does the provision of two separate powers not give rise to the theoretical risk that they may not be used to maintain parity?

SG response

We accept the Committee's observations and will bring forward an amendment at Stage 2 so that the maximum is provided for in one place only.

Section 18(2)(a)(iii) – power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- why the power is required to be taken to prescribe any new period whatever, instead of 15 days, and why the parameters of any new period could not be drawn within a minimum and maximum set out in primary legislation?

SG response

The intention behind these powers is to set the length of sentence where the custody and community sentence provisions apply. It may prove, on the basis of future data (and in the light of the benefits of the investment in the prisons estate and the community payback strategy), that custody and community sentences are more effective for sentences of a longer period than the 15 days currently prescribed for. The power allows the demarcation line to be set on the basis of evidence but without the need for new primary legislation to allow the Scottish Ministers to respond effectively and promptly to changing circumstances in sentence management. The powers will also allow the Scottish Ministers to make changes, if required, to respond effectively to trends.

The affirmative resolution will require a full Parliamentary debate before the period, which would be evidence-based, could be prescribed. On that basis, we accept that this power could be narrowed without losing the desired effect by setting a limit beyond which the demarcation line could not be moved. Further consideration will be given to what that demarcation point might be. This maintains the desired degree of flexibility whilst we hope answering the Committee’s concern about the breadth of the power.

Section 18(2)(a)(iii) – power to prescribe by order the “prescribed period” for the purposes of certain sentences under Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007

The Committee asks for an explanation, in relation to the width of the delegated power in section 18(2)(a)(iii) of the Bill—

- could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – as the DPM suggests?

Schedule 2, paragraphs 10(3) and (4) – power to prescribe the length of periods of detention for those under 21 years of age for the purpose of determining if they are serving “short-term custody and community sentences” or “custody and community sentences”

The Committee asks for an explanation, in relation to the width of the delegated power in paragraphs 10(3) and (4) of Schedule 2—

- could the Government explain the “potentially significant” effects of the use of this power in relation to the sentencing of offenders, given that the period could be prescribed at less than 15 days, or substantially more than 15 days – up to a year as the DPM suggests.

SG response

The powers would have no effect in relation to the sentence handed down to offenders. It is not about introducing a new sentencing option but rather is about managing offenders from the beginning of their sentence through to the end. It will provide a workable and proportionate sentence management regime that will reflect the risk and needs of all offenders and focus on reducing reoffending. The new measures will see all offenders subject to some form of restriction for the full length of the sentence whether it is being served in custody or in the community on licence.

In practice this will mean that offenders who receive a sentence of below the demarcation line will be released on licence at the halfway point of their sentence but will be restricted and supported in the community for the second part of the sentence. For offenders who receive a sentence above the demarcation line, their suitability for release at the end of the custody part of the sentence will be informed by the joint risk assessment and on release he or she will be subject to statutory supervision by a criminal justice social worker. The level of supervision and intervention will vary from offender to offender and will be informed, as above, by the nature of the offence and the offender’s response to work begun in custody.

Section 70(3), so far as inserting section 26G(1) of the Public Finance and Accountability (Scotland) Act 2000 – power to amend list of persons mentioned in that Act

The Committee seeks clarification from the Scottish Government as to (a) the choice of procedure in relation to this power, and in particular why negative procedure has been preferred to affirmative, having regard to the terms of this power, including the consequences of being on the list, (b) the need for an unlimited power to modify Part 2A in respect of new bodies added to the list (including it would appear the ability to modify the purposes for which data matching may be conducted); and (c) why it is thought necessary for provision for an order under inserted section 26G(1) being able to include (in terms of 26G(2)) such incidental, consequential, supplementary or transitional provision as the Scottish Ministers think fit, and in particular to provide further explanation as to

how and in what circumstances it is envisaged that the ancillary power under section 26G(2) might require to be used.

SG response

As noted in the Delegated Powers Memorandum, the list of bodies in section 26C is fairly comprehensive, and would automatically include any new public bodies whose accounts are audited by the Auditor General. The power is a narrow one to allow for additional public bodies to be added in future. It can apply to a limited range of bodies, ie those whose functions are functions of a public nature, or include such functions, but which are not automatically covered by virtue of having their accounts audited by the Auditor General. In light of that narrowness, negative procedure is considered appropriate. We note that the related powers for England, Wales and Northern Ireland inserted by the Serious Crime Act 2007 are subject to draft affirmative procedure. However those powers are wider, and include power to add further purposes for which data matching can be used.

The power to modify the application of Part 2A in relation to bodies that are added, and to make incidental, consequential &c provision gives flexibility and is considered necessary so that appropriate arrangements can be made for particular bodies. As the Committee has identified, this would include power to modify Part 2A so that data cannot be used for certain data matching circumstances. As noted above, the limited range of bodies in respect of which the power could be used are effectively those at the fringes of the public sector, for which the full data matching provisions may not be appropriate. Without this power a body which has only limited public functions may not be willing to come within the scope of section 26C, requiring reliance instead on the voluntary provision of data under section 26B. While section 26C disapplies restrictions on disclosure of data, the power to make incidental or consequential provision could be useful to remove any apparent inconsistencies in other legislation or instruments.

Section 82(1)(a) – Amendment to section 133 of the Criminal Justice Act 1988 - Power to specify further circumstances in respect of which compensation may be paid for a miscarriage of justice

The Committee asks the Scottish Government the following questions—

- The DPM simply states that the purpose of the power is to enable a statutory basis for the existing ex gratia payment scheme to be established. The Committee requests an explanation as to the scope of the current scheme and an explanation as to whether the powers sought extend beyond what is necessary to replicate the current non-statutory arrangements.

The Scottish Government has not explained why it seeks to use delegated powers to provide a statutory basis for the extended scheme. Given that the scope of the existing statutory scheme is set out in primary legislation the Government is asked to explain why it considers it necessary to use delegated powers for the extended scheme.

SG response

The circumstances in which an individual may be eligible for compensation under the ex gratia scheme were set out in a statement by the then Secretary of State (Malcolm Rifkind) in a Written Answer to a Parliamentary Question in January 1986 (Hansard, 23 January 1986, cols 237-8). This statement is similar in its content to the one made by the then Home Secretary in November 1985 (Hansard, 29 November 1985, cols 689-90).

The Secretary of State stated that he was-

"prepared to pay compensation to people who ... have spent a period in custody following a wrongful conviction or charge, where I am satisfied that this has resulted from serious default on the part of a member of a police force or of some other public authority; and there may be exceptional circumstances that justify compensation in cases outside these categories. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond reasonable doubt in relation to the specific charge that was brought."

As set out in the Explanatory Notes, this power will be used to replace the ex gratia scheme by placing it on a statutory footing with the existing statutory scheme. It is intended to correspond to the existing ex gratia criteria. Strictly, the power is not limited to placing the ex gratia scheme on a statutory basis, and no need has been identified to do so – Ministers may in future wish to recognise further circumstances in which compensation should be available, and without some flexibility in the power the only way to do so would be through the creation of another ex gratia scheme.

We anticipate that in preparing an order under this power, detailed consideration will have to be given to the terms used in the 1986 Written Answer, eg what constitutes a "public authority" and "exceptional circumstances", rather than simply repeating the terms of the written answer verbatim. That might better be done in secondary legislation. A distinction can also be drawn between the provisions of the existing statutory scheme, which are required to meet international obligations, and those of the ex gratia scheme which, to the extent that they go beyond the statutory scheme, are not required by international obligations and which could currently be modified or revoked by Ministers at will. Placing the ex gratia scheme on a statutory basis by way of an order making power retains some of this flexibility, but introduces an element of Parliamentary control that is currently absent.

Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

The Committee asks the Scottish Government whether it has considered whether the guidance to be issued under this sub-section should be laid before Parliament, and to comment on whether such provision is or is not in its view appropriate given Parliament's interest in ensuring the independence of assessors and the proper use of public funds.

SG response

We do not consider that a statutory requirement to lay guidance before the Parliament is necessary. As set out in the Explanatory Notes, it is necessary to have a statutory basis for this guidance as the assessor is discharging a quasi-judicial role. Doing so provides greater transparency. We are however content to give a commitment that any guidance that is issued under this power will be laid before the Parliament.

Section 115 – Power to establish rules of court in relation to Part 6

Given that the Scottish Government refers to section 305 of the Criminal Procedure (Scotland) Act 1995 as the model for the power to be conferred on the High Court, why the power is an open power to make rules as may be considered necessary or expedient and not restricted to making rules of court or otherwise provision to regulate practice and procedure in relation to criminal proceedings?

SG response

We have reflected on our comment that section 115 “mirrors similar provision” in section 305 of the 1995 Act. It does not actually “mirror” that provision, and on reflection we consider that this is potentially misleading.

In preparing the draft Bill, we considered whether section 305 was sufficient for our purposes and considered that it was appropriate to create a new power. We required to consider what powers would be necessary given that this is the first time the Disclosure scheme has been put into statute and concluded that we needed flexibility to enable the High Court to do everything we thought it would be likely to require to do in ensuring the statutory scheme worked efficiently. In any event we consider that section 115 is not an entirely open power in that it is limited by the wording of section 115 to only those aspects required in consequence of or giving full effect to, only Part 6 itself, which deals only with the Disclosure of information in criminal matters.

Section 121(3) – Power to set mandatory conditions to licences granted under the Civic Government (Scotland) Act 1982

The DPM states that it is the Government’s intention that the power to prescribe mandatory conditions in respect of licenses under the Civic Government (Scotland) Act 1982 should be subject to affirmative procedure in line with the approach taken to alcohol licensing under the Licensing (Scotland) Act 2005. However, the Committee notes that new section 3A(3) provides for such orders to be subject to annulment. Can the Government clarify its intention and if the power is not to be subject to affirmative procedure to explain why it takes that view?

SG response

We can confirm that it is our intention that the affirmative procedure should apply and we will bring forward an amendment at Stage 2.

Section 129(4) – new section 27A Licensing (Scotland) Act 2005 - Power to prescribe those areas in respect of which licensing boards may vary all or a particular group of premises licences' conditions of operation

- No justification is provided in the DPM as to why it is considered appropriate to use subordinate legislation to enable licensing boards to vary certain licence conditions. If consistency of application is the policy objective can the Scottish Government explain why this cannot be achieved through primary legislation alone?

The DPM explains that the present policy intention is to enable the restriction of the sale of alcohol at off-sales premises to persons under 21. If such a restricted policy objective is in view why is a broad discretionary power required? No justification for the breadth of the power is provided in the DPM. Can the Scottish Government provide such justification to the Committee?

Section 140(1) – Power to make provision for the imposition on relevant licence-holders of a social responsibility levy

Given that the power in section 140 is a significant revenue raising measure, why is it not considered appropriate for the general principles of the proposal (including how the levy is to be calculated and by whom it is proposed to be administered) to be set out in primary legislation leaving only administrative detail for subordinate legislation?

SG response

In a letter to the Justice Committee and Health Committee on 24 March 2009, we advised of our intention to introduce a new health bill to take forward provisions on a range of measures, including those currently set out in sections 129 and 140 of the Bill. As a consequence, we intend to seek to remove these sections from the Bill at Stage 2.

Sections 146(2) and 147(2) – ancillary provision

The Committee asks the Scottish Government for the following additional information—

- To give its reasons for considering negative procedure as a sufficient level of parliamentary control in respect of modifications of the statute book using these powers where there is no textual amendment, particularly in the context of the subject matter of the Bill which impacts on individual rights and liberty.

SG response

We can appreciate the Committee's concern that the Bill deals with the rights and liberty of individuals. We have considered again the question of the appropriate level of parliamentary scrutiny in relation to orders under sections 146 and 147 which would modify the effect of – but not textually amend or repeal – enactments.

Given the subject matter of this Bill we acknowledge that the effect of a modification could be just as significant as the effect of a textual amendment. We think that there is a case for adjusting the level of scrutiny in relation to section 146 and we will bring forward amendments at Stage 2 to increase the level of parliamentary scrutiny in any case where an enactment is modified.

In our view, however, the position is different in relation to section 147. In that case, the modification is made in the context of a move from the old law to the new. The modification is temporary in nature and it is very focused and tightly drawn. The power is exercisable only for transitory, transitional or saving purposes and it is clearly linked to the coming into force of a particular provision of the Bill. We consider that, for these reasons, the current level of parliamentary scrutiny is appropriate.