

VICTIMS AND WITNESSES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Victims and Witnesses (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. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 2(4) – Standards of Service

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

Provision

2. Section 2 imposes a duty on certain persons to set and publish standards of service relating to the carrying out of functions in relation to victims and witnesses, and the procedure for making and resolving complaints. Amendments at Stage 2 moved references to the functions of the Lord Advocate and the Scottish Ministers covered by the duty to set standards of service from subsection (2) to subsection (3).

3. Section 2(4) gives the Scottish Ministers an order-making power to modify the list of persons to whom the duty applies (as set out in section 2(2)). Amendments at Stage 2 extended the order-making power to allow the Scottish Ministers to also modify sections (1), (3) or (5) if it is necessary or expedient as a consequence of a modification to subsection (2).

Reason for taking power

4. There is no immediate intention to use the power to modify the list of persons covered by the obligation to set out standards of service. It follows that there will, therefore, be no immediate need to amend subsections (1), (3) or (5). However, it may be necessary or desirable to amend this list in the future - for example, to include a body which has been given new functions in relation to victims and witnesses and, as a consequence, to also amend subsections (1), (3) or (5), which are connected to subsection (2) as they relate to the functions of the person

setting the standards. It is considered appropriate to provide for the flexibility to make such relatively limited changes by subordinate legislation, rather than requiring further primary legislation.

Reason for choice of procedure

5. The Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

Section 2A(4) – Reports

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

6. Section 2A was introduced to the Bill at Stage 2. Section 2A(2) imposes a duty on the persons mentioned in section 2(2) to prepare and publish a report within 12 months of initially publishing their standards of service, then on an annual basis, assessing how standards have been met, how they intend to continue to meet the standards, any modifications made during the reporting period and any proposed modifications they intend to make during the following reporting period.

7. Section 2A(4) gives the Scottish Ministers a regulation making power to prescribe information, in addition to that detailed at subsection (3), which is to be included in the report.

Reason for taking power

8. There is no intention to use this power in the short term, as subsection (3) sets out the information which the Scottish Ministers consider should be included in reports under this section. However it is possible that, in the light of experience, there may be a need for further information to be included in such reports. This power will give the Scottish Ministers the flexibility to specify additional information to be contained in the reports without requiring primary legislation.

Reason for choice of procedure

9. This power is limited to allowing the Scottish Ministers to specify additional information to be provided in reports relating to the standards of services set out under section 2. Given the narrow scope of this power, the negative resolution procedure is considered appropriate.

Section 2C(1) – Restorative Justice

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative procedure

Provision

10. This provision was inserted into the Bill by way of a non-Government amendment at Stage 2.

11. Section 2C provides that the Scottish Ministers must make provision, by way of regulations, for the referral of a victim and a person who has or is alleged to have committed an offence to restorative justice services. The regulations must, in particular, make provision for the circumstances where such a referral may be appropriate and the procedure and conditions for such a referral.

12. The conditions for referral must include: that such services are used only where they are in the interest of the victim and based on the victim's free and informed consent, which may be withdrawn at any time; that provision is made to ensure the victim's safety and to protect the victim from victimisation and retaliation; that full and impartial information about the process is provided in advance to the victim; that the offender, or alleged offender, has acknowledged the basic facts of the case; and, that discussions that are not conducted in public remain confidential and are not subsequently disclosed except with the agreement of the parties or as required in the interests of justice.

Reason for taking power

13. This power has been taken to enable the Scottish Ministers to make regulations which make provision for the referral of victims and offenders, or alleged offenders, to restorative justice processes.

Reason for choice of procedure

14. The Scottish Government understands that the member who lodged this amendment considered negative procedure to be the appropriate level of scrutiny of any exercise of this delegated power.

Section 3(2)(aa) – Disclosure of information about criminal proceedings

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

15. In the Bill, as introduced, section 3 provides that certain persons (the chief constable of the Police Service of Scotland, a prosecutor, and the Scottish Court Service) must provide certain information to victims and witnesses. Section 3(2)(a) specifies that a person who appears to be the victim of an offence or alleged offence is a "requester" under subsection (1). Amendments at Stage 2 inserted subsection (2)(aa) to provide that, where the death of the person in subsection (2)(a) was or appears to have been caused by the offence or alleged offence, a prescribed relative of that person is also a requester under subsection (1).

16. Section 3(5) provides that the Scottish Ministers may prescribe by order those to be regarded as a relative under subsection (2)(aa).

Reason for taking power

17. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 3, without amending primary legislation.

Reason for choice of procedure

18. This power has a narrow focus on the definition of “relative” in section 3. It is limited to defining the categories of relative (of a person who is or appears to be a victim whose death was caused by an offence or alleged offence) who may request certain information from the chief constable of the Police Service of Scotland, a prosecutor or the Scottish Court Service in relation to a criminal investigation or criminal proceedings relating to any offence or alleged offence. It is therefore considered that the negative procedure is appropriate.

Section 5A(4) – Certain medical examinations: gender of medical examiner

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

19. Section 5A was introduced to the Bill at Stage 2. This section places a duty on a constable (under subsection (2)) to inform alleged victims of certain offences (mentioned in subsection (1)), who have reported the offence to the police, that they may request that their medical examination be carried out by a registered medical practitioner of a specified gender and (under subsection (3)) to inform the registered medical practitioner of any such request.

20. Section 5A(4) gives the Scottish Ministers an order-making power to specify descriptions of other persons to be included in the reference to “registered medical practitioner”.

Reason for taking power

21. The power under section 5A(4) will allow the Scottish Ministers to add persons of other descriptions to the reference “registered medical practitioner” who the constable will be required to notify of a request for a specific gender of examiner. While these examinations will ordinarily be carried out by registered medical practitioners (defined in schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 as “a fully registered person within the meaning of the Medical Act 1983...who holds a licence to practise under that Act”), other healthcare professionals may, in the future, also be qualified to undertake such examinations and this power will provide the flexibility to reflect such changes in practice.

Reason for choice of procedure

22. Any changes made using this power, which is very narrow in scope, will be aimed at reflecting changes in practice, and will be intended to assist in the operational delivery of the provision of forensic medical examinations. It is therefore considered appropriate that the negative procedure is used.

Section 19(7) – Victim statements

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure (or affirmative procedure where the order amends or repeals any part of an Act)

Provision

23. Section 19(7), which was inserted into the Bill at Stage 2, inserts new subsections (13) to (16) into section 14 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”), with regard to victim statements. Subsection (13) allows the Scottish Ministers to prescribe, by order, the form and manner in which victim statements can be made. Subsection (14) allows the Scottish Ministers, when making an order under subsection (13), to include such consequential, incidental or supplementary provision as is considered appropriate, and to modify any enactment. Subsection (15) provides that an order under subsection (13) can be made so as to have effect for a period of time as specified in the order. Subsection (16) provides that an order under subsection (13), which applies for a period as specified in subsection (15), can apply to a specific geographic area or areas.

Reason for taking power

24. Victim statements under section 14 of the 2003 Act are currently made in writing. The intention of this amendment is to allow alternative formats of victim statement to be piloted, and then extended more widely if appropriate. An order-making power is considered the most appropriate way of achieving this, as it allows for limited pilots to be conducted, and for wider changes to be implemented as necessary, without the need for further primary legislation. This order-making power will allow for flexibility in the types of victim statements that will be piloted and will allow for the length and location of the pilot to be varied.

Reason for choice of procedure

25. The negative procedure is considered appropriate, generally, given the power is fairly narrow (in that it only allows for the form and manner of statements to be prescribed). However, where changes to primary legislation are to be made, the additional scrutiny provided by the affirmative procedure is considered appropriate.

Section 21 (new section 253B(5) and (6) of the Criminal Procedure (Scotland) Act 1995) - The Restitution Fund

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

Provision

26. The new section 253B, to be inserted into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), provides that the Scottish Ministers shall establish a Restitution Fund which shall receive monies realised in respect of restitution orders, and disburse them to appropriate beneficiaries. Subsection (5) of new section 253B allows the Scottish Ministers to delegate, by

order, their functions of establishing and maintaining the Restitution Fund. Subsection (6) grants the Scottish Ministers an order-making power to make further provision relating to the administration of the Fund, including specification of eligible persons and provision regarding the making of payments, the keeping of financial and other records and the making of reports to the Scottish Government.

27. The new section sets out in primary legislation the purpose of payments out of the Restitution Fund. This purpose is to secure the provision of support services for persons who have been assaulted as mentioned in section 90(1) of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). The new section also grants the Scottish Ministers powers to specify in subordinate legislation the persons or classes of person who shall receive support from the Restitution Fund as a means of achieving that purpose.

28. At Stage 2, a minor amendment was made to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the *administration* of the Restitution Fund, in addition to the establishment and maintenance of the fund.

29. The provision in subsection (6) was also amended so that the purpose of the order-making power was stated in the introductory text to the subsection explicitly to make further provision about the administration of the Fund. With that having been made clear in the introductory words, there was no longer any need to set out the operation and administration of the fund among the purposes set out later in subsections (a) and (b), and at Stage 2 these purposes were accordingly removed from the list.

Reason for taking power

30. The purposes of the Restitution Fund are to be clearly set out in primary legislation. However, the range of circumstances in which the Fund will operate cannot be foreseen. Some may be beyond the Scottish Ministers’ control, while others may be driven by wider operational concerns of the Scottish Ministers in relation to, for example, efficient and cost-effective administration, whose requirements may change over time. Applicable regulatory regimes may also change over time.

31. It is appropriate that the operation and administration of the Restitution Fund should be able to respond to changes in these circumstances as efficiently as possible. This argues against setting out detailed arrangements in primary legislation.

32. Similarly, such changes in circumstances may make it appropriate or efficient to delegate the Scottish Ministers’ functions of establishing, maintaining and administering the Restitution Fund to a third party (though this is not the Scottish Government’s intention at present).

33. The organisations which provide support services for persons assaulted in terms of section 90(1) of the 2012 Act are also likely to change over time. Organisations will cease to operate, and new organisations will arise. Even where the organisation remains essentially the same, the legal person in which they are embodied may change.

34. Finally, the need to be able to continue to meet the purpose of the Restitution Fund, whatever organisations or persons may exist providing services which meet that purpose, makes setting out recipients of monies from the Restitution Fund in primary legislation impractical.

Reason for choice of procedure

35. Both changes in the circumstances in which the Restitution Fund operates, and in the persons or classes of person who offer the support services which are the purposes of the provision, may occur quickly and without prior warning to the Scottish Ministers.

36. In these circumstances the Scottish Ministers must be able to react quickly to ensure that the purpose of the Restitution Fund is still met. At the same time, these powers are fairly extensive. The joint requirements of speed and flexibility on the one hand, and of proper scrutiny on the other, are best met by the affirmative procedure.

Section 22 (amended section 253G(3), (4) and (8) of the 1995 Act) – The Victim Surcharge Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

37. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund.

38. Subsection (3) of new section 253G, as introduced, provided that Scottish Ministers must establish and maintain the Victim Surcharge Fund for the purposes of securing the provision of support services for persons who have been the victims of crime. Amendments were made at Stage 2 to extend subsection (3) to refer to a person who is or appears to be the victim of crime and the prescribed relatives of such persons, in order that support services can be secured for victims, those who appear to be victims, and prescribed relatives of such persons.

39. Subsection (4) of new section 253G, as introduced, detailed the persons to which payments from the Fund may be made, namely victims and persons who provide or secure the provision of support services for victims. Subsections (4)(a) was amended and (4)(aa) was inserted at Stage 2 to, respectively, replace “victim” with “a person who is or appears to be the victim of crime” and to add prescribed relatives of such persons, so that payments from the Fund can be made to victims, those who appear to be victims and prescribed relatives of such persons.

40. The definition of “support services” in subsection (8) was amended at Stage 2 to refer to the recipients or beneficiaries of such services as a person who is or appears to be the victim of crime and to add the prescribed relatives of such persons as recipients or beneficiaries. Subsection (8), as amended, also allows the Scottish Ministers to prescribe by regulation those to be regarded as a relative under subsections (3), (4) and (8). Amendments at Stage 2 introduced a new subsection (9), which provides that regulations made under subsections (3), (4) and (8) are subject to the negative procedure.

Reason for taking power

41. Rather than set out a definitive list of those to be regarded as relatives on the face of the Bill, it is considered appropriate to provide such detail in subordinate legislation. This will allow the Scottish Ministers the flexibility to modify the definition of “relative”, which has a fairly narrow application in relation to section 22, without amending primary legislation.

Reason for choice of procedure

42. This power has a narrow focus on the definition of “relative” in section 22. It is limited to setting the categories of relatives of persons who are or appear to be the victim of crimes in respect of which the Victim Surcharge Fund relates, to whom payments may be made and to whom support services relate. It is therefore considered that the negative procedure is appropriate.

Section 22 (new section 253G(5) and (6) of the 1995 Act) – The Victim Surcharge Fund

Power conferred on: The Scottish Ministers
Power exercisable by: Order/regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

43. Section 22 inserts section 253G into the 1995 Act and deals with the establishment and operation of the Victim Surcharge Fund. Subsection 253G(5) allows the Scottish Ministers to delegate, by order, their functions of establishing and maintaining the Victim Surcharge Fund. Subsection (6) grants the Scottish Ministers powers to manage the Fund, by making orders connected with its operation, administration, records and reports, and as to how payments are to be made.

44. A minor amendment was made at Stage 2 to subsection (5) to reflect that the functions of the Scottish Ministers, which may be delegated by way of order, include the *administration* of the Fund, in addition to the establishment and maintenance of the fund.

45. The provision in subsection (6) was also amended so that the purpose of the order-making power is stated explicitly in the introductory words i.e. that further provision may be made about the *administration* of the Fund. With that having been made clear in the introductory words, there was no longer any need to mention the operation and administration of the fund in the list of matters set out in the subsection, and at Stage 2 these matters were accordingly removed from the list. Also removed from the list in subsection (6) was the reference to the order-making power being used in particular to make provision specifying persons or classes of person to, or in respect of, whom payments may be made out of the fund. It was considered that the restrictions on the face of the Bill relating to the persons to whom payments can be made (in subsection (4) of 253G) were sufficient and such provision was, therefore, unlikely to be required.

46. Subsection (6), as introduced, provided that subordinate legislation be by way of *order*. In contrast, new section 253F(2) (also inserted into the 1995 Act by section 22 of the Bill), provided that Scottish Ministers may prescribe by *regulations* the offences, sentences and

circumstances to which the victim surcharge is applicable. Subsection (6) was amended at Stage 2 to enable the Scottish Ministers to exercise these powers together and for regulations to make provision relating to the offences, sentences and circumstances to which the victim surcharge is applicable under section 253F(2) and the establishment, maintenance and administration of the Fund under section 253G.

Reason for taking power

47. In relation to the amendments to subsections (5) and (6), the Victim Surcharge Fund is a new fund being established for the immediate assistance of victims of crime in the aftermath of that crime and, as such, it is possible that changes to the operation of the Fund will be required as it comes into being and potential issues are identified. The Bill contains the key parameters for the establishment, maintenance and administration of the Fund but it is more appropriate for the Scottish Ministers to be able to provide for its day-to-day operation in secondary legislation, to allow for both speed and flexibility in making any necessary changes.

48. In relation to the amendment changing the order-making power in subsection (6) to a regulation-making power, as described above, this change enables the Scottish Ministers to make one piece of subordinate legislation relating to the Fund rather than a set of regulations under section 253F(2) and a separate order under section 253G(6).

Reason for choice of procedure

49. In relation to orders under subsection (5), the Scottish Government considers the affirmative procedure is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the choice of person to which the Scottish Ministers wish to delegate the establishment, maintenance and administration of the Fund.

50. In relation to regulations made under subsection (6), given the amount of detail which can be set out using the powers in this subsection, and the impact on the Victim Surcharge Fund, the affirmative procedure is considered appropriate. The change in the type of subordinate legislation, from order to regulations, does not affect the level of Parliamentary scrutiny in this respect.

This document relates to the Victims and Witnesses (Scotland) Bill as amended at Stage 2 (SP Bill 23A)

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