SUBORDINATE LEGISLATION COMMITTEE

AGENDA

2nd Meeting, 2010 (Session 3)

Tuesday 19 January 2010

The Committee will meet at 2.15 pm in Committee Room 4.

1. Decision on taking business in private: The Committee will decide whether to take items 6 and 7 in private.

2. Criminal Justice and Licensing (Scotland) Bill: The Committee will consider the Scottish Government's response to points raised on the delegated powers provisions in this Bill at Stage 1.

3. Draft instruments subject to approval: The Committee will consider the following—
   - the Health Board Elections (Scotland) Amendment Regulations 2010 (SSI 2010/draft).

4. Instruments subject to annulment: The Committee will consider the following—
   - the Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446);
   - the Homeless Persons (Provision of Non-permanent Accommodation) (Scotland) Regulations 2010 (SSI 2010/2).

5. Instruments not laid before the Parliament: The Committee will consider the following—
   - the Tuberculosis (Scotland) Amendment Order 2009 (SSI 2009/445);
   - Act of Sederunt (Child Care and Maintenance Rules) Amendment (No. 2) 2009 (SSI 2009/449);
   - Act of Sederunt (Rules of the Court of Session Amendment No. 9) (Miscellaneous) 2009 (SSI 2009/450);
   - the Wild Birds (Special Protection in Severe Weather) (Scotland) Order 2010 (SSI 2010/4).
6. **Budget (Scotland) (No. 4) Bill**: The Committee will consider the delegated powers provisions in this Bill at Stage 1.

7. **Tobacco and Primary Medical Services (Scotland) Bill**: The Committee will consider the delegated powers provisions in this Bill after Stage 2.

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The papers for this meeting are as follows—

**Agenda items 3 - 7**

Legal Brief  SL/S3/10/2/1 (P)

**Agenda items 2 - 5**

Summary of Recommendations  SL/S3/10/2/2

**Agenda item 2**

Paper by the Clerk  SL/S3/10/2/3

Scottish Government response  SL/S3/10/2/4

**Agenda items 3 - 4**

Instrument Responses  SL/S3/10/2/5

**Agenda item 6**

Budget (Scotland) (No. 4) Bill Delegated Powers Memorandum

**Agenda item 7**

Tobacco and Primary Medical Services (Scotland) Bill Supplementary Delegated Powers Memorandum
The Committee will be invited to consider the following recommendations at the meeting. Decisions are a matter for the Committee.

Agenda Item 2  Criminal Justice and Licensing (Scotland) Bill

The Committee may wish to note the Government response to its stage 1 report.

Agenda Item 3  Draft instruments subject to approval

The Health Board Elections (Scotland) Amendment Regulations 2010 (SSI 2010/draft)

The Committee may wish to report to the lead committee and the Parliament that—

(1) the effect of regulation 2(4) (amending rule 5 of the Schedule to the principal Regulations) is not to specify how the eligibility of voters is to be established in circumstances where a person could be entitled by the criteria set out in rule 5 to vote in both Fife and Dumfries and Galloway Health Board elections;

The Committee considers that the implied effect of that paragraph is that a voter may select in which one area they may vote. If that is the intended policy, the Committee considers that this could have been more clearly expressed;

(2) there appears to be a doubt whether the offences provisions in the new regulation 5A(2), (3) and (4) of the 2009 Regulations, as inserted by regulation 2, are intra vires given that there is a strong presumption against the creation of offences by subordinate legislation, rebuttable only by express provision or clear inference, neither of which appear to the Committee to have been satisfied in this case.
Agenda Item 4  Instruments subject to annulment

The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446)

The Committee may wish to report that regulations 30(1) and (2), 38(10) and 46(2)(a) are defectively drafted and that the Committee welcomes the Government’s commitment to correct these errors before the regulations come into force.

The Committee may also wish to draw to the Government’s attention that regulations 9(4)(d), 15(1) and 18(6)(b) are inconsistent with normal drafting practice in that they do not use gender neutral language.

The Homeless Persons (Provision of Non-permanent Accommodation) (Scotland) Regulations 2010 (SSI 2010/2)

The Committee may wish to consider if it is content with this instrument.

Agenda Item 5  Instruments not laid before the Parliament

The Tuberculosis (Scotland) Amendment Order 2009 (SSI 2009/445)

Act of Sederunt (Child Care and Maintenance Rules) Amendment (No. 2) 2009 (SSI 2009/449)

Act of Sederunt (Rules of the Court of Session Amendment No. 9) (Miscellaneous) 2009 (SSI 2009/450)

The Wild Birds (Special Protection in Severe Weather) (Scotland) Order 2010 (SSI 2010/4)

The Committee may wish to consider if it is content with these instruments.
SUBORDINATE LEGISLATION COMMITTEE

2nd Meeting, 2010 (Session 3)

Tuesday 19 January 2010

Paper by the Clerk

Criminal Justice and Licensing (Scotland) Bill – Response to SLC Stage 1 Report

Background

1. Under Rule 9.6.2 of Standing Orders the Committee submitted its report on the delegated powers provisions in the Criminal Justice and Licensing (Scotland) Bill to the Justice Committee, as lead committee for the Bill, on 5 June 2009.

2. On 7 January 2010, Philip Lamont, Head of the Criminal Justice and Licensing (Scotland) Bill team, wrote to the Clerk of the Subordinate Legislation Committee responding to its Stage 1 report.

Scottish Government Response

3. The response indicates that the Scottish Government intends to seek to amend the Bill in line with most of the Subordinate Legislation Committee’s recommendations on the delegated powers contained in the Bill.

4. However, with regard to the Committee’s recommendations on the power in section 18(2)(a)(iii) and paragraphs 10(3) and (4) of Schedule 2, the Government remains of the view that at this time, it would not be appropriate for the power to be narrowed by setting maximum and minimum limits on the face of the Bill, but considers that this would be best left to subordinate legislation.

5. In relation to the power in section 82(1)(a), the Government considers that it has provided adequate justification and is not proposing to change the scope of the *ex gratia* scheme. It considers that it is not necessary to make the power “so narrow and intricate”.

6. Finally, the Government disagrees with the recommendation on section 115, where the Committee considered that there was not sufficient justification given for the power taken in the terms allowed. The Government disagrees with the Committee’s view that the power is an entirely open power, as it argues that it relates only to the disclosure provision in the Bill.

Progress of the Bill

7. The Bill passed Stage 1 on 26 November 2009. Day 1 of Stage 2 will be held on 2 March 2010.
8. The Subordinate Legislation Committee will give further consideration to the delegated powers contained in the Bill after Stage 2.

Recommendation

9. Members are invited to note the Scottish Government's response to the Subordinate Legislation Committee's report on the Criminal Justice and Licensing (Scotland) Bill at Stage 1.

Dougie Wands
Clerk to the Committee
Our ref: SG response to SLC Stage 1 report – CJ&L Bill
7 January 2010

Dear Douglas

On 4 June 2009, the Subordinate Legislation Committee’s report on the Criminal Justice and Licensing (Scotland) Bill at Stage 1 was published. Our responses (shown in italics) to each of the report’s recommendations are contained below (for ease of reference, I have also included the report’s comments to which we are responding).

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)

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.

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.)

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.

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.

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

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.

Scottish Government response

We can confirm we will lodge suitable amendments at Stage 2.

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)

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.

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.

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.

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.
Scottish Government response

We can confirm we will lodge amendments at Stage 2 to limit the powers of the Scottish Ministers so that they may only specify by order different figures in section 227 K(2)(a) or (b). We can also confirm that the amended power will be subject to the affirmative resolution 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

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.

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.

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).

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.

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.

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.

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).
Scottish Government response

We can confirm we will lodge suitable amendments at Stage 2.

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

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).

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”.

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.

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.

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.

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.

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.
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.

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”

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.

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

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

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.

Scottish Government response

We note the concerns that have been raised about the provisions to provide an order making power that will allow the Scottish Ministers to ‘set the bar’ at which the lower tier custody and community arrangements give over to the more intensive arrangements. We have considered whether appropriate parameters might be specified in the Bill but remain of the
view that it would not be appropriate to set it now. Although the Scottish Government is committed to implementing the new measures as soon as practicable, this work is incorporated within the Reducing Reoffending Programme. This will enable the impact that the new measures will have on the Scottish Prison Service and local authority criminal justice services to be properly assessed and taken into account within the implementation pathway. As the Scottish Prisons Commission noted, the size of the prisoner population will be the critical factor in determining when the new arrangements can be brought on stream.

We need to assess the evidence in ‘real time’ to ensure that the period set provides for a modern and flexible offender management regime for those sentenced to imprisonment. We therefore believe that the proposal to provide an order making power to allow the Scottish Ministers to ‘set the bar’ between the proposed two tiers of sentence management to be the best way to ensure that we can deliver the new measures in the Custodial Sentences and Weapons (Scotland) Act 2007 (as amended by section 18 of this Bill) as quickly and effectively as possible taking account of future developments around the prison service, prisoner numbers and local authority resources. It may also 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 certain length. Setting a limit in primary legislation beyond which the line could not be moved may impede that development.

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

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.

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.

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).

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Scottish Government response

We note the comments made.

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

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.

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.

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.

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.

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.

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.

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.

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.

Scottish Government response

It is not clear to us why the Subordinate Legislation Committee and the Justice Committee are concerned about the scope of the delegated power proposed. We believe we provided adequate justification in our written response to the SLC on 14 May 2009 as to why we wish to use delegated powers to provide a statutory basis for the ex gratia scheme. That is, the order-making power will allow that ex gratia scheme, which was set out in a Parliamentary written answer, to be expressed in appropriate statutory terms. This proposal will therefore introduce an element of Parliamentary control which is currently absent. We are not proposing to change the scope of the ex gratia scheme. However, the order making power would permit the expansion or narrowing of the scheme in future, if that were desired. Ministries 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. It is simply not necessary to make the power so narrow and intricate.
Section 82(1)(d) - New section 133(4B) Criminal Justice Act 1988 - Guidance to assessors

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.

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.

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.

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.

Scottish Government response

We note the comments made.

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

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.

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.

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.

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.

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.

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.

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.

Scottish Government response

This is the first time that disclosure has been put on a statutory footing. In looking at how the scheme should operate it was considered that section 305 of the Criminal Procedure (Scotland) Act 1995 on Acts of Adjournal was not sufficient for our purposes. What was needed was flexibility to enable the High Court to do everything we thought it would likely require to do to ensure that the disclosure scheme works efficiently. What is proposed in the Bill is limited only to those aspects required to give full effect to the Part 6 provisions on disclosure of information in criminal proceedings. We therefore disagree with the statement that the power in section 115 is an entirely open power – it is not as it relates only to the disclosure provisions in the Bill.

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

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.

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.

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

Scottish Government response

We can confirm we will lodge suitable amendments 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

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.

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.

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.

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

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.

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.

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

Scottish Government response

We can confirm suitable amendments at Stage 2 will be lodged to remove sections 129 and 140 from the Bill.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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. 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.

Scottish Government response

We can confirm we will lodge suitable amendments at Stage 2 to section 146 so as to provide any modification of enactments is subject to affirmative procedure. We confirm our agreement to bring forward measures in a form that attracts affirmative procedure where the measures impact on individuals’ rights or liberty.

I hope this is helpful.

Yours sincerely
Philip Lamont
Criminal Justice and Licensing (Scotland) Bill Team
DRAFT INSTRUMENTS SUBJECT TO APPROVAL

The Health Board Elections (Scotland) Amendment Regulations 2010 (SSI 2010/draft)

On 7 January 2010 the Scottish Government was asked:
(1) In regard to the meaning and effect of regulation 2(4)(b), is an effect of that provision considered to be that a voter who may otherwise be entitled to vote in more than one area may select for which area their vote shall count? Or does there require to be provision to determine in which area the vote shall count? Could the provisions be made clearer in this respect?

(2) Regulation 2(2) applies with modifications certain offences provisions in the Representation of the People Act 1983. Can it be explained and justified on what grounds the enabling powers as cited in the preamble to the instrument are being relied on to specify such criminal offences? This is given that those powers do not expressly authorise the specification of offences, and there is generally a strong presumption against the creation of offences by subordinate legislation, which is rebuttable only by express provision or by clear inference in the enabling legislation. (See Craies on Legislation, 8th edition, at page 37.)

The Scottish Government responds as follows:
(1) The effect of regulation 2(4)(b) is to clarify, on the face of the Regulations and as provided for in the enabling Act, that where, in terms of the Regulations, a voter is entitled to vote in more than one Health Board area, or more than once in the same Health Board area (which conceivably could happen if wards were created in Health Board areas in the future), that person may only vote in one of those areas. We think the effect of the provision is clear. This wording was offered to, and accepted by, the Health and Sport Committee during the passing of the Health Board Elections (Scotland) Regulations 2009. If s/he is properly registered in two areas the voter will have to decide which area to vote in. If Parliament approves these Regulations it will also be an offence for a voter to vote twice and guidance to voters will reflect this.

It is possible in other elections to be registered in more than one area, most commonly in the case of students, but we are not aware of any other elections where further clarification is provided to an individual to determine which area they may vote in; it will simply be their decision.

(2) Paragraph 12(3) of Schedule 1A to the National Health Service (Scotland) Act 1978 provides that an enactment may be applied (with or without modifications) to health board elections. It is our opinion that this provides an express power to apply the provisions of the Representation of the People Act 1983 without limitation. As a result,
as with the other provisions of that Act applied by the principal Regulations, this power allows the application of the offences, with modifications, provided for in these Regulations.

INSTRUMENTS SUBJECT TO ANNULMENT

The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009/446)

On 7 January 2010 the Scottish Government was asked:
1. Does the wording of regulation 46(2)(a) make sense or should “at the earlier of” appear after “unless” prior to (a)? If so, what is the effect of this error considered to be?

2. Should the reference in regulation 38(10) to regulation 35 be a reference to regulation 37? If so, what is the effect of this error considered to be?

3. Is regulation 30(2) a formatting error - should it instead complete regulation 30(1)? If so, what is the effect of this error considered to be?

The Scottish Government responds as follows:
We are grateful to the Committee for spotting these points and confirm that there are errors in the Regulations as identified by the Committee. We intend to make an amending instrument so as to come into force at the same time as these Regulations (25th January).