CRIMINAL PROCEEDINGS ETC. (REFORM) SCOTLAND BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Criminal Proceedings etc. (Reform) Scotland Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

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

OUTLINE OF BILL PROVISIONS

3. The Bill contains a number of provisions aimed at improving the operation of the summary justice (non-jury court) system, which were announced in Smarter Justice, Safer Communities – Summary Justice Reform Next Steps, in March 2005. It also brings forward reform to the operation of the bail and remand system in Scotland, based on the commitments made in the Executive’s Bail and Remand Action Plan and the report of the Sentencing Commission for Scotland on the use of bail and remand.

4. The Bill makes provision in 8 main areas:
   - reforms to the system of bail and remand based on the commitments made in the Executive’s bail and remand action plan;
   - changes in the law relating to criminal proceedings which will ensure that cases are dealt with as quickly and effectively as possible in court – these changes mainly relate to procedure in summary cases although some minor changes are also made to solemn procedure;
   - increases in the criminal sentencing powers of the summary courts, ensuring that those courts can deal with an appropriate range of cases in terms of both severity and caseload, and do so more quickly than is currently the case;
   - extending the range of alternatives to prosecution that can be offered to an alleged offender and the manner in which those alternatives can be enforced and disclosed –
This document relates to the Criminal Proceedings etc. (Reform) Scotland Bill (SP Bill 55) as introduced in the Scottish Parliament on 27 February 2006

ensuring that alternatives are robust and can be used in circumstances where a court appearance may not the most effective way of dealing with the case;

• reform of the way in which fines and other financial penalties imposed in respect of a criminal offence can be collected and enforced – in particular the creation of the new role of fines enforcement officer – ensuring that penalties are collected as efficiently and effectively as possible in future, minimising unnecessary court involvement;

• the establishment of justice of the peace courts (JP courts) in place of district courts – delivering the commitment to create a unified courts administration under the control of the Scottish Court Service;

• reform of the procedures by which justices of the peace (JPs) are appointed and trained – including the introduction of periodic appraisal for JPs – fulfilling the commitment to retain JPs and invest in them to ensure that they provide a consistently high standards of justice in courts throughout Scotland; and

• placing the existing Inspectorate of Prosecution in Scotland on a statutory footing.

5. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 55–EN, and in the Policy Memorandum published separately as SP Bill 55–PM.

APPROACH TO USE OF DELEGATED POWERS

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Executive has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill to:

• the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;

• the need to make proper use of valuable Parliamentary time;

• the need to ensure that other areas of regulation can be developed in a coherent and consistent way by other authorities, for example court rules;

• the likely frequency of amendment;

• the possible need to change provisions in a co-ordinated way, for example to react to changes in approach required as the process of court unification is rolled-out in phases; and

• the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

7. Subordinate legislation deals with process as well as policy. Where there are no policy issues involved then there is no need for Scottish Ministers to make the instrument, and no need for Parliament to be able to annul or approve it. For example, detailed rules of criminal procedure can be made by the High Court by Act of Adjournal within the existing authority that is provided by section 305 of the 1995 Act.
8. If subordinate legislation does implement Executive policy then some form of parliamentary procedure is appropriate. A balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill the balance reflects the view of the Executive on the importance of the matter delegated by Parliament.

**GENERAL SUBORDINATE LEGISLATION PROVISION**

9. Section 68 contains the general subordinate legislation provisions. Subsection (1) provides that all powers to make orders are exercisable by statutory instrument. Subsection (2) allows different provisions to be made for different purposes or areas and permits the powers to be used to make incidental, supplemental, consequential, transitional, transitory or saving provisions. Subsection (3) provides that all of these powers are subject to negative resolution procedure, except for orders made under sections 36(1), 36(2) and 50(2) which are subject to affirmative procedure, and the commencement provisions (section 71) where no procedure is required.

10. Section 68 does not apply to the subordinate legislation powers that are to be inserted into the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). An express provision setting out the applicable Parliamentary procedure accompanies all such provisions.

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

**Section 4 – Power to regulate conditions under which the report of a judge in a bail appeal will be made available to 3rd parties**

*New section 32 (3E) of the Criminal Procedure (Scotland) Act 1995*

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the High Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Act of Adjournal</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
</tr>
</tbody>
</table>

12. Section 4(2) of the Bill inserts a new section 32(3E) into the 1995 Act to provide powers for the court to make available the judge’s report on the reasons for his or her decision on bail to other persons who are not already specifically prescribed in the Bill, where there is a bail appeal. Parties in this category might, for example, include criminal justice social workers where the High Court is considering the grant of bail with particular conditions attached.

13. It is important that the court should be able to prescribe other persons who may require to see the judge’s report, and the conditions on which they may have access to it. This ensures flexibility where it is required, but also ensures that the judge’s report is only made available under clear and strictly regulated conditions. The Executive therefore considers that it is appropriate to give the court power to prescribe third parties who should see the judge’s report.
An equivalent power is in place under section 113(4) of the 1995 Act in relation to solemn appeals.

**Choice of procedure**

14. Rules made under this power are procedural and administrative. Detailed matters relating to court procedure, such as the content of court forms, are generally not considered appropriate to be included in primary legislation. They relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally).

**Section 6(2) – Power to determine which police officers have the authority to liberate an accused on an undertaking**

**New section 22(1E) of the Criminal Procedure (Scotland) Act 1995**

**Provision**

15. Section 22 of the 1995 Act empowers certain police officers to release a person who has been charged with an offence on a written undertaking to appear in court on a given date. Under the amendments to that section in the Bill, police officers will be empowered to impose conditions on an undertaking. Section 6(2) of the Bill inserts a new section 22(1E) into the 1995 Act. This provision gives the Scottish Ministers power to describe the police officers who may authorise the imposition of conditions upon an undertaking. If Ministers do not exercise this regulation making power, any police officer may impose the conditions referred to in section 22(1D).

**Reason for taking power**

16. Section 22(1E) creates a reserve power to be used as required to support consistent use of the new power for the police to impose conditions when they release someone on an undertaking. It is also anticipated that the Lord Advocate will issue guidance to the police on the imposition of conditions.

17. The rank or description of authorised police officers will, if required, be described by Scottish Ministers, and reviewed and amended as needed from time to time in the future.

**Choice of procedure**

18. Regulations made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (see section 6(2)(g) of the Bill). The negative resolution procedure is considered appropriate given the limited nature of the enabling power and the need for flexibility in the use of the new power for police officers to impose conditions on undertakings.
Section 7(1) – Power to modify meaning of ‘electronic signature’

New section 305A(10) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

19. Section 7(1) inserts new section 305A into the 1995 Act. Section 305A makes provision to allow for proceedings in the summary courts to be carried out electronically. A number of the subsections of section 305A make reference in various contexts to an electronic signature being required to authenticate various documents. Section 305A(7) defines “electronic signature” by reference to the meaning given to it in section 7(2) of the Electronic Communications Act 2000 (c.7). That meaning is applied to the rest of the 1995 Act unless the context otherwise requires. Section 305A(10) gives Scottish Ministers power, by order, to modify the definition of electronic signature insofar as it relates to provisions of the 1995 Act.

Reason for taking power

20. The use of electronic authentication of documents is intended to make best use of the technology currently available, and that which will be available in the future. This will facilitate the speedy and secure generation, authentication and transfer of documents, with benefits to the criminal justice system. Clearly, it is difficult to anticipate how the technology will develop, and the ways in which it will be used by the various stakeholders in the criminal justice system. Giving the Scottish Ministers power to amend the definition of “electronic signature” as it applies to the 1995 Act provides the flexibility needed to take advantage of developments in electronic communication, and to ensure that the benefits of any such developments are available with the minimum of delay. The power will allow technological changes and their resulting practical effect to be taken into account quickly if that is necessary.

Choice of procedure

21. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature. A change to the definition of “electronic signature” will, in most instances, be an administrative change which is thought unlikely to be contentious. It is not envisaged that any order would have an impact on the rights of parties to criminal proceedings.
Section 7(2) – Power to make provision in relation to use of electronic documentation, storage, and communication

New section 305A(2) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

22. Section 7(1) of the Bill makes provision for the use of electronic communication and authentication in summary criminal proceedings. Section 7(2) provides that the Scottish Ministers may, by order, make provision for: the use of electronic complaints and other electronic documentation; for keeping records of proceedings in electronic form; and using electronic communication.

Reason for taking power

23. The use of electronic documentation, record keeping, and communication is intended to make best use of the technology currently available, and that which will be available in the future. Clearly, it is difficult to anticipate how technology will develop, and the ways in which it will be used by the various stakeholders in the criminal justice system. Giving Scottish Ministers power to make orders in connection with these matters provides the flexibility needed to take advantage of developments in electronic communication, and to ensure that the benefits of any such developments are available with the minimum of delay. The power will also allow technological changes and their resulting practical effect to be taken into account quickly if that is necessary.

Choice of procedure

24. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature. An order in connection with these matters would be of an administrative nature, and is thought unlikely to be contentious. It is not envisaged that any order made would have an impact on the rights of parties to criminal proceedings.
Section 16 – Power to prescribe form of application for warrant for apprehension of a witness

New section 156(5)(b)(i) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

25. Section 16 of the Bill substitutes a new section 156 into the 1995 Act introducing a new procedure for obtaining and issuing warrants for the apprehension of witnesses. Warrant applications can be made orally or in writing. Section 156(5)(b)(i) provides that written applications shall be, or as nearly as may be, in such form as may be prescribed by Act of Adjournal.

Reason for taking power

26. This power relates to the technical content of court documents which are generally dealt with in the Act of Adjournal. This ensures that their content is relevant, kept up to date and allows the substantive law of criminal procedure to operate effectively.

Choice of procedure

27. Rules made under this power are procedural and administrative. They therefore relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally.)

Section 16 – Power to prescribe form of warrant to be used for apprehension of a witness

New section 156(6) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

28. Section 16 of the Bill substitutes a new section 156 into the Criminal Procedure (Scotland) Act 1995 introducing a new procedure for obtaining and issuing warrants for the apprehension of witnesses. Section 156(6) provides that warrants issued under section 156 shall be in such form as may be prescribed by Act of Adjournal or shall be as close to that form as possible.

Reason for taking power

29. This power relates to the form that court documents will take. Such matters are generally dealt with by Act of Adjournal. The substantive content and the circumstances in which the
warrant may be issued is set out within the primary legislation. Detailed matters relating to court procedure, such as the content of court forms, are generally not considered appropriate to be included in primary legislation.

Choice of procedure

30. The form of the warrant issued by the court in this regard is a procedural and administrative matter. It can appropriately be dealt with by the High Court of Justiciary by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally.)

Section 21 – Power to prescribe form by which documents are to be served on an accused’s solicitor

New Section 148C(1) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

31. Section 21 of the Bill inserts new sections 148B and 148C into the 1995 Act. These sections provide for documents to be served on solicitors in summary criminal proceedings. Section 148C(1) provides that service of any items in summary proceedings on solicitors, must be in such form and manner as may be prescribed by Act of Adjournal.

Reason for taking power

32. This power relates to the technical content of court documents which are generally dealt with in the Act of Adjournal. This ensures that their content is relevant, kept up to date and allows the substantive law of criminal procedure to operate effectively.

Choice of procedure

33. Rules made under this power are procedural and administrative. Detailed matters relating to court procedure, such as the content of court forms, are generally not considered appropriate to be included in primary legislation. They relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally.)
Section 35(3) – Power to amend maximum term of imprisonment in legislation

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

34. Section 35 makes provision in relation to the maximum term of imprisonment which can be imposed by a sheriff on summary conviction for a statutory offence. In relation to offences which can be tried on summary complaint or indictment, section 35(1) provides that the maximum sentence on summary conviction is to be 12 months imprisonment. Section 35(2) then provides that all relevant penalty provisions are to be read subject to the terms of section 35(1).

35. Section 35(3) allows the Scottish Ministers to make textual amendments to the relevant penalty provisions that are affected by section 35(1).

Reason for taking power

36. The power in subsection (3) does not extend what is done in subsections (1) and (2). It simply provides a power to textually amend individual offence provisions that are covered by the general provision in subsection (2). Its use will avoid ongoing reliance on the general amendment and will tidy the statute book.

Choice of procedure

37. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate in view of the technical nature of the power. The exercise of the power will not alter the new penalties that apply by virtue of subsections (1) and (2).

Section 35(4) – Power to increase maximum term of imprisonment to 12 months

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by statutory instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

38. Section 35 makes provision in relation to the maximum term of imprisonment which can be imposed by a sheriff on summary conviction for a statutory offence. Section 35(4) allows the Scottish Ministers to amend certain statutory provisions relating to the creation of new offences and penalties. The provision applies to statutes that contain powers to create offences that are triable either on indictment or on summary complaint. Where such a power exists, the Scottish Ministers may amend it so that the maximum term of imprisonment to which a person is liable on summary conviction of an offence is 12 months.
Reason for taking power

39. Section 35(2) operates so as to increase the summary sentencing limit that appears in certain enactments made before the passing of this Bill. However, where offences are set out in subordinate legislation, the maximum penalty set out in the enabling legislation will not be automatically amended. Section 35(4) allows such amendment to take place. This will ensure that the enabling legislation is not at odds with what is in the subordinate legislation, when it is read in accordance with section 35(2). It also ensures that subordinate legislation made under that enabling legislation following the commencement of the provisions in this Bill can contain the higher summary sentencing limits.

Choice of procedure

40. Such an order will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate given that the extent of the power is clearly limited. It is essentially consequential on the provisions of section 35(1) and (2).

Section 36(1) – Power to amend the maximum length of imprisonment, level of fine or amount of caution in a JP court in section 7(6) or (7) of the 1995 Act.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

41. Section 36 gives Scottish Ministers the power to amend the maximum term of imprisonment, level of fine or amount of caution that may be imposed in the JP court when dealing with common law offences. It will also be possible, if necessary, to make the same changes to sentencing levels within any remaining district courts by virtue of the order making power at section 51(5) of the Bill, discussed below.

42. At present, the maximum sentence that can be imposed by a JP in the district court, when dealing with a common law offence, is sixty days’ imprisonment, or a fine or caution of up to level 4 on the standard scale (currently £2,500). The same limit will apply to JPs when sitting in the JP court by virtue of section 7(6) of the 1995 Act, as amended by paragraph 7 of the schedule to the Bill. The order making power in section 36(1) enables Ministers to increase the maximum sentences to six months’ imprisonment, or a fine or caution of up to level 5 on the standard scale (currently £5,000). Any increase in the JPs’ sentencing powers beyond this would require further primary legislation.

Reason for taking power

43. Ministers see potential benefits in allowing JPs to hear some cases which are currently heard in the sheriff courts. However the initial focus of the reforms is on putting in place a more effective system of recruitment, appointment, training and appraisal for JPs. This will ensure that JPs have the support they need in order to perform their current role to a consistently high standard.
44. For these reasons it is not considered appropriate to increase JPs’ sentencing powers immediately. However, the power in section 36(1) will allow the sentencing powers of JPs to be increased in the future. In practice, Ministers do not intend to use the powers until other changes to the system of lay justice have had an effect. Ministers consider, however, that any increase in sentencing powers beyond six months’ imprisonment and a £5,000 fine or caution should be introduced by primary legislation.

Choice of procedure

45. Section 36(3) places a limit upon the power that these provisions provide to change JPs’ jurisdiction. Nevertheless, the provisions would still enable Ministers by order to increase the custodial sentence which JPs can impose. Since this is a significant proposal, Ministers believe that any order made under these powers should be subject to the level of parliamentary scrutiny that the affirmative procedure provides.

Section 36(2) – Power to amend the maximum length of imprisonment or level of fine in a JP court in any enactment other than s7(6) and 7(7) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

46. This provision allows Ministers to make an order amending the maximum penalties that may be imposed in the JP court for any statutory offence. The powers given to Ministers in section 36(2) reflect those that are given under section 36(1). The difference is that section 36(1) relates to penalties for common law offences while section 36(2) relates to penalties for statutory offences.

Reason for taking power

47. The reasons for taking this power are the same as those set out in the explanatory paragraphs on section 36(1).

Choice of procedure

48. The reasons for making any order under this power subject to affirmative procedure are the same as those set out in the explanatory paragraphs on section 36(1).
Section 39(1)(f) – Power to make provision for fixed penalty discounts

New section 302(7A) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

49. Section 39(1)(f) introduces a new section 302(7A) into the 1995 Act. This provides that the Scottish Ministers will have the power to make provision for discounts to be applied to the payment of fixed penalties (sometimes known as “fiscal fines”). In particular, the Scottish Ministers will have the power to fix the amount of any discount, and regulate the circumstances in which the discount is to be applied to the fixed penalty.

Reason for taking power

50. The present position is that fixed penalties have to be paid in full, and whether or not a penalty is paid timeously the alleged offender is not entitled to any discount. The power gives the Scottish Ministers the opportunity of exploring whether the offer of a discount for timeous payment of a fixed penalty would increase the acceptance and collection rate. If this power is used, Scottish Ministers could subsequently modify the size of the discount and the circumstances in which a discount would be made available in the light of experience. There may be a need to further amend any provision made to take account of changes in circumstances such as the collection rate.

Choice of procedure

51. An order made under section 302(7A) of the 1995 Act will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature. The principle of a discount is provided for in the primary legislation itself – the order would relate to the detailed provision and operation of the scheme.

Section 39(2) – Power to prescribe the maximum level of a compensation offer.

New section 302A(8) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

52. Section 39(2) introduces a new section 302A(8) into the 1995 Act. That section gives the Scottish Ministers the power to fix the maximum level of the new compensation offer. The amount is not to exceed level 5 on the standard scale, which is presently £5000.
Reason for taking power

53. It is regarded as appropriate that Scottish Ministers should have the power to set the maximum level applicable to a compensation offer. This allows for a degree of flexibility and also gives Ministers the power to consider the appropriate level of the maximum should the standard scale be altered by other legislation.

Choice of procedure

54. An order made under section 302A(8) of the 1995 Act will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature. The principle of the compensation offer itself is provided for in the primary legislation. Any order made under this power will be subject to the upper limit which has been agreed by Parliament.

Section 40 – Power to prescribe the kinds of activity that may be performed as part of a Work Order

New section 303ZA(14) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

55. Section 40 introduces section 303ZA(14) into the 1995 Act. This forms part of the provisions which create and regulate the work order, an alternative to prosecution which can be offered by the procurator fiscal. Under a work order, the alleged offender will be given the opportunity to perform a number of hours of unpaid work. If this is done, no conviction will be recorded. Section 303ZA(10) provides that where such an order is made, the supervising officer shall determine, inter alia, the nature of the work to be performed.

56. Section 303ZA(14) gives Scottish Ministers the power to make provisions for the purposes of section 303ZA(10), including the kinds of activity to be carried out.

Reason for taking power

57. It is intended that, where possible, the type of activity to be carried out will be responsive to the views of the relevant community. This power gives Ministers flexibility in assessing the type of activities which are (or are not) to be carried out under a work order in any given area. The views of the community may alter from time to time, and this power enables Ministers to adjust the requirements as circumstances change.

58. This power is similar to that in section 245K(5) and (6) of the 1995 Act. Those provisions deal with the types of work to be carried out under a community reparation order and were inserted by the Antisocial Behaviour (Scotland) Act 2004. It is anticipated that there may be some similarities between the activities to be carried out under each type of order.
This document relates to the Criminal Proceedings etc. (Reform) Scotland Bill (SP Bill 55) as introduced in the Scottish Parliament on 27 February 2006

Choice of procedure

59. Regulations made under section 303ZA(14) of the 1995 Act will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature. The principle of the work order itself is provided for in the primary legislation.

Section 43 – Power to make further provision as to fines enforcement officers and their functions

New section 226A(4) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

60. Section 43 inserts new sections 226A to 226I into the 1995 Act. Section 226A allows the Scottish Ministers to authorise persons to act as fines enforcement officers (FEOs). It also sets out the general functions of FEOs as (a) providing information and advice to offenders as regards payment of relevant penalties and (b) securing compliance of offenders with enforcement orders. Subsection (4) allows Ministers to make, by regulations, further provision as to FEOs and their functions.

Reason for taking power

61. FEOs are to be introduced on a phased basis and some of their powers may be piloted in one or more areas before being rolled out nationally. In view of the novel nature of the provisions concerning FEOs, there is a desire to build sufficient flexibility into the provisions to allow adjustments to be made following the evaluation of the pilots. It may also become apparent, as pilots progress, that the existing functions of FEOs need to be amended. This power would allow for such changes to be made with the minimum of delay – ensuring that the provisions in relation to FEOs achieve the aims of improving fine collection levels and reducing the number of people who go to prison as a result of fine default.

Choice of procedure

62. Due to the significance and impact of the functions of FEOs and the need for proper scrutiny of any changes to their powers it is considered that the scrutiny afforded by the affirmative procedure should apply.
Section 43 – Power to make detailed provision relating to the seizure of vehicles

New section 226D(10) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

63. Section 226D(10) of the 1995 Act (as inserted by section 43 of the Bill) allows Scottish Ministers to make regulations in connection with the power for FEOs to direct that a motor vehicle belonging to an individual in default of their fine payments be immobilised or impounded. Subsection (11) gives examples of what such regulations may include, e.g.: the circumstances in which a seizure order may (or may not) be made; the value of a vehicle seizable in relation to the level of penalty outstanding; to ensure protections for owners of vehicles apart from those owned by the defaulter; as to the fixing of notices to vehicles to which an immobilisation device has been fitted; and as to the keeping and release of vehicles immobilised or impounded.

Reason for taking power

64. The overall framework relating to seizure of vehicles by a fines enforcement officer is set out in new section 226D of the 1995 Act (as inserted by section 43 of this Bill). As the role of FEO is yet to be introduced and a number of the powers of FEOs will be piloted in advance of wider roll-out, it is considered prudent to leave some matters of detail relating to the practical operation of this scheme to regulations. However, the statutory provisions themselves contain a considerable amount of detail. In addition, examples of what may be included in the regulations under subsection (10) are set out in subsection (11).

Choice of procedure

65. The powers of FEOs in relation to seizure are clearly set out in the Bill itself. The regulations would cover a range of detailed procedural matters and accordingly the negative resolution procedure is considered to be appropriate.

Section 43 – Power to describe the form of a warrant for civil diligence exercisable by a fines enforcement officer

New section 226F(1) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

66. When a court makes an enforcement order (enabling the fine it imposes to be collected by a FEO) one of the powers that will be available to the FEO will be to recover the fine by way of certain forms of civil diligence (namely earnings arrestment and arrestment of money in a bank
or building society account). In order for those powers to be exercised the court will have to grant a warrant for civil diligence which will need to be in a set form. New section 226F(1) of the 1995 Act (as inserted by section 43 of this Bill) provides that such warrant is to be in a form prescribed by Act of Adjournal.

Reason for taking power

67. A warrant granted under section 226F(1) will authorise a FEO to execute certain types of diligence such as arrestment of earnings and bank accounts. The precise form that a court warrant should take is a matter that is dealt with in rules of court, made by Act of Adjournal.

Choice of procedure

68. This power relates to the technical content of court documents (the form which a warrant should take in this case) which are dealt with in the Act of Adjournal. This ensures that their content is relevant, kept up to date and allows the substantive law of criminal procedure to operate effectively. Rules made under this power are procedural and administrative. They relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally.)

Section 43 - Power to make detailed provision regulating execution of relevant diligences by a fines enforcement officer

New section 226F(6) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

69. When a court makes an enforcement order (entitling the fine it imposes to be collected by a FEO) one of the range of powers that will be available to the FEO will be to recover the fine by way of certain forms of civil diligence (namely earnings arrestment and arrestment of money in a bank or building society account). The manner in which those types of diligence may be executed by FEOs will be detailed by the regulations made under this power. The power will allow Ministers to specify the circumstances in which the types of diligence mentioned are (or are not) to be executed by a FEO and to modify the application of any enactment or rule of law applying in relation to those types of diligence in so far as they may be executed by a FEO.

Reason for taking power

70. The detailed procedures to be followed by a FEO in executing any diligence are still under development. The intention is to ensure that the procedures mirror existing diligence procedures in so far as possible. It is considered that flexible powers are required in this area in order to ensure that the FEO can effectively execute diligence to ensure that fines are collected in this manner where appropriate. The power is also required to ensure that any changes to the law of diligence (such as those that are being made in the Bankruptcy and Diligence Bill) can be applied to FEOs with such modifications as may be necessary.
Choice of procedure

71. Regulations made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other hand, the need for scrutiny for a provision of this nature. The principle of allowing FEOs to execute certain forms of civil diligence is provided for in the primary legislation – this power relates to the detailed procedure surrounding the execution of any such diligence.

Section 43 – Power to include other penalties within the meaning of ‘relevant penalty’ and to specify the ‘relevant court’ in respect of a particular penalty or penalties

New section 226I(1) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

72. New section 226I of the 1995 Act contains various definitions of terms used in new sections 226A – 226G of the 1995 (which establish FEOs and make provision in relation to their powers and duties). A list of the penalties falling within the definition of “relevant penalty” appears in subsection (1). A definition of “relevant court” is also provided in subsection (1). The term “relevant penalty” is used in new section 226B(1) to describe the type of penalty which an FEO may enforce when a court grants an enforcement order. The term “relevant court” is used in new section 226B(4) to describe the court which may make an enforcement order in respect of the penalty. Section 226I(1) gives Ministers the power by order to include other penalties in the definition of “relevant penalty” and the power to specify which court should be the “relevant court” in respect of those other penalties.

Reason for taking power

73. This power is required to cover new penalties which may be appropriate for enforcement by the FEO in future. It is not possible to predict those penalties so the power provides the flexibility to deal with changing circumstances and ensure that the policy intention behind the establishment of the FEO (better collection rates and fewer defaulters being imprisoned in default of payment) is not frustrated by the creation of new penalties.

Choice of procedure

74. The order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other hand, the need for scrutiny for a provision of this nature.
Section 44(1) - Power to prescribe form of report to be served on a probationer following breach of a probation order

New section 232(1A) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

75. Section 44(1) of the Bill inserts a new subsection (1A) into section 232 of the 1995 Act. Section 232 makes provision about failure to comply with the requirements of a probation order. Section 232(1A) requires reports made under section 232(1) to be served on a probationer in such manner as may be prescribed by Act of Adjournal.

Reason for taking power

76. This power relates to the manner of service of court documents, a procedural issue which is generally dealt with in the Act of Adjournal. Use of the Act of Adjournal ensures consistency of practice and also allows the rules to be changed if necessary to ensure that they are relevant, up to date and allow the substantive law of criminal procedure to operate effectively.

Choice of procedure

77. Rules made under this power are procedural and administrative. Detailed matters relating to court procedure, such as the content of court forms, are generally not considered appropriate to be included in primary legislation. They relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally).

Section 44(2) - Power to prescribe form of report to be served on an offender in breach of a community service order

New section 239(4ZA) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the High Court
Power exercisable by: Act of Adjournal
Parliamentary procedure: None

Provision

78. Section 44(2) of the Bill inserts a new subsection (4ZA) into section 239 of the 1995 Act. Section 239 makes provision about the requirements of community service orders. Section 239(4ZA) requires reports made under section 239(4) to be served on an offender in such manner as may be prescribed by Act of Adjournal.
This document relates to the Criminal Proceedings etc. (Reform) Scotland Bill (SP Bill 55) as introduced in the Scottish Parliament on 27 February 2006

Reason for taking power

79. This power relates to the manner of service of court documents, a procedural issue which is generally dealt with in the Act of Adjournal. Use of the Act of Adjournal ensures consistency of practice and also allows the rules to be changed if necessary to ensure that they are relevant, up to date and allow the substantive law of criminal procedure to operate effectively.

Choice of procedure

80. Rules made under this power are procedural and administrative. Detailed matters relating to court procedure, such as the content of court forms, are generally not considered appropriate to be included in primary legislation. They therefore relate to the type of matters which can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see also section 305 of the 1995 Act which makes provision for the Act of Adjournal generally).

Section 46(2) – Power to establish Justice of the Peace courts

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

81. In order to facilitate the move towards a unified summary courts administration, JP courts will be established across Scotland, to replace the current district courts, on a phased basis. JP courts will be administered by the Scottish Court Service (SCS). Section 46(1) of the Bill places Ministers under a duty to secure the adequate and efficient provision of courts of summary criminal jurisdiction in Scotland. In pursuance of that duty, section 46(2) of the Bill provides that Ministers may by order establish courts of summary criminal jurisdiction to be known as justice of the peace courts.

Reason for taking power

82. The process of court unification will take place on a phased basis, sheriffdom by sheriffdom, over a number of years. The establishment of JP courts (and the disestablishment of district courts) will be taken forward as part of that phased process. A power to establish JP courts by order is required in view of the fact that the process will be phased and that the exact timing of that phasing will depend on the lessons learned from one phase before moving into the next. Until volumes of business and estates requirements are fully known Ministers will be unable to precisely establish the level of JP court provision required – the order making power will allow changes to be taken into account and new circumstances to be considered as court unification proceeds across Scotland.

Choice of procedure

83. The order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other hand, the need for scrutiny for a provision of this nature. The provision relates to the implementation of JP
This document relates to the Criminal Proceedings etc. (Reform) Scotland Bill (SP Bill 55) as introduced in the Scottish Parliament on 27 February 2006

courts – the detailed legislative framework under which they will operate is included in the Bill itself.

Section 46(6) – Power to relocate or disestablish a JP court

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

84. In order to facilitate the move towards a unified summary courts administration, JP courts will be established across Scotland, to replace the current district courts, on a phased basis. ‘JP courts’ will be administered by the Scottish Court Service (SCS). Section 46 of the Bill places Ministers under a duty to secure the adequate and sufficient provision of courts of summary criminal jurisdiction in Scotland. In order to help fulfil that duty section 46(6) of the Bill provides that Ministers may by order provide for the relocation or the disestablishment of a JP court.

Reason for taking power

85. A power to relocate or disestablish JP courts by order is required in order to ensure that Ministers have flexibility to respond to changing business and accommodation needs. For example, in due course it may be appropriate to relocate a JP court to a new area within the sheriff court district where business need is high or there are access to justice issues to be addressed. Alternatively, existing premises may become unsuitable, requiring a relocation.

Choice of procedure

86. The order made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other hand, the need for scrutiny for a provision of this nature. The provision relates to the detailed provision and location of JP courts in response to changing circumstances.

Section 50(2) – Power to provide that a JP court is to be constituted by one JP only

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

87. This provision allows Scottish Ministers to amend section 6(2) of the 1995 Act, which states that “The jurisdiction and powers of the district court shall be exercisable by a stipendiary magistrate or by one or more justices”. This allows JPs to sit in benches of one, two, three or more. In practice, in Scotland, most JPs sit on their own, but there are approximately 18 district courts which have three person benches.
88. Section 50(2) of the Bill allows Ministers, by order, to amend section 6(2) of the 1995 Act so that it provides that a JP court, when not constituted by a stipendiary magistrate, shall be constituted by only one JP.

**Reason for taking power**

89. The reason for taking this power is that Ministers see possible advantages in ensuring consistency across Scotland in terms of the size of bench which is used within the JP court.

90. Ministers recognise that as workloads are currently organised, sitting in three person benches enables justices in rural areas to gain sufficient bench experience to maintain their skills. In addition, there is no hard evidence on whether one or three person benches lead to better judicial decision-making. It has therefore been decided that the other changes to the lay justice system should take effect before a decision is taken on this further change to the working practices of some of the courts over which justices preside.

91. For all of these reasons, it is not considered appropriate to make any changes to the size of the bench in the JP courts at present. Ministers do, however, wish to retain the flexibility to make such a change at a later date, upon consideration of how a reformed lay justice system is operating.

**Choice of procedure**

92. The change that any order under this provision would make is not one which Ministers have yet decided to implement. In addition, it is a change which could be subject to some controversy, particularly in areas which currently have three person benches. For that reason, Ministers think that it is important that any order made under section 50(2) is subject to the parliamentary scrutiny that the affirmative procedure would provide.

**Section 51(1) – Power to disestablish district courts**

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

**Provision**

93. In order to facilitate the move towards a unified summary courts administration, JP courts will be established across Scotland, to replace the current district courts, on a phased basis. Section 51 provides that Ministers may by order provide for any district court to be disestablished and may impose specific requirements on the local authority responsible for the court in relation to that disestablishment.

**Reason for taking power**

94. The process of court unification will take place on a phased basis, sheriffdom by sheriffdom, over a number of years. The establishment of JP courts and the disestablishment of district courts will be taken forward as part of that phased process. The power to gradually disestablish district courts as they are replaced by JP courts is essential to facilitate the process.
The power needs to be flexible in view of the fact that the process will be phased and that the exact timing of that phasing will depend on the lessons learned from one phase before moving into the next.

95. The power also allows provision to be made in relation to staffing and property of the district court (sections 52(1) and (5)).

Choice of procedure

96. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other hand, the need for scrutiny for a provision of this nature. The provision relates to the disestablishment of individual district courts – the principle of that approach as a consequence of the court unification process is provided for in the Bill itself.

Section 51(4) – Power to repeal provisions of the District Courts (Scotland) Act 1975

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament</td>
</tr>
</tbody>
</table>

Provision

97. The provision enables Ministers to repeal by order any or all of the provisions of the District Courts (Scotland) Act 1975. The 1975 Act contains provisions on district courts and justices and clerks of the peace.

Reason for taking power

98. The provisions of the 1975 Act will be superseded by the provisions of this Bill. Eventually, therefore, the whole of the 1975 Act will be repealed. It will, however, be necessary to repeal different parts of the 1975 Act at different times in view of the fact that the disestablishment of district courts will take place on a phased basis over a number of years. Accordingly, once the district courts in a particular sheriffdom are disestablished, the Scottish Ministers will repeal the 1975 Act in so far as it applies in that sheriffdom. At the same time, they will commence the relevant provisions of the Bill relating to JP courts for that sheriffdom. This will make it clear that local authorities no longer have responsibility for providing district courts and that the Scottish Ministers have assumed responsibility for the provision of the new JP court.

Choice of procedure

99. Ministers have made clear the intention to repeal the 1975 Act and replace it with the provisions in this Bill. Order-making powers are necessary as a transitional measure to provide the flexibility to do this, over time, in the way which best facilitates the effective operation of the criminal justice system. Decisions about the timing of the repeal of different parts of the 1975 Act will be of a largely technical nature. It is therefore proposed that orders made under this provision should be subject to the negative procedure.
Section 51(5) – Power to apply enactments relating to JP courts to remaining district courts

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

100. This provision entitles Ministers to apply any statutory provisions referring to JP courts to any district courts that remain in operation.

Reason for taking power

101. As court unification will proceed on a sheriffdom by sheriffdom basis, district courts will continue to operate as they do at present in some parts of Scotland until the programme of court unification is complete. In order to ensure that the operation of the remaining district courts is in line with the new JP courts it may be necessary to apply certain provisions of the Bill relating to JP courts to the remaining district courts (e.g. alterations to sentencing limits in section 36 of the Bill). This provision will ensure a consistent approach to managing criminal cases during the transitional period.

Choice of procedure

102. Ministers have made clear the intention to move towards a unified summary criminal court administration by way of the provisions in this Bill. Order-making powers are necessary as a transitional measure to ensure that those district courts that remain can continue to manage business effectively. Orders made under this section will be subject to the negative resolution procedure. This is considered appropriate for a transitional provision of this nature.

Section 51(6) – Power to modify enactments for the purpose of the continued operation of remaining district courts

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

103. This provision entitles Ministers to modify the provisions of the 1975 Act and any other relevant enactment, including the 1995 Act, so far as it applies to any remaining district courts for the purpose of the ensuring the effective and continued operation of any remaining district courts.

Reason for taking power

104. During the court unification process it will be important to ensure that the existing legislation remains applicable to the remaining district courts and that modifications can be made to it where necessary. A flexible power is needed to ensure that courts can operate effectively whilst the process of unification takes place.
Choice of procedure

105. As with the power at section 51(5), the power at subsection (6) is transitional in nature, and is needed to ensure that district courts can operate effectively pending the completion of the unification process. The negative procedure is considered appropriate for a transitional provision of this nature.

Section 51(7) - Power to make provision relating to the jurisdiction and powers of remaining district courts

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

106. This power entitles Ministers to make provision in relation to the functions (including the jurisdiction and/or powers) of any remaining district courts for the purpose of their continued operation.

Reason for taking power

107. As the unification process will take a number of years it will be important to ensure that the existing legislation remains applicable to the remaining district courts and that specific provision can be made in respect of one or more district courts to ensure a consistent approach to the management of criminal cases during the transitional period. The power follows on from the power at section 51(6). Where subsection (6) allows enactments to be modified, subsection (7) allows transitional provisions to be made that might go beyond a statutory modification.

Choice of procedure

108. As with the powers at sections 51(5) and (6), the power at subsection (7) is transitional in nature, and is needed to ensure that district courts can operate effectively pending the completion of the unification process. The negative procedure is considered appropriate for a transitional provision of this nature.

Section 54(5) – Power to regulate procedure and consultation to be followed in certain appointment processes for Justices of the Peace

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

109. This provision gives Ministers the power to make orders relating to the procedure and consultation to be adopted in appointing justices of the peace. The provision mirrors the provision in section 9(8A) of the District Courts (Scotland) Act 1975, which was inserted by the Bail, Judicial Appointments etc. (Scotland) Act 2000. No orders have been made under the provisions of the 1975 Act.
110. Under section 54(5)(a) and (b) of the Bill, the requirements relating to procedure and consultation will not apply in a situation when an existing JP is being reappointed – either when existing JPs become subject to the new appointment system, or when a JP reaches the end of their five year term of appointment.

111. Section 54(6) of the Bill provides that an order made under this provision can specify the degree of lay involvement in the recruitment process, and the manner in which JP vacancies are to be publicly advertised.

Reason for taking power

112. Ministers intend to ensure that the recruitment of new JPs is carried out in a consistent, fair and transparent manner throughout Scotland. The power to make an order will allow them to set out in detail the means by which the new recruitment process will operate. It will also provide flexibility to change and update the procedures as required.

Choice of procedure

113. The Bill makes it clear that these provisions for consultation may involve public advertisement and lay involvement in the selection process. In addition, these provisions will provide greater transparency in relation to the selection process than is currently the case. The order in question will relate to the detailed mechanisms to be followed under the selection process as opposed to the basic framework of JP appointment which is outlined in the Bill. Ministers are therefore of the view that this order should be subject to the negative procedure.

Section 54(7)(a) – Power to specify the date on which the current appointment of justices of the peace ceases to have effect

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

114. This provision allows Scottish Ministers to specify the date on which JPs’ current appointments will cease. All current JPs will have their existing appointments terminated under this provision. There is a presumption that full JPs will then be appointed for a five year term as a JP (which would commence on the same day as the termination of their existing appointment) if they accept terms of appointment relating to training, appraisal and making themselves available to meet the business needs of the area.

Reason for taking power

115. The precise date on which JPs’ appointments will cease has yet to be determined. It is possible – although unlikely – that Ministers will decide that JPs should switch to the new system of five year appointments for full JPs on different dates in different parts of the country. The order making power contained under this provision provides Ministers with flexibility in how to implement this transitional measure.
Choice of procedure

116. The power being sought is a technical one, relating to the date at which a measure in the primary legislation will be implemented. It is therefore considered that the negative procedure is appropriate for any order made under this provision, balancing speed and flexibility with the need for scrutiny.

Section 56(1) – Power to make provision for training and appraisal of Justices of the Peace

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

117. Section 56(1) allows Scottish Ministers to make provision by order relating to the training arrangements for JPs and the appraisal of JPs. Under section 56(2) such an order may confer functions upon the Lord President, and any such order may not be made without the Lord President’s prior approval of the provision contained in the order.

118. The order may set out the arrangements for establishing committees with a role in ensuring that appraisal is delivered in each sheriffdom. The order may also empower the Lord President to draw up training schemes or courses of instruction for justices of the peace (in practice, this would probably be done through the non-statutory Judicial Studies Committee).

Reason for taking power

119. The order may include some quite detailed provisions on issues such as the composition of any appraisal or training committee. Ministers wish to retain some flexibility to revise the provisions made for the training and appraisal of JPs, in case evidence shows that, once the new training system has come into operation, revisions would be desirable. If the detailed provision for training were to be set out in statute it could quickly become out of date and require further amendment.

Choice of procedure

120. The order will outline the manner in which detailed arrangements for training and appraisal are to be organised. This will be of a technical nature, addressing how training and appraisal should be delivered, rather than impacting upon the basic principle that JPs should be trained and appraised in accordance with a framework that has judicial approval. It is therefore considered that the negative procedure is appropriate for any order made under this provision, balancing speed and flexibility of passage with the need for scrutiny.
Section 58(6) – Power to make provision for tribunals for the removal of Justices of the Peace

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

121. This provision allows Scottish Ministers to make provision by order relating to a tribunal which can be established to investigate whether a JP should be removed. The provision replaces section 9A(7)-(9) of the District Courts (Scotland) Act 1975. Under section 58(5) of the Bill the tribunal would be established at the instance of the sheriff principal, rather than at the instance of Scottish Ministers (as is the case under the 1975 Act). It is envisaged that the procedures set out any such order will be very similar to those in the Justices of the Peace (Tribunal) (Scotland) Regulations 2001, which currently govern the operation of such tribunals.

122. The provision states that an order may authorise a specified body or class of persons to recommend to a sheriff principal that an investigation be carried out. In practice, it is envisaged that the appraisal committee in each sheriffdom will be given the power to recommend to a sheriff principal that an investigation be carried out. Appraisal committees might do this if, for example, a JP were found in an appraisal to have serious training needs, and had then received the necessary training, but was still found in a follow-up appraisal not to be adequately performing their functions.

Reason for taking power

123. The provisions relating to the organisation and conduct of tribunals will cover issues such as the procedure for writing to the relevant JP with a draft of the tribunal’s findings and what should happen if a tribunal member becomes unable to serve on the tribunal during the course of the investigation. This order will be detailed and technical in nature. The general principle of establishing a tribunal for the removal of JPs in certain circumstances is provided for in the Bill itself – these more detailed powers will regulate that process.

Choice of procedure

124. The order will largely replicate the 2001 Regulations which were subject to negative procedure. Ministers are of the view that negative procedure continues to be appropriate, in view of the technical nature of these provisions and the fact that they implement detailed policy within the framework of the Bill.
Section 61(9) – Power to regulate procedure/consultation to be followed in making appointments of stipendiary magistrates

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

125. This section provides that, in appointing stipendiary magistrates, Scottish Ministers must comply with such requirements relating to procedure and consultation as they may by order make. Requirements for procedure and consultation will not apply, however, in cases where existing stipendiary magistrates are being reappointed.

126. The District Courts (Scotland) Act 1975 does not give Scottish Ministers any equivalent order-making power, since recommendations on which stipendiary magistrates should be appointed are currently provided by the relevant local authority. Under a unified courts system, however, that will no longer be the case.

127. Section 61(10) of the Bill provides that an order made under this provision can specify the degree of lay involvement in the recruitment process, and the manner in which vacancies are to be publicly advertised. This provision mirrors that made with regard to justices of the peace at section 54(6). There will however be differences between the regulations relating to the appointment of stipendiary magistrates, and those relating to the appointment of JPs. This reflects the fact that stipendiary magistrates are members of the professional judiciary, and have higher sentencing powers than lay justices of the peace.

Reason for taking power

128. Ministers intend to ensure that the recruitment of stipendiary magistrates is carried out in a fair and transparent manner. Stipendiary magistrates are professional judges, and after the administration of the summary court system has been unified, the relevant local authority will no longer have responsibility for their recruitment. The Scottish Executive is currently discussing with the Judicial Appointments Board how stipendiary magistrates should be recruited. The power to make an order will allow Ministers to set out in detail the means by which the new recruitment process will operate. It will also provide some flexibility to change and update the procedures as required.

Choice of procedure

129. The Bill already provides that this power may be used to make provision relating to the degree of consultation required in the recruitment process and that the process may involve public advertisement and/or lay involvement in the selection process. The order in question will relate to the detailed mechanisms to be followed under the selection process as opposed to the basic framework of appointment for stipendiaries, which is outlined in the Bill. Ministers are therefore of the view that this order should be subject to the negative procedure – balancing speed and flexibility of passage with the need for scrutiny.
Section 61(12) – power to specify the date on which the current appointment of stipendiary magistrates ceases to have effect

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

130. This provision allows Scottish Ministers to specify the date on which stipendiary magistrates’ current appointments will cease. All current stipendiary magistrates will have their existing appointments terminated under this provision. They will then be appointed for a renewable five year term as a full-time or part-time stipendiary magistrate if they accept terms of appointment relating to training, appraisal and making themselves available to meet the business needs of the area.

Reason for taking power

131. The precise date on which stipendiary magistrates’ current appointments will cease has yet to be determined (this is connected to the phased implementation of court unification. At present there are only stipendiary magistrates in Glasgow). The order making power contained under this provision provides Ministers with the necessary flexibility to implement the new system of appointments at an appropriate time (in practice it is likely to coincide with the Sheriffdom of Glasgow and Strathkelvin being unified and Glasgow district court coming under the control of the Scottish Court Service).

Choice of procedure

132. The power being sought is a technical one, relating to the date at which a measure in the primary legislation will be implemented. It is therefore considered that the negative procedure is appropriate for any order made under this provision, balancing speed and flexibility of passage with the need for scrutiny.

Section 69 – Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament, unless the order amends an Act in which case affirmative resolution.

Provision

133. Section 69 of the Bill confers on Scottish Ministers a power to make by order such incidental, supplementary, consequential, transitory, transitional or saving provision as they consider necessary or expedient. Section 69(2) ensures that the power extends to the modification of any enactment (including the Bill), instrument or document, although where that is done, section 69(3) provides that the instrument will be subject to affirmative procedure.
Reason for taking power

134. Any body of new law, particularly one contained in a large reform measure such as the Bill, gives rise to a need for a range of ancillary provisions.

135. The Executive considers that the power to make such provision should extend to modification of enactments, including the Bill.

136. Without the power to make incidental, supplemental and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament’s or the Executive’s resources.

137. The Executive expects that transitory and transitional provision will also be needed to facilitate implementation of some reforms. As the process of court unification will be phased-in over a number of years there will be a period of time where District Courts continue to exist, regulated by existing legislation in the District Courts (Scotland) Act 1975 and JP courts will also exist, regulated by the provisions of this Bill and associated orders. Flexible provision will be necessary to ensure that both courts can operate effectively and to deal with matters such as the need for effective communication and, where necessary, transfer of business between one court and another.

138. The Executive considers it prudent to include a power to make savings provisions also – this will guard against the risk that any change in the law inadvertently leads to a situation where an accused person may avoid a criminal trial or punishment, or be treated unfairly by virtue of the transition from the existing law to the new law.

Choice of procedure

139. Where an order changes primary legislation it is submitted that the affirmative procedure is appropriate. In any other situation, the negative procedure is considered appropriate for these powers.

Section 71(1) – Commencement

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
</tr>
</tbody>
</table>

Provision

140. Section 71 of the Bill provides that Scottish Ministers may by order appoint a day when the provisions of the Bill shall come into force. Such an order may appoint different days for different purposes; include such transitional, transitory or saving provisions as the Scottish Ministers consider necessary or expedient; and make different provision for different purposes or areas.
Reason for taking power

141. A large law reform measure such as this Bill will not come into force on Royal Assent, or indeed on a single day. The Executive considers that the provisions of the Bill should be commenced at different times and for different purposes as Scottish Ministers think appropriate or expedient. This will allow changes to be implemented once those who must use the system are sufficiently prepared and will also allow phased implementation (in relation to court unification for example) to take place.

Choice of procedure

142. The decision on when and to what extent the Bill is commenced is an administrative issue for Scottish Ministers. As is usual therefore, the Executive considers that the commencement powers should not be subject to any Parliamentary procedure.

Schedule, paragraph 23(4) – Power to substitute for any reference to the district court, the area of the district court or a justice of the peace, a reference to the JP court, the area of a JP court or a justice of the peace appointed under section 54(1) of this Bill

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

143. This provision allows Ministers to amend legislation by order so that references to the district court (and related expressions) are replaced with references to the justice of the peace court (and related expressions).

Reason for taking power

144. The measure allows the statute book to be tidied up to deal with any outstanding references to the district court, the area of a district court or to JPs appointed under the 1975 Act. The change would avoid ongoing reliance on the general changes to legislation that are made by paragraphs 23(1) - (3). Any change of this nature will arise purely from the change in the name of the court, rather than from any substantive policy decision.

Choice of procedure

145. As noted above, any amendment made by regulations under this power would arise purely from the change in the name of the court, rather than from any substantive policy decision. The change would be a technical one. Consequently, the negative procedure is considered appropriate.
CRIMINAL PROCEEDINGS ETC. (REFORM) SCOTLAND BILL

DELEGATED POWERS MEMORANDUM