Purpose

1. This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.4.A of the Parliament’s Standing Orders, of provisions in the Management of Offenders etc. (Scotland) Bill introduced to the Scottish Parliament on 4 March 2005. It outlines the reasons for seeking the proposed powers and describes the purpose of each of the provisions for subordinate legislation in the Bill.

Outline and scope of the Bill

2. The Bill takes forward a number of the Scottish Executive’s policy commitments from the Criminal Justice Plan “Supporting Safer, Stronger Communities” published 6 December 2004\(^1\). In summary, the Bill:

- promotes an integrated framework for managing offenders through a more coherent and integrated delivery of offender management services by community justice authorities, consisting of members of local authorities, nominated by the authorities and supported by a chief officer and staff;

- requires community justice authorities and the Scottish Prison Service to work together to provide an action plan for co-ordinated delivery of offender services across the community justice area;

- imposes a duty on the Scottish Ministers (exercising functions under the Prisons (Scotland) Act 1989), community justice authorities and local authorities to co-operate and exchange information with one another in carrying out their respective functions;

- imposes a duty on the police, local authorities and the Scottish Ministers to establish joint arrangements for assessing and managing the risk posed by sex offenders and offenders convicted of specified categories of offence, including the sharing of information;

- strengthens procedures for taking action when sex offenders subject to the notification requirements contained in the Sexual Offences Act 2003 fail to comply with these requirements;

- provides for the creation of a Home Detention Curfew scheme which will allow early release for low risk prisoners and allow a better reintegration into communities and reduce the number of offenders detained in prisons; and

- enables the Criminal Injuries Compensation Authority to recover, in the civil courts, from perpetrators of crimes, sums which the Authority has paid out under the Criminal Injuries Compensation Scheme to victims of those crimes.

\(^1\) http://www.scotland.gov.uk/library5/justice/scjp-00.asp
Rationale for subordinate legislation

3. In considering whether matters should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has weighed the importance of the matter against the need to:

- ensure sufficient flexibility in responding to changing circumstances, and the ability to make changes quickly in the light of experience without the need for primary legislation; and

- allow detailed administrative arrangements to be set up and kept up to date within the basic structures and principles set out in the primary legislation, subject to the Parliament’s right to challenge the inappropriate use of powers.

Overview of delegated powers

Section 2(1)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument.

Parliamentary procedure: affirmative procedure of the Scottish Parliament

4. Section 2(1) provides an order making power to the Scottish Ministers to establish community justice authorities. Community justice authorities will have the role of planning, co-ordinating, monitoring and reporting on the services delivered by local authority criminal justice teams and the Scottish Ministers through the Scottish Prison Service. These authorities are expected to comprise a number of neighbouring local authorities although a single authority may comprise a community justice authority. The order will prescribe the number and boundaries of each community justice authority and will be made following consultation with key stakeholders. The intention is to set out membership of the community justice authority, the number of members for each constituent local authority, the method and weighing of voting within the community justice authority and other detailed issues relating to the constitution of community justice authorities.

5. Agencies involved in criminal justice work are already organised in a number of different ways, such as police force areas, sheriffdoms, criminal justice social work groupings, etc., which are not always co-terminous. The Executive recognises that there is a legitimate debate on the size of each community justice authority area and its boundaries and thus intends to consult on this issue in spring 2005. Thus the Bill provides the framework for the establishment of community justice authorities by order. The Order will be made subject to affirmative resolution procedure, thereby offering the Parliament the chance to scrutinise and debate the constitution, shape and number of community justice authorities before the authorities can be established.

Section 2(7)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument
Section 2(7) provides the Scottish Ministers with an order making power to amend section 2(5) of the Bill. Section 2(5) specifies the statutory functions of community justice authorities.

This power allows Ministers to alter the functions of community justice authorities without requiring primary legislation where a change is deemed appropriate. For example, once the community justice authorities become established and working relationships with the existing agencies develop it is anticipated that it may become apparent that additional functions could usefully be undertaken by the authorities. Equally it may become apparent that the existing functions should be altered or removed and section 2(7) gives Ministers the necessary flexibility to achieve this without having to resort to primary legislation. In recognition that this power enables Scottish Ministers to amend primary legislation, an order made under this subsection would be subject to scrutiny and debate through the affirmative resolution procedure in the Scottish Parliament.

Section 2(8) provides that any order under section 2(7) can prescribe different provisions for different community justice authorities. Thus the power to prescribe functions is precise and allows Ministers to specifically direct the activities of individual community justice authorities where this is deemed necessary. This provision offers further justification for the use of affirmative resolution procedure.

Section 2(16), definition of “partner bodies”

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Section 2(16) enables the Scottish Ministers to designate by order bodies as “partner bodies”. Community justice authorities will be under a duty to consult with partner bodies in preparing a plan for reducing reoffending (section 2(5)(a)(i)) and to share offender information (section 2(5)(f)). Partner bodies are not identified in the Bill and the bodies to be included will be the subject of consultation. Establishing the list of partner bodies by order eliminates the need to amend primary legislation should any body change its name or cease to exist or should a new relevant body come into existence. As this may occur relatively frequently and be uncontroversial in nature, full scrutiny associated with affirmative procedure could place a disproportionate burden on the Parliament and negative resolution is therefore considered appropriate.
Section 5(12)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

10. Section 5(12) provides the Scottish Ministers with an order making power to amend subsection 5(2) of the Bill. Section 5(2) identifies the bodies and people who may report to Ministers on the failure of the community justice authority in the carrying out of its functions. Section 5(12)(a) enables Ministers to add to the persons described in section 5(2) while section 5(12)(b) allows Ministers to alter or remove any of these persons. Such amendment would also apply in relation to the power to report on failures by local authorities in accordance with section 6. The intention of the power is to allow amendment of the list without the necessity of amending primary legislation. For example the names of the specified bodies may change, they may cease to exist (or cease to have relevant functions) or it may become apparent that additional bodies should be added to the list. However, it is recognised that such changes may generate concerns on the extent of who should report on the activities of the community justice authorities. These changes would also result in amendment to primary legislation. Therefore the order will be subject to affirmative procedure in the Scottish Parliament to allow full scrutiny and debate of any amendment to the persons described in section 5(2).

Section 7(2)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

11. Section 7(2) provides Scottish Ministers with the power by order to transfer functions described in section 27(1) of the Social Work (Scotland) Act 1968 from local authorities to a community justice authority. This provision will give flexibility to enable community justice authorities to deliver any of the individual elements of criminal justice social work services as described under section 27(1) of the Social Work (Scotland) Act 1968 in place of local authorities where that is considered more appropriate. Different provision may be made for different community justice authorities by virtue of section 7(4) thereby giving Ministers flexibility to deal with community justice authorities on an individual basis. It is recognised that the exercise of this power would involve a shift of statutory responsibility by in effect amending existing provisions in primary legislation that confer functions on local authorities. Affirmative resolution procedure is considered more appropriate.
Section 9(3)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

12. Section 9(3) provides the power to prescribe the persons with whom the “responsible authorities” (i.e. the local authority, the police and the Scottish Ministers) must cooperate in the establishment and implementation of the arrangements for the assessment and management of risk posed by certain offenders. The categories of offenders subject to these arrangements are specified in section 9(1).

13. The effective management and assessment of offenders who are subject to the provisions of section 9 will require the co-operation of a number of agencies. The provisions of section 9(3) will allow Scottish Ministers to compile and subsequently amend the list of agencies required to cooperate with the “responsible authorities” in the implementation of these arrangements, as the need is identified, without further primary legislation. The list of relevant bodies is not included in the Bill in order to allow for consultation with these agencies. It is considered that negative resolution procedure is appropriate on the basis that the decision to include many of the bodies that will be specified will be uncontroversial.

Section 9(7)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

14. Section 9(7) provides an order making power for Scottish Ministers to amend the definition of “responsible authorities”.

15. The categories of offender covered by section 9 are those which are most likely to pose a risk to the community. The three main agencies identified in the current provisions as “responsible authorities” are local authorities, the police and the Scottish Ministers. These agencies currently play a primary role in the management of high risk offenders and it is considered appropriate that there should be express reference to them on the face of the Bill. It is likely that the power in subsection (7) would only be used if Scottish Ministers required to add to the list of agencies that require to be included as “responsible authorities”. This is to ensure flexibility so that new bodies which are set up in future, or changes to existing roles and responsibilities can be accommodated and the arrangements kept up to date. In such an event it would be desirable that the definition could be amended speedily. Identifying suitable primary legislation to incorporate such an amendment is likely to incur delay and not be in the interest of improving community safety. The affirmative resolution procedure will however provide the opportunity for close scrutiny and debate by the Parliament before any amendment could be effected and is considered appropriate as the effect of the order will be to amend primary legislation.
Section 11(3)

New section 3AA(6) (further powers to release prisoners) of the Prisoners and Criminal Proceedings (Scotland) Act 1993

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

16. Section 3AA provides a new power for the Scottish Ministers to release prisoners on licence. It prescribes the limits on this power, including the period during which a prisoner is eligible for release and categories of prisoner that are to be excluded from consideration.

17. Subsections 3AA(1), (2) and (3) limit the period during which the new power can be exercised and the general category of prisoner in respect of whom the power can be exercised. It can only be exercised:

- for short term prisoners (i.e., prisoners serving a sentence of less than 4 years) serving a sentence of 3 months or more;
- for a defined group of long-term prisoners (i.e., prisoners serving a sentence of 4 or more years) where the Parole Board has made recommendations as to their release at the half way stage of their sentence;
- once such a prisoner has served one quarter of his sentence, or four weeks of his sentence (whichever is longer); and
- within 135 days of the point when he would have served half of the sentence. It also provides that the power cannot be used within 14 days before the prisoner would have been released.

18. Section 3AA(5) provides for a number of exclusions from the new power. These cover situations where the prisoner may be considered as a high risk, where special post-release arrangements are in place or where the prisoner has failed to comply with the conditions contained in a previous licence.

19. Subsection 3AA(6) provides an order making power to adjust the parameters set out in subsections (1), (2), (3) and (5). This would allow the minimum sentence length in respect of short-term prisoners, the minimum period to be served in custody and the maximum and minimum lengths of the licence period to be adjusted, and for the list of exclusions to be amended. This power should be read alongside section 27(2)(b) of the 1993 Act, which provides a power for references in the Act to particular proportions of a prisoner’s sentence to be adjusted. This existing power will allow the reference to “one quarter” of the sentence in section 3AA(2)(b) to be amended.

20. The power is considered necessary to ensure that the parameters of the new system can be kept in step with other aspects of the early release arrangements in the 1993 Act, and in light of experience of the system in practice. The list of exclusions may also require to be updated to take account of other legislative changes and experience. It is not intended that this power will be used in the short-term.
21. As the power allows the basic parameters of the home detention curfew scheme to be adjusted, and in common with the existing power in section 27(2), it is considered appropriate for orders under this section to be subject to the affirmative resolution procedure. The amendment made by section 11(12) to section 45 of the 1993 Act provides for this.

Section 11(8)

New section 12AA(3) (conditions for persons released on licence under section 3AA) of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

22. Section 12AA sets out the conditions to be included in a licence under section 3AA. The licence must include a curfew condition (as set out in section 12AB) and a set of “standard conditions”. Further conditions can be imposed under the existing section 12.

23. Subsections (3) and (4) provide that the standard conditions are to be prescribed by order by the Scottish Ministers, and subsection (5) provides that different standard conditions can be prescribed for different classes of prisoner. Subsection (6) requires Ministers, in exercising the power of prescription and in specifying additional conditions, to have regard to considerations of protecting the public at large, preventing re-offending by the prisoner, and securing the successful reintegration of the prisoner into the community, as they do when deciding whether to release a prisoner on HDC licence under the new section 3AA(1).

24. For short-term prisoners, it is proposed that the standard conditions should initially be to:

- be of good behaviour and keep the peace; and
- not commit any offence and not take any action which would jeopardise the objectives of the offender’s release on licence (i.e. protect the public, prevent reoffending and secure successful reintegration into the community).

25. For long-term prisoners, it is proposed that the standard conditions should initially be to:

- report forthwith to the officer in charge of the office at [name of office];
- be under the supervision of such officer to be nominated for this purpose from time to time by the Chief Social Work Officer of [named local authority];
- comply with such requirements as that officer may specify for the purposes of supervision;
- keep in touch with the supervising officer in accordance with that officer’s instructions;
• inform supervising officer if changes place of residence, gains or loses employment;

• be of good behaviour and keep the peace; and

• not travel outside Great Britain without prior permission of the supervising officer.

26. In the case of long-term prisoners, these are based on the usual conditions recommended by the Parole Board for inclusion in licences relating to long-term prisoners released under section 1 of the 1993 Act. Other than the second and third points listed above, the conditions included in the licences of such prisoners are non-statutory, and each condition must be specifically recommended by the Parole Board. Prescribing the standard conditions for HDC licences by order will provide greater certainty. It will also reduce the administrative burden. The proposed standard conditions will need to be consistent with the considerations set out in subsection (4) of the new section 3AA (applied by section 12AA(6)) for each individual prisoner.

27. The order-making power allows the standard conditions to be updated to keep in step with other aspects of the early release arrangements in the 1993 Act, eg changes in the usual conditions used by the Parole Board, and in light of experience and developments of the system in practice.

28. It is considered appropriate for orders under this section to be subject to the negative resolution procedure. The amendment made by section 11(12) to section 45 of the 1993 Act provides for this. As noted above, the equivalent usual conditions for other forms of release on licence are not subject to any form of Parliamentary control or scrutiny, and we do not therefore consider it desirable to require a higher level of Parliamentary involvement than that afforded by the negative resolution procedure.

29. An alternative approach would have been to set out the standard conditions in the Bill, together with a power to amend them, rather than leaving them entirely to the order-making power. As noted above, the equivalent usual conditions for other forms of release on licence are non statutory, and we do not therefore consider it desirable for this set of standard conditions alone to be prescribed on the face of the Bill.

Effect on section 245C of the Criminal Procedure (Scotland) Act 1995 (remote monitoring)

30. Although not strictly a new power, the Committee may wish to be aware of the effect of the amendments made by section 11(8) of the Bill on the existing powers contained in section 245C of the 1995 Act.

31. Section 245C(3) of the 1995 Act provides that the Scottish Ministers shall by regulations specify devices which may be used for the purpose of remotely monitoring the compliance of an offender with the requirements of a restriction of liberty order. Current provision is contained in the Restriction of Liberty Order (Scotland) Regulations 1998 (SI 1998/1802), as amended by SI 1999/144 and SSI 2002/119. Section 11(8) of the Bill inserts a new section 12AB into the 1993 Act. Subsection (3) of that new section applies section 245C of the 1995 Act in relation to compliance with the curfew condition in a HDC licence as it applies in relation to compliance with a restriction of liberty order. The effect is that the existing regulations under section 245C(3), and any future regulations, will have effect for HDC licences.
Section 11(11)

Effect on section 20 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (the Parole Board for Scotland)

32. Although not strictly new powers, the Committee may wish to be aware of the effect of the amendments made by section 11(11) of the Bill on the existing powers contained in section 20 of the 1993 Act.

33. Section 11(11) introduces a new power into the 1993 Act to allow the Scottish Ministers to revoke the HDC licence on which a person has been released and recall that person to custody. Persons recalled to custody under the new section 17A will be entitled to make representations in writing with respect to the revocation to the Parole Board (section 17A(2)(b)). By virtue of subsection (3) of the new section 17A, the Parole Board may direct the Scottish Ministers to cancel the revocation after considering such representations.

34. The existing section 20(4) of the 1993 Act provides that the Scottish Ministers may by rules make provision with respect to the proceedings of the Parole Board. The current rules are contained in the Parole Board (Scotland) Rules 2001 (SSI 2001/315). This power would allow rules to be made to cover the new role of the Parole Board in considering representations made by persons recalled to prison under section 17A.

35. Section 20(5) further provides that the Scottish Ministers may give the Board directions as to the matters to be taken into account by it in discharging its functions under Part 1 of the 1993 Act. That power would extend to the new role of the Parole Board under section 17A. No such directions are in effect, nor is it intended that the power would be used in relation to home detention curfew.

Section 13

36. Under the Criminal Injuries Compensation Scheme, the Criminal Injuries Compensation Authority (CICA) may make payments of compensation to persons who have been victims of crime. Section 13 of the Bill amends the Criminal Injuries Compensation Act 1995 (under which the Scheme is made), the effect of which is to give the CICA the power to recover certain of the sums paid out by it, from persons previously convicted of the offence to which the payment of compensation relates.

37. Section 13 of the Bill has the effect of extending the amendments made to the Criminal Injuries Compensation Act 1995 by section 57(2) of the Domestic Violence, Crime and Victims Act 2004 to Scotland, subject to the modifications set out at section 13(2) & (3). There are two types of power involved.

38. Firstly is the establishment, through regulations, of an administrative regime for recovery of compensation. This will involve making provision for the conferral of functions on officers of the CICA for the purpose of seeking recovery, the giving of notice of an intention to seek recovery, the procedure to be followed in contested recovery proceedings and provisions for the reviewing of decisions to recover.

39. As these regulations supplement the powers of the CICA under the Criminal Injuries Compensation Scheme, it is appropriate for the degree of Parliamentary scrutiny of the regulations to match the degree of Parliamentary scrutiny of the Scheme. The Scheme is
subject to affirmative resolution procedure (by virtue of section 11 of the Criminal Injuries Compensation Act 1995) and the Bill therefore makes provision for the regulations too to be subject to affirmative resolution procedure.

40. Secondly, there is proposed to be a power by order to amend the statutory list of relevant information to be contained in a recovery notice, as such information is set out at section 7B(2) of the Criminal Injuries Compensation Act 1995. This power to amend is intended to be exercised by order under section 7B(3).

41. That list is believed to be sufficiently comprehensive to cover the information which it is relevant and appropriate to be given to a person, from whom recovery is sought. However, to cover the possibility that, once the powers under these sections are applied, it becomes clear that additional (or less) information ought properly to be contained in a recovery notice, the power to modify the list as appropriate is proposed at section 7B(3).

42. More commonly, such a detailed provision might be entirely contained in secondary legislation. That is not the case here and the power to modify is an appropriate safeguard, to facilitate the adjustment of the requirements of a recovery notice, without necessitating further primary legislation.

43. Such an order making power, relating as it does to the power to amend a provision set out in primary legislation, should appropriately be subject to affirmative resolution procedure.

Section 14(1)(b)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

44. This section inserts into section 27 of the Social Work (Scotland) Act 1968, as a subsection (1B), provision to allow Scottish Ministers by order to amend the list of functions specified in section 27(1) of the 1968 Act. This enables alterations to be made to the list of functions local authorities may undertake without primary legislation being required. This will enable the statutory framework to reflect properly the way in which local authorities’ criminal justice social work responsibilities may develop over time, for example by involvement in the delivery of new forms of disposal. Since the amendments are being made to primary legislation affirmative resolution procedure is considered to be appropriate.

Section 14(2)(a)

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative procedure of the Scottish Parliament

45. This inserts into section 27A of the Social Work (Scotland) Act 1968, as a subsection (1A), provision to allow Scottish Ministers to add purposes falling within the definition of the term “relevant service” for the purposes of section 27A(1). This enables Ministers to provide
funds to the community justice authorities for the purposes of providing services under section 27 of that Act for complying with area plans or for other similar purposes that Ministers may prescribe. For example, as we develop the national strategy as planned in the Criminal Justice Plan published in December, new services may be identified which would contribute to Ministers’ aims of reducing reoffending. These might for example relate to new services which address the link between offending and drug or alcohol addiction. Whilst at this stage no additional services have been identified, this section provides flexibility so that the Executive can fund the provision of such new services, in the future. Since the amendments are being made to primary legislation affirmative resolution procedure is considered to be appropriate.

Section 15

Power conferred on: the Scottish Ministers

Power exercisable by: order by statutory instrument

Parliamentary procedure: affirmative procedure if amending primary legislation
negative procedure if amending subordinate legislation

46. Section 15 gives the Scottish Ministers the power by order to make supplementary, incidental, consequential, transitory, transitional or saving provision deemed necessary or expedient for the purposes or in consequence of, or for giving full effect to, any of the provisions within the Management of Offenders etc. (Scotland) Bill. The power would be appropriate to allow Ministers to make changes to other legislation as a consequence of the Bill that are not apparent at the moment. Affirmative resolution procedure is considered appropriate where amendments are being made to primary legislation. Negative resolution procedure is considered to be appropriate where the amendments are made to subordinate legislation.

Section 17(2)

Power conferred on: the Scottish Ministers

Power exercisable by: order by statutory instrument

Parliamentary procedure: none

47. Section 17(2) provides power to the Scottish Ministers to commence provisions of the Act by order (other than sections 13, 15, 16, 17 and 18 which commence on Royal Assent). No commencement date is specified in the Bill as Ministers are yet to determine when it would be appropriate to bring the substantive provisions of the Bill into force. As normal with Commencement Orders, no form of Parliamentary procedure is required.