POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This supplementary memorandum has been prepared by the Scottish Executive to accompany the Police, Public Order and Criminal Justice (Scotland) Bill following Stage 2 consideration of that Bill, which concluded on 18 April 2006. It details provisions in the Police, Public Order and Criminal Justice (Scotland) Bill which were inserted at Stage 2 that add new powers to make subordinate legislation or substantially alter powers which were already in the Bill. It describes the persons upon whom these powers are conferred, the form in which the powers are to be exercised, the Parliamentary procedure to which the powers are to be subject and why it is considered necessary to delegate the powers. It does not form part of the Bill and has not been endorsed by the Parliament.

FURTHER AND AMENDED DELEGATED POWERS

Section 21(1) – Regulations relating to the Agency

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

2. Section 21 has been amended to ensure that Scottish Ministers have similar regulations making powers in respect of police members of the Agency as they currently have in respect of constables of police forces.

3. The section 21 enabling powers are modelled on the enabling powers contained at section 26 of the Police (Scotland) Act 1967. The list of provisions in the Bill at introduction did not refer to conduct and discipline which is provided for in section 26(2A) of the 1967 Act. ‘Conduct and discipline of police members’ has therefore been added at subsection 2(fa) to the matters listed at section 21 in respect of which the Scottish Ministers may make regulations as regards police members of the Agency.

4. Section 26 of the Police (Scotland) Act 1967 provides a power for Scottish Ministers to make regulations governing the conditions of service in police forces including, at subsection (2)(i), “the treatment as occasions of police duty of attendance at meetings of Police Federations and any body recognised by the Secretary of State for the purposes of section 64 of the Police
This document relates to the Police, Public Order and Criminal Justice (Scotland) Bill as amended at Stage 2 (SP Bill 46A)

Act 1996” (which relates to membership of trade unions). Section 21 has been amended to include a similar regulation making power for Scottish Ministers as regards police members of the Agency who attend meetings of the Scottish Police Federation or other bodies recognised by the Secretary of State for the purposes of section 64 of the 1996 Act.

5. These additional powers will be subject to negative resolution procedure in the Scottish Parliament which is the same as the other powers contained in section 21. As we explained in paragraph 13 of the Memorandum on Delegated Powers due to the detailed technical and administrative nature of any regulations made under these powers and the need to have flexibility to amend at regular intervals, it is not thought appropriate to incorporate these detailed matter in the Bill and in our view negative procedure will provide the appropriate degree of parliamentary scrutiny as the regulations will be uncontroversial in nature and will relate to administrative and technical details.

Section 37(3)(c) – power to require or permit Commissioner to discontinue reconsideration in particular circumstances

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6. Section 32(5A) of the Bill was amended so that the Commissioner can direct a reconsidering authority to reconsider a complaint. The reconsidering authority can be either the appropriate authority in relation to the complaint (the policing body who receives the initial complaint) or another relevant authority, as defined in section 43. Circumstances may arise when it would be more appropriate for the Commissioner to ask a relevant authority to reconsider a complaint.

7. Section 37(3)(c) has been amended in consequence so that the regulations made under it allow the Commissioner to give directions to the reconsidering authority about actions it should take if the reconsideration of a complaint has to be discontinued. This change widens the category of persons to whom the Commissioner may issue directions to but does not alter any other aspect of the delegated powers under section 37 of the Bill.

8. Prior to the amendment, the regulations made under section 37(3)(c) would have allowed the Commissioner to give directions of this kind only to the appropriate authority.
New section 72B (Sex offender notification requirements)

**Effect on section 83 of the Sexual Offences Act 2003 (notification requirements: initial notification)**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** order made by statutory instrument
- **Parliamentary procedure:** affirmative procedure of the Scottish Parliament

9. Section 72B(2) amends section 83(5) of the Sexual Offences Act 2003 by inserting a new paragraph (i) to provide a general regulation making power for Scottish Ministers to extend the range of information relevant to sex offenders that they must notify to the police under Part 2 of the 2003 Act. The power allows Ministers to prescribe further information about the offender or their personal affairs which the offender will then be required to notify to the police under Part 2 of the 2003 Act. It is intended in the first instance that the power will be exercised to implement a recommendation in the Report by Professor Irving, “Registering the Risk – Review of Notification Requirements, Risk Assessment, and Monitoring of Sex Offenders”, that the bank account details of sex offenders should be information that a relevant offender has to provide to the police. Given the complex and detailed nature of these aspects of an individual’s financial affairs, it is considered more suited to set out this level of detail in subordinate legislation. For example, it could include any account held in joint names and any internet based bank accounts. It could also include the provider, account numbers, expiry dates and start dates. Accordingly, rather than try to exhaustively detail and provide for these matters on the face of the Bill itself these detailed measures will be prescribed in regulations.

10. Whilst there is no intention at present to further add to the notification requirements beyond what is currently in the 2003 Act and the new requirements to provide passport details (new section 83 (5)(h)) and the bank details that will be prescribed, it is possible that in the future there may be information that sex offenders hold that will be helpful for the police to have, in the context of the general crime prevention purposes of the scheme. This amendment provides for such a situation arising.

11. The new power is subject to affirmative resolution procedure (see the amendment to section 138 of the 2003 Act made by section 72B(9)) which adds the new power to the list of regulations in the 2003 Act that are currently subject to affirmative resolution procedure. Requiring sex offenders to notify personal information on a regular basis to the police is potentially an infringement of their article 8 rights to privacy and family life which requires to be justified in each case according to the objective that the notification of the information is intended to have and the degree of intrusion that notification will have on the offender. It was also recognised that Parliament would have a considerable interest in any such regulations. It was therefore considered appropriate to have this level of scrutiny over regulations that provide for any further information to be part of the notification regime in the 2003 Act.
New section 72B(5) (Sex offender notification requirements)

**Effect on section 84 of the Sexual Offences Act 2003 (notification requirements: initial notification)**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** order made by statutory instrument
- **Parliamentary procedure:** affirmative procedure of the Scottish Parliament

12. Section 72B (5) amends section 84(1) of the Sexual Offences Act 2003 by inserting a new paragraph (g) to provide a regulation making power for the Scottish Ministers to prescribe the changes to information prescribed under the power described above that must be notified to the police within 3 days of the change occurring. This power is therefore essentially consequential on the new section 83(5)(i) power described above. At present, section 84 sets out the changes to information subject to the notification requirements that must be notified to the police within 3 days.

13. It is not possible for this information to be set out on the face of section 84 because the changes to the information prescribed under section 83(5)(i) which should be notified to the police will depend upon exactly what information is prescribed. Since the power is consequential on the power in section 83(5)(i) it has been made subject to affirmative procedure. This is in line with the Regulations in the 2003 Act that are currently subject to affirmative resolution procedure (see the amendment to section 138 of the 2003 Act made by section 72B(9))

New section 72C (Information about release: power to require giving of specified information)

**Effect on section 96 of the Sexual Offences Act 2003 (Information about release or transfer)**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** order made by statutory instrument
- **Parliamentary procedure:** negative procedure of the Scottish Parliament

14. The Scottish Ministers can make regulations under section 96 of the Sexual Offences Act 2003 which require any person who is responsible for a relevant sex offender to give notice to specified persons of any occasion when the relevant offender is released from prison or hospital, or when a different person becomes responsible for him or her. The regulations may also make provision for determining who is to be treated as a responsible person.

15. Although the offender has an obligation to notify his or her details to the police under the 2003 Act, section 96 was directed at providing a strong additional safeguard towards protecting the public, by requiring persons responsible for a relevant offender to notify other authorities of that offender’s movements. For example it is clearly important for the police to know when and where a relevant offender is released into the community. It is also important that when a new person becomes responsible for an offender (for example where an offender is transferred from a prison to a hospital) that the new person is notified of the fact that the person is a relevant offender.
16. The Executive conducted a consultation exercise in connection with making regulations under section 96 of the 2003 Act which would require specified people to notify the police of any occasion when the offender was released or a different person became responsible for the offender. Some of the respondents stated that it would be useful if the regulations enabled certain personal information about a sex offender to be passed on to the police at the same time as the notice was given. This would enable the police to identify the relevant offender and also determine if these offenders subsequently comply with the sex offender notification requirements under Part 2 of the 2003 Act.

17. Section 72C of the Bill amends section 96 of the 2003 Act by inserting new subsections (2A) and (2B). The effect of these amendments is that the Scottish Ministers will have the power to include in the regulations under section 96 of the 2003 Act provision requiring a responsible person to provide notice of any information about a relevant sex offender, which is listed in the regulations when giving notice. The regulations can also make provision requiring a responsible person to provide a photograph of any part of the offender.

18. The sort of information that is likely to be specified in the Regulations will be the address to which the offender may be released to and their date of birth etc. As with the original power in section 96, it is considered that it is appropriate to set out the details of what information should be passed on and any photograph, in regulations as opposed to in the Bill given the level of detail involved. Specifying this information in regulations will provide more flexibility to amend or update these details in the future should it become apparent that particular information will be relevant for the police (or any other prescribed person) to have when notice is given of the offender’s release or transfer.

19. Regulations which are made under the current power under section 96 of the 2003 Act are already subject to negative procedure. The negative resolution procedure was considered appropriate for the original power due to the fact that the power places no additional burden on offenders themselves. The Executive considers that the same justification applies.

Section 76(1)(b)

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20. Section 76 of the Bill provided that a person must attend a mandatory assessment into their drug misuse if a sample which is taken under new section 20A of the Criminal Procedure (Scotland) Act 1995 reveals the presence of a class A drug and the police station in which this sample is taken is located in an area which is prescribed in an order made by the Scottish Ministers.

21. Section 76(1)(b) has been removed from the Bill as this order making power is regarded as being superfluous. This is because new section 20A(3)(c) of the 1995 Act already provides that a sample can only be taken from a person if, among other things, the police station at which the sample is taken is located within an area which has been prescribed in an order made by the
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Scottish Ministers. The effect of this provision is that a person can only attend an assessment if the sample is taken at a police station which is within a prescribed area.

Section 86(1) – power to make provision in relation to the procedure to be followed in proceedings for sentence review under section 84

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

22. Section 86(1) gives the Scottish Ministers power by order to make provision for the procedure to be followed in proceedings for sentence review and appeal under section 84. This power was not amended during Stage 2, but following from a query raised by the Subordinate Legislation Committee during Stage 1, the power’s Parliamentary procedure has been changed from affirmative procedure to negative procedure. Affirmative procedure had originally been chosen for this power as orders made under it may amend primary legislation. The Scottish Executive accepted the view expressed by the Subordinate Legislation Committee that the provisions of any such order will largely be matters of administrative or procedural detail. The Scottish Executive also notes that any such power to amend primary legislation is limited in its extent. An example of this type of power being subject to negative procedure is found in section 24F of the Criminal Procedure (Scotland) Act 1995. The power given under that section allows amendment of the bail provisions of the Criminal Procedure (Scotland) Act 1995 for the limited purposes of extradition hearings. For these reasons the Scottish Executive takes the view that negative procedure is the appropriate form of parliamentary scrutiny.

Section 86(3) – power to make provision for taking account of time spent in custody, on release on license or on unconditional release when a sentence is reviewed under section 84

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

23. Section 86(3) gives the Scottish Ministers the power by order to make provision as to how a period served in custody; a period during which a person is released on license under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c. 9); or a period during which a person is on unconditional release under Part 1 of the 1993 Act, are to affect the calculation of periods of time under the 1993 Act as they apply to a revised sentence imposed under either section 84(6), (8) or (10) of the Bill. In making any such order the Scottish Ministers may, by virtue of section 86(4), modify the 1993 Act.

24. This provision will allow the Scottish Ministers to make provision to ensure that proper account is taken of time spent in custody, on release on license or on unconditional release, if a person’s sentence is subsequently reviewed under the provisions of section 84.

25. It is considered that the provisions to be contained in such an order will be of a detailed and technical nature. It is therefore thought more appropriate to make provision for these in subordinate legislation rather than on the face of the Bill. It is considered that negative
resolution procedure provides the appropriate level of scrutiny on the basis that the content of the regulations is unlikely to be controversial, and due to the limits on the extent of the power to amend primary legislation.

Schedule 1 paragraph 11(5) - power to apply provisions of Police (Scotland) Act 1967 to seconded constables

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26. Schedule 1 paragraph 11(2) provides power for the Authority to make arrangements for constables of police forces to be seconded to the Authority to serve as members of its staff. As amended at Stage 2, paragraph 11 provides an order making power for Scottish Ministers to apply and modify provisions of the Police (Scotland) Act 1967 and any subordinate legislation made under it to constables seconded to the Authority who are not appointed as police members of the Agency. This gives Scottish Ministers the same power to apply with modifications provisions of the 1967 Act in relation to seconded constables as they already have in respect of police members of the Agency by virtue of paragraph 8 of schedule 2 to the Bill.

27. The power has been added because, as is the case with police members of the Agency, it is considered that it may be necessary in the future to apply with modifications some of the provisions of the 1967 Act to seconded constables who remain with the Authority rather than the agency.

28. The equivalent power in schedule 2 for police members of the Agency is subject to affirmative resolution procedure on the basis that it involves modifications to primary legislation. The new power as currently drafted is not subject to affirmative procedure. This was an oversight and the Executive intends to lodge amendments at Stage 3 which make the necessary consequential adjustments to section 93.

Schedule 2 paragraph 8 – power to apply provisions of Police (Scotland) Act 1967 to police members of the Agency

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29. Paragraph 6(8) of schedule 2 provided a power for Scottish Ministers to apply the provisions of the 1967 Act to police members of the Agency. However the power did not cover either the Director or Deputy Director both of whom will have all the powers and privileges of a constable. The modification provision has therefore been extended to apply the provisions of the 1967 Act to the Director and Deputy Director and has been moved to a new supplementary paragraph. The provision is also extended to allow subordinate legislation made under the 1967 Act to be applied to the Director, Deputy Director and police members of the Agency.
30. The power has now been drafted as a new paragraph 8 in schedule 2. The power as originally included in paragraph 6(8) was subject to affirmative resolution procedure. The necessary consequential change to section 93 to take account of the redrafting was not made and the power as currently drafted is therefore subject to negative procedure. We will lodge amendments at Stage 3 which make the necessary consequential adjustments to section 93.

**Schedule 3 paragraph 2(1) – power to make a staff transfer order**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** order made by statutory instrument
- **Parliamentary procedure:** negative resolution of the Scottish Parliament

31. Schedule 3, paragraph 2 provides a power for the Scottish Ministers to make a staff transfer order. The background to this power and the justification for negative procedure was set out in detail at paragraphs 96-100 of the Memorandum on delegated powers.

32. The power was amended at Stage 2, Schedule 3 by amending paragraph 2(1)(b) and the insertion of new sub-paragraphs (3A) and (3B). The changes do not affect the substance of the power. The previous provision at paragraph 2(1)(b) referred to the scheme making provision in connection with the transfer of constables from police authorities or joint police boards to relevant service. It is considered more accurate to describe the transfer as being a transfer of constables from police forces. It was also considered appropriate to include provision making clear that where the order makes provision for such a transfer it can require the relevant maintaining authority for the police force to make a scheme in relation to the transfer of the relevant staff (sub-paragraph (3A). New sub-paragraph (3B) defines the maintaining authority as being either the police authority or a joint police board where appropriate.
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