MEMORANDUM ON DELEGATED POWERS

POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) BILL

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 Police, Public Order and Criminal Justice (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.

Outline of Bill provisions

2. The Bill progresses a range of policies designed to improve police effectiveness and enhance community safety, including some specific commitments from A Partnership for a Better Scotland. Most of the topics were the subject of the consultation paper, Supporting Police, Protecting Communities: Proposals for legislation with additional consultation in Complaints Against the Police in Scotland: A Consultation Paper and Fireworks Regulations 2004: Consultation on proposals to tackle the anti-social use of fireworks through the regulation of use and supply.

3. The Bill is divided into 4 Parts and in summary provides for:
   - the establishment of a new Scottish Police Services Authority (the Authority) to provide the common police services currently provided by the Scottish Police College, the Scottish Criminal Records Office, the Scottish Police Information Strategy and the 4 forensic science laboratories. The Authority will also maintain the Scottish Crime and Drug Enforcement Agency (the Agency) which will replace the Scottish Drug Enforcement Agency (SDEA);
   - the establishment of a new Police Complaints Commissioner for Scotland;
   - clarification that an allowance can be made to special constables in respect of services given;
   - Her Majesty’s Inspectorate of Constabulary to recruit more widely;
   - the introduction of football banning orders;
   - reform of the law on public processions;
   - amendments to the law on knives and offensive weapons;
   - police powers of search and arrest in relation to fireworks possession offences;
   - police powers to require persons to give their date and place of birth;
   - police powers to take fingerprints to verify identity;
   - the introduction of mandatory drug testing and referral for arrested persons; and
   - the introduction of a system of statutory incentives for providing evidence for use against others.
Rationale for subordinate legislation

4. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has carefully considered the importance of the each matter against the need to:

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

- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

5. In addition to the powers outlined below the Bill also contains a number of direction making powers. It is considered that these are of an executive rather than legislative nature and as such they are not detailed in this memorandum.

General subordinate legislation provision

6. Section 93 contains the general subordinate legislation provisions and provides that all powers to make orders or regulations are exercisable by statutory instrument. Subsection (2) allows different provisions to be made for different purposes and permits the powers to be used to make supplementary, incidental, consequential, transitory, transitional or saving provisions. Subsection (3) provides that all of these powers are subject to negative resolution procedure, except for orders made under sections 19(1) and 22(1) and paragraph 6(8) of schedule 2 and, in certain circumstances, sections 86(1) and 92(1), which are subject to the affirmative procedure, and the commencement provisions where no procedure is required.

Delegated powers

Section 19(1) – power to modify powers of the Agency

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

7. Section 18 of the Bill sets out the powers of the Agency and enables it to act in support of Scottish or other UK police forces or the law enforcement agencies as listed in section 17 if requested to do so by a chief constable or any of the bodies specified. Provision is also made to allow the Agency to co-operate with other bodies, including overseas agencies and to provide assistance in response to requests made by a government or other body outwith the UK. Section 2 of the Bill sets out the functions of the Agency one of which is the prevention and detection of serious organised crime, however, section 18(2) provides the Agency with powers to carry out activities relating to less serious crime if it is carried out for the purposes of their other functions.

8. Section 19(1) confers a power on the Scottish Ministers allowing them to modify by order section 18 to add, remove or amend the powers of the Agency. Before exercising such a power the Scottish Ministers are required to consult the Authority, the Director of the Agency
and persons whom the Scottish Ministers consider represent the interests of chief constables of police forces and police bodies (section 19(2)).

9. This power is considered necessary and appropriate to enable Scottish Ministers to ensure that the Agency has the necessary ability to respond to new and emerging circumstances. Organised criminals use sophisticated and ever changing tactics, including spontaneous activity to pursue their agendas. The power therefore provides the necessary flexibility to deal with changing circumstances without requiring further primary legislation. The power is subject to affirmative resolution procedure which is considered to provide the appropriate degree of parliamentary scrutiny where primary legislation is being amended and will allow the opportunity for parliamentary debate in respect of any such modification of the Agency’s 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

10. Section 12 provides that the Agency will consist of a Director, Deputy Director, police members and support staff members. Police members are appointed in accordance with paragraph 6 of schedule 2, and will fall into 2 broad categories; those who are seconded from Scottish police forces and those who are recruited directly by the Agency. Both categories of police members will be subject to terms and conditions as determined by the Authority and will not be subject to any regulations made under section 26 of the Police (Scotland) Act 1967 which provide for a number of matters including qualification for appointment, promotion, rank, conduct and efficiency, pay, leave and allowances.

11. Section 21(1) gives Scottish Ministers power to make regulations as to the government and administration of the Agency and conditions of service with the Agency. Subsection (2) lists a number of matters which the regulations may make provision for. These provisions are similar to those in section 26 of the 1967 Act. Subsection (3) provides that any regulations may authorise Scottish Ministers, the Authority or the Director of the Agency to make provision about specified matters and subsection (4) permits the regulations to confer discretionary powers on these persons and also permits delegation of functions conferred on persons by the regulations.

12. Subsection (5) provides that any regulations made must provide that a police member is allowed at least 52 days per year when not on duty and subsection (7) prohibits appointments for a fixed term except where someone is above the rank of superintendent. Subsection (6) allows any regulations in respect of pay and allowances to be made with retrospective effect to cover circumstances where pay awards require to be backdated. These provisions are all similar to those contained in section 26 of the 1967 Act.

13. Due to the detailed technical and administrative nature of the material that will be included in these regulations and the need to have flexibility to amend at regular intervals, it is not thought appropriate to incorporate these matters in the Bill. The regulations will be subject to negative resolution procedure which follows the procedure for regulations made under section 26 of the 1967 Act. This procedure is thought to provide the appropriate degree
of parliamentary scrutiny as the regulations will be uncontroversial in nature and will relate to administrative and technical details.

Section 22(1) – power to amend the list of police support services

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

14. Section 3 places a duty on the new Authority to provide police support services. These police support services are listed in subsection (2) of that section and cover the services currently provided by the Scottish Police College, the Scottish Criminal Records Office, the Scottish Police Information Strategy and the planned new national forensic science service. It is possible that in the future it will be desirable for the Authority to provide additional support services on a national basis where this would further improve police efficiency or indeed that one of the current services will no longer be considered necessary.

15. This issue was discussed in the consultation paper Supporting Police, Protecting Communities: Proposals for legislation, which pointed out that the ability to respond to changing demands and to facilitate the transfer of suitable existing services as appropriate is an important consideration with respect to improving support services in Scotland and freeing resources for front line policing. Accordingly the consultation paper proposed, at para 2.35, that the legislation should include an enabling provision to allow additional functions to be added or indeed removed from the new body. Of the 27 respondents who commented on this proposal, 25 agreed that this flexibility should indeed be built into the legislation.

16. Accordingly section 22(1) provides an order making power for Scottish Ministers to modify section 3(2) of the Bill, which defines the police support services which the Authority is under a duty to provide. By including this power it will allow the Authority to develop and keep abreast of changes in modern police services without requiring further primary legislation. We recognise of course that this is a significant and important power which should only be exercised after careful consultation with interested parties and proper parliamentary scrutiny. Section 22(2) accordingly provides that before making an order under this section the Scottish Ministers must consult the Authority, persons whom they consider represent the interests of unitary police authorities and joint police boards, and such other persons as they consider appropriate. The order is subject to affirmative resolution procedure to allow for parliamentary debate to take place as is appropriate when a power of this nature is being exercised.

Section 23(1) – power to require the use of police support services

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

17. This section enables the Scottish Ministers by regulations to require police forces or such of them as are specified in the regulations, to use such police support services as are specified in the regulations. This power can only be exercised if the Scottish Ministers consider that it would be in the interests of the efficiency or effectiveness of the police to do
so (subsection (2)) and in considering whether to exercise this power the Scottish Ministers must have regard to the role of the police within the criminal justice system.

18. This provision is similar to that contained section 36(2) of the Police (Scotland) Act 1967 in respect of the Scottish Ministers’ powers to direct all police forces to use specified facilities or services. In practice no regulations have been made under the power in section 36(2) of the 1967 Act, however it is considered that where police support services are provided on a national basis, it is appropriate that Ministers should have the power, subject to consultation with interested parties, to require some or all police forces in Scotland to use the police support services in question. In practice, and on the basis of experience of the similar power in the 1967 Act, it is not expected that the power would need to be used other than as a last resort, since the development of additional police support services on a national basis would be the subject of a thorough consultation process with police forces and other interested parties before they were rolled out.

19. The power to make such regulations is subject to negative resolution procedure. This mirrors the procedure in the 1967 Act and is thought to provide the appropriate degree of parliamentary scrutiny for this provision given that extensive consultation that will have taken place prior to the power being exercised.

**Section 32(3) – power to prescribe exceptions from notifying complainer of the outcome and action to be taken following a complaint handling review**

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

20. Section 32(2)(a) requires the Police Complaints Commissioner for Scotland (the Commissioner), to keep the complainer informed of the conclusions the Commissioner has reached and any actions the Commissioner proposes to take after reviewing a complaint which has been referred to the Commissioner. Section 32(3) gives Ministers the power to prescribe exceptions from the duty to notify complainers of the outcome and actions to be taken, as a result of a complaint handling review.

21. The regulations under this section can only prescribe exceptions from providing information to a complainer about the conclusions or proposed action which the Commissioner has reached after reviewing a complaint if this information may be used in criminal proceedings, for detecting or preventing crime, or if its disclosure would be detrimental to national security. The regulations will also enable Ministers to prescribe exemptions from the duty to provide the complainer with information if they consider to do so is justified on proportionality grounds or is in the public interest.

22. Given the administrative and detailed nature of these provisions it is thought to be more appropriate to specify the detail of the exceptions in regulations rather than on the face of the Bill. This power will also provide the flexibility for Ministers to change the nature of any exceptions, or add further exceptions from the duty imposed on the Commissioner in section 32(2), if this becomes necessary in the future.
23. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power and the administrative nature of the provision.

Section 33 – power to make regulations in relation to the discontinuation of a complaint handling review

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

24. Section 33 enables the Commissioner to discontinue a complaint handling review in certain circumstances. If these circumstances arise, the Commissioner will be under a duty to discontinue the review of that complaint. There are three separate regulation making powers in this section.

25. Section 33(2) gives Ministers the power to make regulations which specify descriptions of complaints which require the Commissioner to discontinue a complaint handling review. There will be circumstances when it will not be appropriate for a review of a complaint to continue. A complainer could make complaints of a vexatious nature or allegations of a criminal nature may come to light which the Commissioner does not have jurisdiction to deal with. It is important that the Commissioner knows exactly when to discontinue a review of a complaint.

26. Sections 33(4)(b) and (c) allow Ministers to set out in regulations the types of directions which the Commissioner can give to an appropriate authority if a complaint handling review has to be discontinued, or to specify what steps the Commissioner can take following the discontinuation of this process.

27. It is considered to be more appropriate to specify the detail of the circumstances when Commissioner must discontinue a review of complaint, the steps which the Commissioner can take and the directions which the Commissioner can give to appropriate authorities if this situation arises, in regulations rather than putting this detail in the Bill. A regulation making power provides more flexibility to specify additional circumstances in which the review of a complaint should be discontinued. This power will also enable Ministers to change the nature of the directions that will be available to the Commissioner or to amend the steps which the Commissioner can take if required to discontinue the review of a complaint.

28. Regulations made under this section will be subject to negative resolution procedure. Since the parameters for these regulations are set out in the section 33 and the regulations will be administrative in nature it is appropriate that the provisions should be subject to the negative resolution procedure.
Section 36(3) – power to prescribe exceptions from notifying complainer about the outcome, findings and action to be taken following the reconsideration of a complaint

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

29. If the Commissioner has directed an appropriate authority to reconsider a complaint, section 36(2) places a duty on that authority to keep the complainer informed of any findings which have been reached, what action is proposed and the outcome of this action after reconsidering a complaint. If the Commissioner supervises the reconsideration of any complaint, the Commissioner will be under a duty to provide this information to the complainer. Section 36(3) applies section 32(3) to the duties imposed on the Commissioner and an appropriate authority by section 36. By virtue of section 32(3), the Ministers are given the power to prescribe exceptions from the duty to notify complainers of the findings, outcome and actions to be taken, after a complaint has been reconsidered.

30. Regulations under this section can only prescribe exceptions from providing information to complainer about the conclusions or proposed action which are to be taken at the end of the reconsideration of a complaint, if such information may be used in criminal proceedings, for detecting or preventing crime, or if its disclosure would be detrimental to national security. The regulations will also enable Ministers to prescribe exemptions from the duty to provide the complainer with information if they consider to do so is justified on proportionality grounds or is in the public interest.

31. It considered to be more appropriate to specify the detail of the exceptions from the duty imposed on the Commissioner and appropriate authorities by section 36(2) in regulations rather than in the Bill. This power will also provide the flexibility for Ministers to change the nature of any exceptions, or add further exceptions from the duty imposed on the Commissioner and appropriate authorities in section 36(2), if this becomes necessary in the future.

32. We consider that the negative resolution procedure provides the appropriate level of parliamentary scrutiny for any regulations made under this section in light of the limited nature of the enabling power and the administrative nature of the provision.

Section 37 – power to require or permit Commissioner to discontinue reconsideration in particular circumstances

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

33. Section 37 enables the Commissioner to discontinue the reconsideration of a complaint if certain circumstances arise. If these circumstances do arise, the Commissioner will be under a duty to discontinue the review of that complaint. There are three separate regulation making powers in this section similar to those in section 33.

34. Section 37(1) gives Ministers the power to make regulations which specify descriptions of complaints which require the Commissioner to discontinue the
reconsideration of a complaint, if that complaint falls within such a description. There will be circumstances when it will not be appropriate for a reconsideration process to continue. A complainant could make complaints of a vexatious nature or allegations of a criminal nature may come to light which the Commissioner does not have jurisdiction to investigate. It is important that the Commissioner knows exactly when to discontinue a review of a complaint.

35. Sections 37(3)(c) and (d) allow Ministers to set out in regulations the types of directions which the Commissioner can give to an appropriate authority if the reconsideration of a complaint has to be discontinued, or to specify what steps the Commissioner can take following the discontinuation of this process.

36. It is more appropriate to specify the detail of the circumstances when the Commissioner must discontinue the reconsideration of a complaint, the steps which the Commissioner can take and the directions which can be given to appropriate authorities if this situation arises, in regulations rather than in the Bill in view of the detailed nature of the provisions which will be required. A regulation making power also provides more flexibility to specify additional circumstances in which the review of a complaint should be discontinued. This power will also enable Ministers to change the nature of the directions that will be available to the Commissioner or to amend the steps which the Commissioner can take if required to discontinue the review of a complaint.

37. Regulations made under this section will be subject to negative resolution procedure. Since the parameters for these regulations are clearly set out in the section 37(3) it seems appropriate that the detailed provisions should be subject to the negative resolution procedure.

Section 41(1) – power to require the giving of information to the Commissioner

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

38. Section 41(1) gives Ministers the power to make regulations setting out the circumstances in which documents or information specified or described in those regulations should be provided to the Commissioner by appropriate authorities.

39. In order to carry out his functions the Commissioner will, from time to time, need to have access to information held by an appropriate authority. This is likely to include material such as files and papers relating to complaints referred to the Commissioner or internal guidance on complaints handling. Police forces also handle a large amount of potentially sensitive information in relation to criminal investigations. It will therefore be important to have clarity over the types of information that must be provided to the Commissioner and to set out the procedures for providing how information is to be given to the Commissioner so that a consistent approach is adopted.

40. Specifying the type of information that the Commissioner will require and how this information should be provided in regulations is more flexible than containing this detail in primary legislation. Using subordinate legislation will enable changes to be made to the type of information that should be given to the Commissioner if this becomes necessary. If it
becomes apparent that it is necessary to change the manner in which an appropriate authority should provide information, or certain types of information, to the Commissioner, it will be easier to make such procedural changes in regulations.

41. We have provided for negative resolution procedure to apply since the regulations will deal with detailed points of procedure and in the circumstances we consider this will provide the appropriate level of parliamentary scrutiny. It is not envisaged that the type of information that should be given to the Commissioner, or how this information should be given, will be controversial.

Section 46 – Power to amend the definition of “relevant service” in section 38A of the Police (Scotland) Act 1967

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

42. This section provides the Scottish Ministers with an order making power to amend subsection (1) of section 38A of the Police (Scotland) Act 1967. Section 38A provides that any service that a constable is engaged on outside the constable’s force which is listed in subsection (1) is “relevant service” for the purposes of section 38A. The significance of this sort of service being regarded as relevant service is that the constable’s pay and pension rights are preserved at the end of the relevant service. The constable is also entitled to be promoted in the constable’s police force as if serving in that force.

43. Section 46 of the Bill inserts a new section 38B into the 1967 Act which allows Scottish Ministers to add, remove or amend the list of types of outside service which will be regarded as relevant service. This will allow Ministers to take account of service in any organisation or body which may be created in the future and in respect of which it is considered appropriate for constables to be covered by the “relevant service” rights. Over the last few years a number of such bodies have been created which have resulted in amendments to section 38A, for example, service in relation to the Proceeds of Crime (Scotland) Act 2002, service with the National Criminal Intelligence Service, service as a member of staff of the Serious Organised Crime Agency and service with the Independent Police Complaints Commission. It will also allow for descriptions of service to be removed or amended where they are no longer relevant or where a name change of an organisation has taken place.

44. The power includes a consequential power to amend section 38A. For example, when a new type of relevant service is added, it will be necessary to consider in each case the application of subsections (3), (4), (5) and (6) of section 38A to the new type of service and amend these subsections accordingly.

45. It is considered that negative resolution procedure is appropriate given the limited nature of the power and that it relates to technical matters concerning the status and pay and pension rights of constables on secondment from their home force.
**Section 51(2)(b) – power to prescribe a football match as a regulated football match**

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

46. Under section 49 of the Bill, a football banning order has the effect of prohibiting a person from attending regulated football matches in the United Kingdom and requires them to report at a police station and surrender their passport in connection with regulated matches outside the United Kingdom. Section 51(2) and (3) defines what is meant by a regulated football match. This covers domestic matches within Scotland, England and Wales involving specified clubs and international matches involving those clubs and the national teams.

47. Section 51(2)(b) provides the Scottish Ministers with an order making power to prescribe individual matches as regulated matches for the purposes of the football banning order legislation.

48. This will enable Ministers to, where necessary, ensure that specific matches are covered by the football banning order legislation. For example, any UEFA Cup Final, Champions Cup Final or similar match to be held in Scotland may not include any Scottish or UK team but there is still a chance that people subject to Scottish football banning orders may attempt to attend the match. In such cases it could be justifiable to extend the banning orders to automatically cover such matches as well and this power will provide the necessary flexibility to do so. It is considered that negative resolution procedure is appropriate as decisions to extend the coverage of football banning orders to certain specific games will be uncontroversial.

**Section 51(4) – power to amend the description of regulated football matches**

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

49. As noted above, under section 49 of the Bill, a football banning order has the effect of prohibiting a person from attending regulated football matches in the United Kingdom and requires them to report at a police station and surrender their passport in connection with regulated matches outside the United Kingdom. Section 51(2) and (3) defines what is meant by a regulated football match. This covers domestic matches within Scotland, England and Wales involving specified clubs and international matches involving those clubs and the national teams.

50. Section 51(4) provides the Scottish Ministers with an order making power to amend the definition of regulated football match by either adding to the descriptions of football match, amending an existing description or removing an existing description.

51. This will enable the Scottish Ministers to amend where necessary the list of matches which are regulated for the purposes of the football banning order legislation, without requiring new primary legislation. Once banning orders are established it may become apparent that the list of regulated matches should be changed. For example, it may be found that non-regulated matches involving clubs in certain competitions are related to significant
amounts of disorder. In these cases it could be justifiable to extend the banning orders to automatically cover these matches as well. Alternatively, it may be found that matches involving clubs in certain competitions that are regulated and subject to banning orders are not actually related to any significant amount of disorder. In these cases, it could be justifiable to remove these matches from the list of regulated matches. Further, the description of regulated football matches might also require to be changed to reflect any reforms that may be made to the various football leagues and associations. It is considered that negative resolution procedure is appropriate as decisions to extend the automatic coverage of football banning orders to other games or remove it from some games already covered will be uncontroversial. The equivalent power in the legislation in England and Wales is also subject to negative resolution procedure (section 14(2) and 22A(4) of the Football Spectators Act 1989).

Section 55(1)(b) – power to prescribe additional people that the court must send a copy of an FBO

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

52. Section 55(1) provides that where a football banning order is made the court must ensure that the person against whom the order is made, the enforcing authority and the police station at which the person is to report initially all receive a copy of the order. In addition, where the person is detained in custody, the person in whose custody the person is detained must also receive a copy of the order. Section 55(1)(b) provides Ministers with power to prescribe by order other people that the copy football banning order should be sent to. Whilst it is considered that section 55 covers all those who have an interest in knowing that an FBO has been imposed the power to add to the list will provide flexibility for the future should it become apparent that there are other people who have an interest in knowing that an FBO has been made. As this relates to matters of procedural detail rather than substantive issues, it is considered that negative resolution procedure is appropriate

Section 58(1) – power to designate external tournaments for the purposes of the control period

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

53. This section provides Ministers with an order making power to designate an external tournament for the purposes of section 58(1). Section 58(1) provides that a notice under section 57(4) may not require a person to report or surrender their passport except in the control period for a regulated football match outside the United Kingdom or a designated external tournament that includes a regulated football matches. The “control period” is defined for the purposes of regulated football matches outside the United Kingdom as meaning the period five days before the match and ending when the match is finished. This will be the standard control period that would apply to most matches outside the United Kingdom. However in the event of a significant international tournament involving regulated football matches it is considered more appropriate for the control period to last for the whole of the time that the tournament takes place. This will ensure that persons subject to banning
orders can be prevented from attending the whole tournament rather than just the games in
that tournament which involve the national team.

54. It is envisaged that the power will be used in circumstances where the external
tournament is of sufficient importance to justify this (e.g. the World cup and the European
Championships) and there is a need to prevent known troublemakers from attending the
whole tournament even if the team they support is not playing until later on in the tournament
or is knocked out early. The equivalent power for England and Wales in section 14(6) of the
1989 Act is subject to negative resolution procedure and has, to date, been used to prescribe
the European Championships and the World Cup. Given the purpose of the power and its
limited nature (the external tournament must be one involving regulated football matches) it
is considered that negative resolution procedure is appropriate.

Section 65(2) – power to modify the definition of the enforcing authority

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

55. Under section 65, the enforcing authority is the chief constable for Strathclyde. The
enforcing authority is responsible for determining the requirements that are necessary to give
effect to a football banning order and for deciding whether a person requires to surrender
their passport in connection with a match outside the United Kingdom (see section 57). The
enforcing authority is also responsible for deciding whether it is appropriate to exempt a
person from the requirement to surrender their passport (section 60). The enforcing authority
will be a civilian unit within Strathclyde Police to ensure that it has strong links to the police
forces who will be concerned with the day to day operation of banning orders. The Bill
therefore provides for the Chief Constable for Strathclyde to be the enforcing authority.

56. Section 65(2) provides Ministers with an order making power to modify the definition
of the enforcing authority so as to appoint a different body or person as the enforcing
authority for the purposes of football banning orders. It is considered appropriate to be able
to do this, without the need to resort to primary legislation to allow for flexibility in the future
should it become clear in the light of experience that it is appropriate for the functions to be
carried out by a different person. It is considered that negative resolution procedure is
appropriate on the basis that this power is essentially concerned with changes to the
administration of the scheme rather than a fundamental change to the way in which the
scheme operates.

Section 66 – power to specify exempt processions

New section 62(11B)(b) of the Civic Government (Scotland) Act 1982

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

57. Section 66(5) of the Bill amends section 62 of the Civic Government (Scotland) Act
1982 (“the 1982 Act”) so that all organisations are required to give notice to local authorities
and the police of their intention to hold a procession. Section 66(8) of the Bill inserts new
section 62(11B)(b) into the 1982 Act which provides Ministers with an order making power
to exempt processions of a certain description from the notification requirements set out in section 62 of the 1982 Act.

58. This order making power is necessary as there may be future processions which are held on a regular basis which are of a small size or nature that the Ministers consider that it is not necessary for the organisers to notify the local authority and the police of this event. It is considered appropriate to provide the Ministers with this order making power as it gives them flexibility to quickly revoke an order which makes a particular procession exempt from the notification requirements, if the Ministers consider that notice of this type of procession should be given to the local authority and the police. Negative resolution procedure is appropriate on the basis that any processions which will be made exempt from the notification requirements will be of an uncontroversial nature.

Section 74(7) – power to specify approved device for taking fingerprints

New section 13(8) of the Criminal Procedure (Scotland) Act 1995

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: none

59. Section 74(7) inserts a new section 13(8) into the Criminal Procedure (Scotland) Act 1995 which will give Ministers the power to approve by order devices which can be used to take fingerprints in order to verify the identity of someone suspected of having committed an offence.

60. Section 74(2) gives the police the power to take the fingerprints of someone they suspect of having committed an offence in order to verify that person’s identity. It is important that devices used for this purpose are reliable and technically sound. Requiring that such devices must be approved by Scottish Ministers before they can be used ensures that this will be the case. It is appropriate that such a device can be approved by order because as technology evolves, it may be that different devices will become available for use by the police. Giving the Ministers an order making power to approve such a device gives them the flexibility to approve a number of devices, or revoke a device which is will be taken out of operation, without the need to bring forward primary legislation.

61. This order making power is not subject to any parliamentary procedure as it is not considered necessary that approval for a fingerprinting device requires to be scrutinised by Parliament. This is consistent with section 18(7B) of the Criminal Procedure (Scotland) Act 1995 which provides that the Ministers can approve a device by order for taking fingerprints and other images under section 18 of that Act. Such an order is not subject to any parliamentary procedure.
Section 75 – power to prescribe police areas

New section 20A(3)(c) of the Criminal Procedure (Scotland) Act 1995

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

62. Section 75 inserts new section 20A into the Criminal Procedure (Scotland) Act 1995 so that a person who has been arrested can be tested for a relevant class A drug. New section 20A(3)(c) provides that a person can only be tested for the presence of a relevant class A drug if the police station which that person is brought to after their arrest is located in an area which is prescribed by the Scottish Ministers. This order making power is subject to negative resolution procedure.

63. It is considered appropriate to give the Scottish Ministers the power to prescribe the areas in which drug testing can take place, rather than specify these areas in the Bill, as this will enable the provisions to be piloted in a number of police areas. In addition, a number of measures will need to be put in place in each police area before the drug testing provisions can become operational in that area. Giving the Scottish Ministers the power to prescribe these areas will also allow a phased approach to be applied to implementation of the provisions.

64. We consider that the negative resolution procedure is appropriate for any regulations made under this new section 20A(3)(c), given the limited nature of the enabling power. Prescribing the area in which the provisions will become operational is not thought to be controversial.

Section 75 – power to amend lists of relevant offences and class A drugs

New section 20B(9) of the Criminal Procedure (Scotland) Act 1995

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

65. As noted above, section 75 inserts new sections 20A and 20B into the Criminal Procedure (Scotland) Act 1995. New section 20A(3)(d) of that Act provides that a person can be tested for a relevant class A drug if they are arrested under suspicion of committing a relevant offence, or if a senior police officer has grounds for suspecting that the misuse of a relevant class A drug caused or contributed to the offence which that person was arrested under suspicion of committing. Section 20A(8) identifies the list of relevant offences. This provision also sets out that the relevant class A drugs which the police can test for are cocaine and diamorphine.

66. New section 20B(9) confers an order making power on Scottish Ministers to modify section 20A(8). Section 20B(9)(a) enables Ministers to make an order which adds to or removes an offence to or from the list of relevant offences in new section 20A(8). Section 20B(9)(b) allows Ministers to make an order which adds to or removes any substance, preparation or product to the list of Class A drugs described in section 20A(8) (but only...
substances, preparations or products which are defined as a Class A drug in the Misuse of Drugs Act 1971).

67. The offences which have been designated as relevant offences in new section 20A(8) are those which research shows are most closely linked with the misuse of cocaine and diamorphine. This research into which crimes are associated with the misuse of these class A drugs will continue and will be regularly evaluated when the sections 75 to 82 of the Bill come into operation. If evidence suggests that additional crimes are linked to the misuse of cocaine or diamorphine, or that any of the existing relevant offences in section 20A(8) no longer show a link with such drug misuse, it will be necessary to amend the definition of a relevant offence in section 20A(8).

68. It may also be necessary to amend the list of relevant class A drugs if research shows that the misuse of other class A drugs is closely linked with certain acquisitive offences. It is also possible that the types or classifications of class A drugs may change and it may become apparent that there are additional index offences for which we would want to test for drugs. Providing the Scottish Ministers with an order making power to amend section 20A(8) will give them the flexibility to make any future changes expeditiously rather than having to rely on bringing forward primary legislation. This flexibility and ability to make changes expeditiously is important in trying to ensure that those who misuse class A drugs attend an assessment into their drug misuse in order to reduce the crime rate in Scotland.

69. It is considered that evidence to support any changes to the list of relevant offences or class A drugs in section 20A(8) should be open to full parliamentary scrutiny and as such it is considered that the order-making power should be subject to affirmative resolution procedure.

**Section 76(1)(b) – power to prescribe police areas**

*Power conferred on: the Scottish Ministers*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: negative resolution of the Scottish Parliament*

70. We consider that this power is superfluous given the inclusion of a similar power in new section 20A (3)(a) of the 1995 Act (inserted by section 75). Accordingly we will seek to remove this provision by amendment at Stage 2.

**Section 82 – power to make regulations prescribing experience and qualifications for a suitably qualified person**

*Power conferred on: the Scottish Ministers*

*Power exercisable by: regulations made by statutory instrument*

*Parliamentary procedure: negative resolution of the Scottish Parliament*

71. Section 76(2) provides any person who tests positive for a relevant class A drug will be required to attend a mandatory assessment into their drug misuse. Section 76(3) specifies that a drug assessment is an appointment with a suitably qualified person, known as a drugs assessor. Section 82 defines a “suitably qualified person” as a person who has such qualifications or experience as are prescribed by regulations made by the Scottish Ministers.
72. It is more flexible to prescribe the detail of the experience and qualifications for being a drugs assessor rather than putting this information in primary legislation. A list of qualifications or experience will also need to be regularly amended to take account of new qualifications or courses which are made available to people working in drug misuse field. It will be easier to detail any new qualifications in regulations rather than having to bring forward primary legislation. 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.

Section 86 – power to make procedure in relation to review of sentence and appeal against a decision in a review of sentence

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

73. This section gives the Scottish Ministers power by order to make provision for the procedure in relation to sentence review and appeal against a decision in a sentence review under section 84 of the Bill.

74. By virtue of subsection (2)(a) the order may apply with modifications the provisions on appeal from solemn proceedings in Part VIII of the Criminal Procedure (Scotland) Act 1995 and, by virtue of subsection (2)(b), the order may also modify that Part of the 1995 Act. If the order modifies the 1995 Act it will be subject to affirmative procedure, otherwise it is subject to negative resolution procedure.

75. This power allows the Scottish Ministers to provide for a tailor-made procedure for the new sentence review proceedings under section 84. It allows the Scottish Ministers to apply the provisions in relation to appeal against sentence under the 1995 Act, but to modify those provisions to take account of the differences between sentence review and appeal against sentence in order to provide for an effective sentence review procedure. Additionally, the power allows Ministers to amend the 1995 Act where appropriate to take account of sentence review and the possibility of appeal against sentence review.

76. It is considered that the provision to be contained in such an order will be of administrative and procedural detail which is more appropriate for subordinate legislation. However, where it may be necessary to amend the 1995 Act to take account of these procedures, we consider that affirmative procedure provides the appropriate level of parliamentary scrutiny.

Section 92 – Ancillary provision

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

77. This section provides that the Scottish Ministers may by order make such supplemental, incidental, consequential, transitory, transitional or saving provisions that they consider necessary for the purposes of, or in connection with, the Bill. Subsection (2) provides that such an order may modify any enactment.
78. This provision is considered to be necessary to allow flexibility if further changes are found to be necessary as a result of the provisions in the Bill. Whilst some modifications have been identified in preparation for the Bill it may be that there are others which will be required. Part 1 of the Bill, for example, makes some changes to the Police (Scotland) Act 1967 and it is possible that not all of the consequences have been identified. The power whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient for the purposes of, or in consequence of the provisions of the Bill.

79. Where any such order amends primary legislation it will be subject to affirmative procedure and otherwise it will be subject to negative resolution procedure. It is submitted that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 94 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: none

80. This section provides that with the exception of sections 89, 90, 92, 93, 94 or 95 the provisions of the Bill will come into force by order made by the Scottish Ministers. As is the usual practice any such commencement orders will not be subject to parliamentary procedure.

Schedule 1 paragraph 3(8) – power to amend maximum number of members of the Authority

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

81. Schedule 1 paragraph 3 provides for the Scottish Ministers to appoint members of the Authority. Paragraph 3(4) provides that the Authority is to consist of not more than 10 members, including a convener and at least two members (not including the convener) from each of three separate categories as defined in sub-paragraph (3). These are police force members, police authority members and lay members. In practice, this means that the board must comprise a convener and between six and nine other members.

82. These arrangements seem sensible, practical and appropriate, and have a certain amount of flexibility built into them however it is considered appropriate that there should be power to amend the total number of board members if this proves necessary in the light of experience without requiring further primary legislation. Paragraph 3(8) accordingly provides power for Scottish Ministers to amend by order the maximum number of board members specified in subsection (4). Subsection (9) provides that before making such an order the Scottish Ministers must consult the Authority, persons whom they consider represent the interests of unitary police authorities and joint boards, and persons whom they consider represent the interests of chief constable in Scotland.

83. The order is subject to negative resolution procedure which is considered appropriate as it is administrative in nature relating to the efficient functioning of the Authority. Further it will have been preceded by an extensive process of consultation with key stakeholders who
will be best placed to consider if an adjustment to numbers is required and as a result any changes are likely to be uncontroversial.

**Schedule 2, paragraph 1(4) – power to make regulations as regards the Director of the Agency**

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

84. Section 12 provides that the Agency must have a Director appointed in accordance with paragraph 1 of schedule 2. Paragraph 1 provides that the first Director of the Agency will be the existing Director of the SDEA when the provisions come into force. It is envisaged that subsequent Directors will be appointed in a similar way to the rules governing the appointments of chief constables and other senior officers under sections 4 and 5 of the Police (Scotland) Act 1967. Paragraph 1(4)(b) of schedule 2 gives Scottish Ministers the necessary power to determine any requirements that must be satisfied in respect of this appointment.

85. These powers have been included in subordinate legislation as it would not be appropriate to put such detailed provision on the face of the Bill. Further as the requirements for these posts may change over time the power will provide the necessary flexibility to deal with changing circumstances. The power is subject to negative resolution procedure which we consider to be an appropriate level of scrutiny for administrative matters relating to qualifications for appointment such as this.

**Schedule 2, paragraph 1(7) – power to amend rank of the Director of the Authority**

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

86. The current Director of the SDEA holds the rank of Deputy Chief Constable (DCC), and anyone eligible to apply for a DCC post is eligible to apply for the post of Director of the SDEA. Paragraph 1(6) of schedule 2 provides that the Director of the new Agency will also hold the rank of DCC in a police force in Scotland.

87. The power at paragraph 1(7) enables Scottish Ministers to substitute another rank for the rank of DCC. For example the work of the Agency may be subject to expansion and the rank of DCC may no longer be considered an appropriate rank for the post of Director. Equally changes in police rank structure may require an amendment to the Director rank to reflect these changes. It is therefore considered that this power is necessary to ensure flexibility in the future and avoid the need for primary legislation should it be required to change the rank of the post of Director.

88. It is considered that negative resolution procedure is appropriate on the basis that this will be an uncontroversial administrative change which is limited in nature.
Schedule 2 paragraph (2)(2)(b) – power to make regulations as regards the Deputy Director of the Agency

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

89. Section 12 provides that the Agency must have Deputy Director appointed under paragraph 2 of schedule 2. As with Directors (other than the first) it is envisaged that the post of Deputy Director will be appointed in a similar way to the rules governing the appointments of Chief Constables and other senior officers under sections 4 and 5 of the Police (Scotland) Act 1967. Paragraph 2(2)(b) of schedule 2 gives Scottish Ministers the necessary power to determine any requirements that must be satisfied in respect of this appointment in a similar manner to the power they have in respect of the Director.

90. It is appropriate to have these powers in subordinate legislation as it would not be appropriate to put such detailed provision on the face of the Bill. Further as the requirements for these posts may change over time the power will provide the necessary flexibility to deal with changing circumstances. The power is subject to negative resolution procedure which we consider to be an appropriate level of scrutiny for administrative matters relating to qualifications for appointment such as this.

Schedule 2 paragraph 2(5) – power to amend rank of Deputy Director of the Agency

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

91. Paragraph 2(5) of schedule 2 provides that the Deputy Director of the Agency will hold the rank of ACC in a police force in Scotland and anyone eligible to apply for an ACC post will be eligible to apply for the post of Deputy Director.

92. The power at paragraph 2(6) enables Scottish Ministers to amend the rank of ACC for another rank in a similar manner to the power to amend the rank of the Director. As with the provisions in relation to the Director it is considered that this power is necessary to provide flexibility to adapt to changes in the future and that negative resolution procedure is appropriate for this limited power.

Schedule 2 paragraph 6(8) – power to apply provisions of Police (Scotland) Act 1967 to police members of the Agency

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

93. As explained above police members of the Agency will either be seconded from other police forces or directly recruited. Those police members who are directly recruited will be engaged on a period of relevant service under section 38A(1) of the Police (Scotland) Act 1967 and section 38(3AA) of the 1967 Act (as inserted by schedule 5 of the Bill) provides that they will continue to be constables and be treated for relevant enactments as constables of their own police force. The relevant enactments are sections 17(1), (4),(5) and (7A) and 43
of the 1967 Act which relate to certain duties of constables and the offence of impersonating a constable. This mirrors the position for officers currently on central service with the existing common police services as provided for in section 38 of the 1967 Act.

94. Whilst those police members who are directly recruited will have all the powers and privileges of a police constable and will be subject to regulations made under section 21 they are not deemed to be on relevant service nor are they constables of a police force for certain purposes like those who are seconded. As the 1967 Act stands many of the provisions apply to constables of a police force and accordingly they do not apply to those who are directly recruited. Similarly it is not possible to provide that for certain purposes they will be treated as constables of their own force, simply because they do not have a force to belong to.

95. The power for the Agency to recruit directly is new as currently the SDEA can only recruit police officers on secondment from Scottish police forces. Whilst schedule 5 lists a number of amendments to the 1967 Act as a result of the new provisions in respect of those seconded to the Agency it may be necessary in the future to apply with modifications some of the provisions of the 1967 Act to those who are directly recruited. The modifications required will not necessarily all become apparent until detailed administrative arrangements surrounding those who are directly recruited have been finalised and further may require to be amended in the light of experience as the power to recruit directly is new. Accordingly, paragraph 6(8) of schedule 2 provides a power for Scottish Ministers to apply the provisions of the 1967 Act with modifications to those police members of the Agency who have been directly recruited this allowing the necessary modification to be made if required. The power is subject to affirmative procedure which we consider appropriate in these circumstances where primary legislation is being amended.

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

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

96. As explained above the new Authority will be responsible for providing all of the services currently provided by the Scottish Police College, the Scottish Criminal Records Office, the Scottish Police Information Strategy and the 4 forensic science laboratories. It will also be responsible for establishing and maintaining the Scottish Crime and Drug Enforcement Agency (the Agency) which will replace the SDEA. To ensure a seamless transition from the existing services to the new Authority, the intention is that all of the staff currently employed by these services will transfer to the new Authority and be employed by the Authority when it comes into being (currently planned for 1 April 2007).

97. Paragraph 2(1) of schedule 3 to the Bill provides a power for the Scottish Ministers to make a staff transfer order to pave the way for all of the staff of the existing services, including police officers serving with them on secondment or on central service, to transfer to the new Authority and, where appropriate, the Agency. The transfer order may also make provision requiring a police authority or joint police board whose support staff or constables are to be transferred to the Authority to make an appropriate staff transfer scheme (paragraph 2(4)) and requiring the Scottish Ministers to make a transfer scheme in respect of constables moving from central to relevant service.
98. Paragraph 3 of schedule 3 provides that before making a staff transfer order the Scottish Ministers must consult the Authority and the Director of the Agency (if the order includes provision transferring police officers or support staff to the Agency). If the order includes provision relating to support staff currently employed by police authorities or joint police boards, then the same requirement to consult the Authority and, if appropriate, the Director of the Agency is placed on the police authority or joint board in question.

99. Given the level of detail that will be involved it is thought appropriate that the provisions of the transfer order should be included in subordinate rather than primary legislation. It is also thought appropriate that those bodies involved in the transfer should be responsible for the finer details and as such we have provided that the transfer order may make provision requiring transfer schemes. Provisions in respect of the effect of the order on existing contracts of employment are contained on the face of the Bill to offer persons the appropriate level of protection.

100. The transfer order is subject to negative resolution procedure which is thought to be the appropriate level of parliamentary scrutiny for detailed administrative matters such as this which are subject to extensive consultation.