FORCED MARRIAGE ETC. (PROTECTION AND JURISDICTION) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

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

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

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into 18 sections and 3 Parts. Part 1 (sections 1 to 13) and Part 2 (section 14) comprise the substantive provisions. Part 3 (sections 15 to 18) makes general provision in relation to ancillary orders, subordinate legislation, crown application and commencement.

Part 1: Forced marriage protection orders (sections 1 to 13)

4. Section 1 enables the Court of Session or a sheriff to make a forced marriage protection order for the purposes of protecting a person from being forced, or from any attempt to force them, into a marriage; or to protect a person who has been forced into a marriage. Subsection (4) describes what a forced marriage means for the purposes of Part 1. Subsection (6) defines “force” to include coercion by threats or other psychological means and to knowingly take advantage of a person’s incapacity to consent to marriage or to understand the nature of the marriage.

5. Section 2 provides that the court may make an order containing any terms that are considered appropriate in order to protect against conduct that may lead to a person being forced into marriage; or to protect a person who has been forced into a marriage. Subsection (2)(a) makes it clear that these terms may relate to conduct outwith Scotland.
6. Section 3 provides that the person to be protected - or a relevant third party - can apply without leave to the court. Subsection (7) defines “relevant third party” to mean a local authority, the Lord Advocate or a person specified by order made by the Scottish Ministers. Subsection (2) provides that other third parties must first get the permission of the court to make an application.

7. Sections 4 to 9 make further provision in relation to forced marriage protection orders. Section 4 enables the court to make a forced marriage protection order on its own initiative in certain circumstances when civil proceedings before the court, and to refer matters to the Lord Advocate in certain circumstances when criminal proceedings are before the court. Section 5 makes provision for interim orders. Sections 6 to 8 make further provision in relation to duration, variation, recall and extension of forced marriage protection orders. Section 9 makes it a criminal offence to breach a forced marriage protection order and sets out the penalties.

8. Section 10 enables the Scottish Ministers to make provision by order to apply the provisions (or particular provisions) in Part 1 to forced civil partnerships, with such modifications as are considered necessary.

Part 2: Declarators of nullity of marriage in sheriff court (section 14)

9. This Part amends section 8 of the Domicile and Matrimonial Proceedings Act 1973 (c.45) to clarify the existing jurisdictional rules applying to sheriffs in relation to declarators of nullity of marriage to bring these into line with those of the Court of Session.

10. Further information about the Bill’s provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 53–FM, and in the Policy Memorandum published separately as SP Bill 53–PM.

APPROACH TO USE OF DELEGATED POWERS

11. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
   - the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
   - the need to make proper use of valuable Parliamentary time; and
   - the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

12. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate. Powers that are referred to here as being exercisable by order are made by statutory instrument.
PART 1 – FORCED MARRIAGE PROTECTION ORDERS

Section 3(7)(c) - Power to specify a person, or a person falling within a description of persons, as a relevant third party

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative

Provision

13. Section 3(7)(c) enables the Scottish Ministers to specify a person, or person falling within a description of persons, as a relevant third party.

Reason for taking power

14. To enable the Scottish Ministers to specify other persons as relevant third parties in addition to local authorities and the Lord Advocate. Specifying a person as a relevant third party removes the requirement for that person to first obtain the permission of the court to apply for a forced marriage protection order. In future it may be felt appropriate to specify representative voluntary sector organisations as relevant third parties. It is preferable to have the capacity to do this without the need to await a suitable vehicle in primary legislation.

Choice of procedure

15. By virtue of section 16(2), any order made under section 3(7)(c) is subject to annulment in pursuance of a resolution of the Scottish Parliament. Since any specification made under this section would remove the discretion of the court to refuse to consider applications from the third parties specified, it is thought appropriate that any such specification is subject to annulment.

Section 10(1) - Power to apply Part 1 to civil partnerships

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provision

16. Section 10(1) enables the Scottish Ministers to make provision applying the forced marriage protection regime in Part 1 (or any provision of it) to civil partnerships at it applies to marriages. For the purposes of applying this Part, the power enables the Scottish Ministers to make such modifications of enactments (including of the Bill itself) as they consider necessary.

Reason for taking the power

17. The Scottish Ministers recognise that individuals could be forced into a civil partnership for financial gain or to secure immigration status. However, in the absence of evidence that this is a particular problem at present, the power is sought to enable the Scottish Ministers to quickly introduce equivalent provision for the purposes of protecting individuals from forced civil partnerships should evidence show that this is needed. In order to protect potential victims from
harm, it is considered preferable to have a limited power to apply the forced marriage protection regime to civil partnerships without the need to await a suitable vehicle in primary legislation.

**Choice of procedure**

18. By virtue of section 16(3)(a), no order can be made under section 10(1) unless a draft of the order has been laid before, and approved by resolution of, the Scottish Parliament. Although the power is limited to the purposes of applying the provisions of Part 1 to civil partnerships, given that this can include provision modifying any enactment and that the provisions may themselves carry significant public interest, it is considered appropriate that the power is subject to affirmative procedure to enable Parliament to fully scrutinise and approve any such provision.

**PART 3 – GENERAL**

**Section 15(1) - Power to make ancillary provision**

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<tr>
<th>Power conferred on:</th>
<th>Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
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<td>Parliamentary procedure:</td>
<td>Negative / Affirmative</td>
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**Provision**

19. This section enables Scottish Ministers to make such incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes, or in consequence, of any provision of the Bill, including ones which modify any enactment (including the Bill).

**Reason for taking power**

20. The provisions introduced by the Bill may give rise to the need for ancillary provisions to support the full implementation of the Bill. Ancillary powers are therefore sought to enable the Scottish Ministers to make incidental, consequential, transitional, transitory or saving provision as appropriate for these purposes, especially as all the consequences cannot always be predicted or covered in advance at the primary legislation stage.

21. Without these powers to make ancillary provision, it might be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. As it would not be an effective use of Parliament’s time, or the Scottish Government’s resources to deal with such matters through primary legislation, it is thought appropriate to address these through subordinate legislation.

**Choice of procedure**

22. By virtue of section 16(3)(b), an order made under section 15(1) containing a provision which adds to, replaces or omits any part of the text of any Act is subject to the affirmative procedure. Any other order made under this section is subject to the negative procedure by virtue of section 16(2). This distinction is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.
Section 18(2) - Power to appoint the day(s) on which the provisions comes into force

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** None

**Provision**

23. Section 18(2) provides that the Bill comes into force on such day as the Scottish Ministers may by order appoint. By virtue of section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) this power may be exercised so as to appoint different days for different purposes (including different days for different provisions).

**Reason for taking power**

24. The Scottish Ministers wish to have the flexibility to commence the provisions on different days for different purposes so that they can ensure that they link up with implementation arrangements including relevant guidance and updated jurisdictional rules.

**Choice of procedure**

25. No provision is made for laying the order in Parliament as the power is limited to commencing provisions which the Parliament has already scrutinised. The Subordinate Legislation Committee will, in terms of its remit, still have the opportunity to consider the order.
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