COMMUNITY JUSTICE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

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 Community 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.

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 Community Justice (Scotland) Bill establishes a new model for community justice services which has local delivery, partnerships and collaboration at its heart, with national arrangements to provide the profile, leadership and strategic direction which are felt to be missing from the current structure. Robust accountability and driving improvement will also be important aspects of the new model. Enhanced opportunities for innovation, learning and development will be provided. The model also recognises stakeholder views that community justice services should be person-centred, evidence-based and make best use of resources.

4. The Bill consists of 37 sections and 2 schedules. In summary, they make provision as follows:

- **Section 1** defines community justice for the purposes of the Bill.
- **Sections 2 to 11** and **schedule 1** establish Community Justice Scotland as an Executive Non-Departmental Public Body and set out its key functions.
- **Section 12** prescribes a list of community justice partners for the purposes of the Bill.
- **Sections 13 to 16** provide for the development and review of both a national strategy for community justice and a national performance framework. The performance framework will set out national outcomes for community justice as well as indicators by which achievement of these may be monitored.
• **Sections 17 to 22** require the statutory community justice partners in relation to each local authority area to prepare and report on an outcomes improvement plan for community justice.

• **Sections 23 to 25** require Community Justice Scotland to monitor performance in the area of each local authority against the national performance framework and to provide periodic reports on performance to local community justice partners. Community Justice Scotland is empowered to make recommendations to Scottish Ministers on any action it considers necessary in relation to the achievement of outcomes or improvement of performance. Community Justice Scotland must also produce an annual report in relation to performance across Scotland in achieving the national outcomes.

• **Section 26** makes provision for Community Justice Scotland’s involvement in the development and arrangement of community justice services.

• **Sections 27 to 29** make provision for Community Justice Scotland’s functions with regard to innovation, learning and development.

• **Section 30** requires Community Justice Scotland and community justice partners to co-operate with each other.

• **Section 31** abolishes the Community Justice Authorities established under the Management of Offenders (Scotland) Act 2005.

• **Section 32** is an interpretation provision.

• **Sections 33 to 37** are supplementary, dealing with matters such as commencement and the making of ancillary provision.

• **Schedule 2** amends various pieces of existing legislation in consequence of the Bill provisions.

**RATIONALE FOR SUBORDINATE LEGISLATION**

5. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered the need to:

   • Strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;

   • Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;

   • Make proper use of valuable parliamentary time;

   • Allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill; and,

   • Take account of the likely frequency of amendment.

6. The relevant provisions are described in detail below. For each provision, the memorandum sets out:
This document relates to the Community Justice (Scotland) Bill (SP Bill 68) as introduced in the Scottish Parliament on 7 May 2015

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and,
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

DELEGATED POWERS

Section 3 – Functions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

7. Section 3(4) makes provision for the Scottish Ministers to confer additional functions on, or transfer another person’s functions to, Community Justice Scotland; or make changes to the body’s functions in relation to community justice; or remove or transfer functions which have been conferred on or transferred to the body under regulations previously. Before making regulations, the Scottish Ministers must consult Community Justice Scotland and anyone else they consider appropriate. Section 3(5) provides that regulations made under section 3(4) may modify any enactment.

Reason for taking power

8. Over time, it may be deemed necessary or desirable for Community Justice Scotland to acquire further powers or for existing powers to be modified in response to any changes in the policy or practice of planning, delivering and monitoring of community justice services. The power therefore allows the flexibility to respond to developments as the nature and practice of planning for community justice evolve and the provisions in the Bill take effect. Section 3(5) provides a power to modify other legislation, should it be necessary to transfer existing statutory functions to Community Justice Scotland in future.

Choice of procedure

9. Community Justice Scotland will play a key role in the new model for community justice. Using this provision, the Scottish Ministers may add to or amend any of Community Justice Scotland’s functions in section 3(1); transfer functions from another person or body and may also make consequential amendments to primary legislation. It is considered appropriate that this power is subject to affirmative procedure to afford Parliament a high level of scrutiny.
Section 12(3) – Community justice partners

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

10. Section 12(1) prescribes community justice partners for the purposes of this Act. Subsection (3) enables the Scottish Ministers to modify by regulation the list of community justice partners.

Reason for taking power

11. Community justice partners have a key role to play in the successful planning, delivery and monitoring of community justice services. The list prescribed in section 12(1) comprises those partner bodies most directly involved in community justice and they therefore have a crucial role in ensuring that planning for the achievement of the community justice outcomes in their local area works as efficiently and effectively as possible. The power in subsection (3) provides the flexibility to respond to any future changes to the bodies listed in subsection (1).

Choice of procedure

12. The power relates to modifying the list of community justice partners for the purposes of this Act as the nature and practice of planning for community justice evolve and the provisions in the Bill take effect. The Scottish Government considers that affirmative procedure is appropriate given that the provision may add to, or replace or omit any community justice partner in subsection (1). In addition the community justice partners have statutory obligations placed on them with which they must comply. That being the case, the high level of scrutiny afforded by the affirmative procedure is considered appropriate.

Section 17 – Preparation of community justice outcomes improvement plan

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

Provision

13. Section 17 requires community justice partners for the area of a local authority to prepare a community justice outcomes improvement plan for that area. Section 17(1) provides that the plan must be prepared in accordance with timings set by the Scottish Ministers in regulations.

Reason for taking power

14. The Scottish Ministers will select a date for the production of the first plans under section 17 in accordance with arrangements for commencing the provisions of the Bill and production of the documents which will inform the contents of the plan (such as the national strategy and...
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performance framework). This will also enable timescales for planning and reporting under the Bill to be aligned.

Choice of procedure

15. The production of plans and reports under the Bill is dependent on the Scottish Ministers having published other documents (the national strategy and performance framework), which they must do no more than a year after the relevant sections come into force. The establishment of the planning and reporting timescales is best done when the publication dates for these documents are known, to provide justice partners and Community Justice Scotland with adequate time for planning and reporting. This setting of timescales for preparation of the plans under the Bill is considered to be a matter of detail not thought to be significant enough to warrant affirmative procedure; negative procedure is thought to afford sufficient parliamentary scrutiny.

Section 20 – Reports on performance in relation to community justice outcomes

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

Provision

16. Section 20 requires community justice partners for the area of a local authority to prepare a report for that area setting out their assessment of the achievement of outcomes in terms of their outcomes improvement plan. Reports must be produced at the end of every annual reporting period. Section 20(1) (a)provides that the first period will be prescribed by the Scottish Ministers in regulations.

Reason for taking power

17. The Scottish Ministers will select a date for the production of the first reports under section 20 in accordance with arrangements for commencing the provisions of the Bill and for production of the documents which will inform the contents of the report (principally the production of outcomes improvement plans under section 17). This will enable timescales for planning and reporting under the Bill to be aligned.

Choice of procedure

18. The production of plans and reports under the Bill is dependent on the Scottish Ministers having issued other documents (the national strategy and performance framework), which they must do no more than a year after the relevant sections come into force. The establishment of the planning and reporting timescales is best done when the publication dates for these documents are known, to provide justice partners and Community Justice Scotland with adequate time for planning and reporting. This setting of timescales for preparation of reports under the Bill is considered to be a matter of detail not thought to be significant enough to warrant affirmative procedure; negative procedure is thought to afford sufficient parliamentary scrutiny.
Section 35(1) – Ancillary

Power conferred on: the Scottish Ministers
Power exercisable by: regulations

Provision

19. Section 35 confers on the Scottish Ministers a power to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision made by this Act. Under subsection (2) regulations may modify this or any other enactment.

Reason for taking power

20. Any new law may give rise to the need for a range of ancillary provisions. Without the power to make supplementary, incidental, consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with in order to give full effect to the original Bill. That would not be an effective use of either the Parliament’s or of the Scottish Government’s resources. For example, minor consequential amendments to legislation which deals with other aspects of community or local authority service planning may be required to properly give effect to the Bill. The power itself is restricted by being ancillary to the provisions of the Bill and any such provision must clearly be for the purposes of the Bill, or in consequence of it, or for giving full effect to it. It is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to Parliamentary procedure.

Choice of procedure

21. Under section 35(2) any regulations made under section 35(1) will be subject to affirmative procedure if they contain provisions which add to, or replace or omit any part of, the text of this or any other Act. Otherwise, they will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation while ensuring that other ancillary provision is still subject to appropriate scrutiny by Parliament.

Section 36 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: no procedure

Provision

22. Section 36(2) provides that the other provisions of this Act will come into force on such a day as the Scottish Ministers may by regulations appoint. Section 36(1) provides that sections 34
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to 37 inclusive will come into force the day after Royal Assent. These are formal sections which relate to regulations; ancillary provisions; commencement; and short title.

Reason for taking power

23. The purpose of this Bill is to reform and make improvements, therefore the decision on when and to what extent the Bill is commenced is best determined by the Scottish Ministers, particularly since it will be appropriate to commence provisions at different times. For example, early commencement of the provisions establishing Community Justice Scotland will allow the public appointment process for key roles in the new body to commence before it becomes fully functional. Similarly, the abolition of community justice authorities will not be commenced before Community Justice Scotland is operational. There is no intention for the transitional provisions to be complex. Transitional, transitory and saving provision may be made by a commencement order and the Scottish Government considers that ancillary powers are required to ensure that particular provisions in the Bill are dealt with appropriately when other Bill provisions are commenced.

Choice of procedure

24. Section 36 has the effect that any such commencement order will not be subject to parliamentary procedure. This is typical of commencement powers and is justified having regard to the administrative nature of commencement of the Bill provisions which have been agreed to by the Scottish Parliament. As set out above, it is not expected that the commencement provisions will be complex – rather the various provisions will simply be staggered to ensure the transition to the new model is smooth and efficient.

SCHEDULE

Section 1 paragraph 3(5) – Community Justice Scotland

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

Provision

25. Schedule 1, paragraph 1 establishes Community Justice Scotland as a body corporate. Paragraph 3(1)(a) enables the Scottish Ministers to appoint a member as chair of Community Justice Scotland. Paragraph 3(1)(b) enables Scottish Ministers to appoint at least 5 but no more than 8 other members of Community Justice Scotland. Paragraph 3(5) gives the Scottish Ministers the power to change the minimum or maximum number of members specified by paragraph 3(1)(b).

Reason for taking power

26. The Scottish Government is of the view that five to eight members for Community Justice Scotland will be sufficient to enable it to carry out its functions effectively. There is no immediate intention to use this power, but it will allow Scottish Ministers to respond to practical
experience and changing circumstances without recourse to primary legislation to alter the number of members. This reflects current best practice on optimum board size.

**Choice of procedure**

27. The Scottish Government considers that regulations made under this provision should be subject to the negative procedure. The power allows for altering the minimum or maximum number of members without changing the structure or functions of Community Justice Scotland as agreed by the Scottish Parliament.
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