

POLICE AND FIRE REFORM (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Police and Fire Reform (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

PART 1 – POLICE REFORM

Section 11 – Ranks

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: affirmative.

Provision

2. Section 11(1) provides the ranks which a constable may hold in the Police Service of Scotland. Section 11(5) enables the Scottish Ministers to add or remove ranks and section 11(5A) allows regulations made under section 11(5) to make such provision in consequence of the addition or removal of a rank as the Scottish Ministers consider appropriate.

Reason for taking power

3. This power is considered necessary and appropriate to ensure that the Police Service of Scotland has the ability to enable hierarchical organisational change either by adding or deleting ranks.

Stage 2 amendment

4. The Bill as introduced allowed the addition or deletion of ranks below Assistant Chief Constable (ACC) by regulations subject to affirmative procedure. At Stage 1 of the Bill, a number of stakeholders, including the Association of Chief Police Officers in Scotland (ACPOS), made representations that it may become necessary to add senior ranks above ACC in the future should there become an operational need for this. The Bill has been amended at Stage

2 to extend the power so as to provide greater flexibility by enabling the addition or removal of senior officer ranks (other than that of Chief Constable).

5. The amendments also permit regulations to make provision consequential on the addition or removal of a rank, including the creation or removal of offices corresponding to the rank, provision relating to the functions of senior officers, and the modification of provisions of the Bill or any other enactment, but only where this is in consequence of the addition or removal of a rank. This is to ensure that any changes may be properly reflected in that structure.

Choice of procedure

6. Any regulations will be subject to affirmative procedure in accordance with section 120(2). This procedure is appropriate given that the list of ranks appears on the face of the Bill. Furthermore, the regulations will also be subject to statutory consultation to ensure the views of those directly affected by them are considered by Ministers. The adoption of affirmative procedure also provides appropriate parliamentary procedure in relation to any consequential provision which might modify the Bill or an enactment comprising primary legislation.

Section 15 – Constables: service outwith the Police Service of Scotland

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

Provision

7. Section 15 makes provision for constables to be engaged in service outwith the Police Service on temporary service (or secondment), with the consent of the Chief Constable. Under section 15(2)(a) the Scottish Ministers may, by regulations, prescribe types of service as “temporary service”, and under section 15(2)(b) make such further provision as they consider appropriate.

Reason for taking power

8. As police officers are office holders and their terms and conditions of service are set by legislation, it is necessary to make statutory provision to enable those officers to work outwith the Police Service whilst they remain police officers. Over time the types of temporary service are likely to change and there needs to be flexibility to make any changes without the need for primary legislation. This power enables the Scottish Ministers to ensure that a police officer is able to undertake temporary service with a wide range of other employers or services and for that range of services to change over time to take account of newly established bodies or to facilitate new types of joint working. It is preferable to have the capacity to do this without the need to await a suitable vehicle in primary legislation and providing for this in secondary legislation means that it will be possible to make arrangements for temporary service as best serves the Service, without the need for primary legislation.

Stage 2 amendment

9. The Bill was amended at Stage 2 to provide the Chief Constable with greater flexibility in relation to the arrangements which may be made for temporary service. As amended, the Bill provides that all types of service outwith the Police Service are to be known as “temporary service” and sets out the status of constables on such service. The power to make regulations has therefore been adjusted so that, rather than prescribing types of service which are to be known as “temporary service” and therefore attract the provisions of section 15, the regulations may make further provision about temporary service. In particular, they may prescribe types of temporary service which are treated differently to the general position set out in section 15(2) of the Bill as amended, or in respect of which constables may not be engaged or may be engaged only with the consent of Ministers. As before, the regulations may modify provisions of the Bill in relation to constables on temporary service.

Choice of procedure

10. Regulations made under these provisions remain subject to negative procedure, which is appropriate given the administrative nature and detail of these regulations and the probability of the power being used to implement terms and conditions negotiated with the services. The power is not substantively different to that in the Bill as introduced; therefore a greater level of parliamentary scrutiny is not considered necessary.

Section 49 – Power to make regulations as to the governance, administration and conditions of service of constables and police cadets

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

Provision

11. Section 49 gives the Scottish Ministers powers to make regulations for the governance, administration and conditions of service of constables (including special constables) and police cadets. Sections 50 to 54 set out in more detail what regulations may or must provide. These cover appointments; promotions; probation; efficiency and effectiveness; restrictions on private life or business interests; resignation; retirement; conditions of service; duties; disciplinary procedures; and personal records. Section 55 requires the Scottish Ministers to consult and share a draft of the regulations with the Chief Constable, the Scottish Police Authority (the Authority), the staff associations and where appropriate the Police Negotiating Board for the United Kingdom and section 56 allows regulations to make provision for the delegation of functions.

Reason for taking power

12. These provisions are necessary as police officers are office holders and not employees. Their terms and conditions of service are therefore largely set out in subordinate legislation rather than through a contract of employment governed by employment law. Although cadets are not police officers, they are appointed with a view to becoming officers and their terms and conditions are therefore broadly equivalent and are provided for through regulations. Regulations will be amended from time to time following appropriate statutory consultation and formal negotiation with the Authority, the Chief Constable and the staff associations. That, and 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, mean that it is not appropriate to incorporate these matters in primary legislation.

Stage 2 amendment

13. Section 53 requires that regulations made under section 49 by the Scottish Ministers must establish, or provide for the establishment of, procedures for dealing with a constable whose standard of behaviour or performance is unsatisfactory. It includes a provision allowing functions to be conferred on the Police Investigations and Review Commissioner in relation to investigations into misconduct and unsatisfactory performance. Police staff associations expressed concerns about the inclusion of unsatisfactory performance in this provision. In their view performance is an employment matter and is for the Police Service and Authority to deal with and the Commissioner should have no role in it.

14. The Scottish Parliament accepted this view and amended the Bill at Stage 2 to remove investigations into unsatisfactory performance of constables from the functions that may be conferred on the Commissioner.

Choice of procedure

15. Regulations made under these provisions will be subject to negative procedure. This procedure is appropriate given the administrative nature and detail of these regulations and the probability of the power being used to implement terms and conditions negotiated with the service and the staff associations. The amendments do not alter the choice of procedure.

Section 63, new section 33A – Power to prescribe what is a “serious criminal offence” for the purposes of investigation by the Police Investigations and Review Commissioner

Power that has been removed

Provision

16. Section 63 inserts section 33A into the Police, Public Order and Criminal Justice (Scotland) Act 2006 (the 2006 Act). Section 33A provides for the general functions of the Police Investigations and Review Commissioner. Section 33A(2)(b) gives the Scottish Ministers power to prescribe offences as being a serious criminal offence for the purposes of section 33A(1)(b)(i).

Reason for taking power

17. The Commissioner will investigate any circumstances in which there is an indication that a person serving with the police may have committed a serious criminal offence. This will be done under the direction of the appropriate prosecutor, and will include offences resulting in death or serious injury, or other offences prescribed by regulations. This power could be used to expand the types of offences that the Commissioner may investigate under the direction of the appropriate prosecutor without the need for amending primary legislation.

Stage 2 amendment

18. The Bill as introduced conferred no power on the Commissioner to investigate any other type of offence. In discussion with stakeholders including the Crown Office and the Police Complaints Commissioner, the Scottish Government felt that this may be too restrictive as in some cases the prosecutor may determine that a particular offence, though not resulting in death or serious injury, requires an independent investigation outwith the Police Service. The Bill has therefore been amended the Bill at Stage 2 to provide flexibility to allow the prosecutor to determine whether an offence should be investigated independently and to enable it to direct the Police Investigations and Review Commissioner to undertake such an investigation. As the prosecutor will now be able to determine which offences to refer to the PIRC, Scottish Ministers no longer require the ability to prescribe offences as being a serious criminal offence for the purposes of section 33A(1)(b)(i).

PART 2 – FIRE REFORM

Section 99, new schedule 1A paragraph 3(2) – Power to modify descriptions of a person who may be disqualified from membership of the SFRS Board

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

Provision

19. Paragraph 3(1) of new schedule 1A of the 2005 Act describes persons who are disqualified from appointment and from holding office as a member of the Scottish Fire and Rescue Service (SFRS). Sub-paragraph (d) of paragraph 3 as introduced gave the Scottish Ministers power to prescribe other descriptions of persons who should be disqualified from appointment.

Reason for taking power

20. This power is considered appropriate to ensure no conflict arises between the role of board members and any other role they may hold. It also allows the necessary ability to respond to new and emerging circumstance and legislation.

Stage 2 amendment

21. The Bill was amended at Stage 2 to remove sub-paragraph (d) and replace it with a broader power to allow Ministers to adjust the list of persons described as disqualified. This gives Ministers greater flexibility to monitor the new arrangements for the SFRS. This will allow Ministers, as well as adding to the disqualification criteria, to remove criteria where there is considered to be a strong case for those initially disqualified to be able to become members.

Choice of procedure

22. An order made under this provision will, like its predecessor, be subject to negative procedure, given its administrative nature.

Section 118, schedule 5, paragraph 1 – Power to appoint a day by order for the transfer of joint board staff to SFRS

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

Provision

23. Paragraph 2 of schedule 5 provides for the transfer of employees of joint fire and rescue boards to SFRS on a day appointed by Ministers by order, under paragraph 1 of that schedule.

Reason for taking power

24. In preparation for the establishment of the service, it will be necessary to ensure that staff transfer at the appropriate time. It may be necessary for different staff to transfer on different dates, or for all staff to transfer on a particular date, to support the smooth and effective transition to the new service. The date or dates cannot at this stage be specified as it will depend on work undertaken with and by the existing services and the result of timescales for transition. It is therefore appropriate for the date or dates to be set by order in due course.

Stage 2 amendment

25. The Bill as introduced provided for this power to be subject to negative procedure in the Scottish Parliament. The Bill was amended at Stage 2 to provide for the exercise of the power instead to be subject to no procedure. This was to reflect the position on introduction for the equivalent police power, in paragraph 2(1)(b) of schedule 4, and as erroneously stated in the original Delegated Powers Memorandum in relation to fire.

Choice of procedure

26. It is considered appropriate that an order made under this provision will be subject to no parliamentary procedure as it is simply determining the date on which staff will transfer in accordance with the provisions set out in the Bill and is therefore analogous with a commencement order.

PART 3 – GENERAL

Section 122 – Transitional Provision

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

Provision

27. Section 122(1) enables the Scottish Ministers to make transitional, transitory and savings provisions in connection with the coming into force of any provision of this Act.

Reason for taking power

28. This order-making power is necessary to allow for flexibility as provisions within the Bill are brought into force. Without the power, were a transitional provision that requires an amendment to the primary legislation necessary to facilitate implementation of the Act, we would have to return to Parliament to request primary legislation. That would not be an effective use of resources by the Scottish Parliament or the Scottish Government and would potentially delay implementation. The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, or in connection with, the coming into force of any provision of the Bill.

Stage 2 amendment

29. In response to the recommendations of the Subordinate Legislation Committee (SLC), the Scottish Parliament amended section 120 of the Bill at Stage 2 to ensure that the power in section 122 is subject to the affirmative procedure where it contains provisions which add to, replace or omit any part of the text of an Act.

Choice of procedure

30. This is a residual power that is included to ensure that any unforeseen obstacle to the transition to the Scottish Police Authority or to SFRS can be addressed. There are precedents for this kind of power, which is restricted by the fact that only transitional and transitory provision can be made. Bearing in mind the limited scope of the power, in terms of the subject matter and nature of the provision that can be made, the Scottish Government felt that the negative procedure would provide sufficient parliamentary scrutiny.

31. It remains the Scottish Government's view that the temporary nature of transitional provisions means that the negative procedure is generally appropriate. However, acknowledging on this particular occasion the merit of taking a consistent approach to the applicable procedure where orders are made which include textual modification under sections 121 and 122, the choice of procedure was changed to affirmative where it is used to make textual amendments to primary legislation and to the negative procedure otherwise.

This document relates to the Police and Fire Reform (Scotland) Bill as amended at Stage 2 (SP Bill 8A)

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