

Management of Offenders (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 Management of Offenders (Scotland) Bill ('the 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 the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill provisions

3. The Management of Offenders (Scotland) Bill consists of four parts and two schedules. The Bill brings forward a number of reforms designed to deliver on the Scottish Government's commitment to continue to transform the way in which Scotland deals with offenders, ensuring that Scotland's justice retains its focus on prevention and rehabilitation, whilst enhancing support for victims.

4. Part 1 of the Bill (sections 1-16) provides for the expansion of the current electronic monitoring regime, including facilitating the introduction of new technologies, and increasing the options available to manage and monitor offenders in the community and further protect public safety. In summary:

- Sections 1-4 are concerned with the use of electronic monitoring by the courts in criminal proceedings;
- Sections 5-7 relate to the use of electronic monitoring by Scottish Ministers in connection with the release of an individual from imprisonment or detention on parole;

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- Sections 8-9 deal with the specification of approved devices for monitoring, and the use of those devices and the information obtained through monitoring.
- Section 10-11 are concerned with the arrangements that need to be put in place for an electronic monitoring system to operate.
- Sections 12-14 outline the obligations which an individual is placed under, and set out a number of rules in relation to any breach of those obligations.
- Sections 15-16 cover the procedure for making regulations and introduce schedule 1.

5. Part 2 of the Bill provides for a reduction in the length of period during which people have to disclose their offending history, while still protecting public safety. This will help individuals to break the cycle of offending by assisting their attempts to, for example, gain employment or attend university or college. In summary:

- Sections 17-30 amend some of the rules relating to the disclosure of convictions as set out in the Rehabilitation of Offenders Act 1974 ('the 1974 Act').
- Sections 31-32 provide new powers to Scottish Ministers in relation to alternatives to prosecution, and regulate how powers under the 1974 Act are exercisable.
- Sections 33-35 provide transitional provisions, introduce schedule 2 and provide a definition of the 1974 Act.

6. Part 3 of the Bill provides reforms designed to simplify and modernise processes, and support consistency of approach, in relation to parole matters and the Parole Board for Scotland. In summary:

- Sections 36-39 are concerned with the composition of the Board and the appointment and reappointment of members.
- Sections 40-43 deal with changes to functions and requirements of the Board in relation to prisoners.
- Sections 44-45 relate to the independence, and administrative arrangements, of the Board.
- Sections 46-47 make repeals to the Custodial Sentences and Weapons (Scotland) 2007 and provide a definition of the 1993 Act.

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7. Part 4 of the Bill deals with some standard final matters such as commencement and the making of ancillary provisions.

Rationale for subordinate legislation

8. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the need to:

- strike the appropriate balance between the importance of the issue and providing sufficient flexibility to respond to changing or unforeseen circumstances without the need for primary legislation;
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision approved by the Parliament;
- allow detailed administrative arrangements to be kept up-to-date within the basic structures set out in the Bill;
- take account of the likely frequency of amendment; and
- ensure the proper use of parliamentary time.

9. The relevant provisions are described in detail below. For each provision the memorandum sets out:

- 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 4(1) – Modification of the list of relevant disposals

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

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10. Section 4(1) of the Bill provides that Scottish Ministers may by regulations modify the list of relevant disposals in section 3(2) so as to add, alter or remove an entry. The list of relevant disposals specifies the court orders alongside which the court may impose an electronic monitoring requirement on an offender. Section 4(1) also provides that Scottish Ministers may also limit an entry to the list of relevant disposals so as to specify a certain aspect of what a court can do. This would enable Ministers to add a specific court order to the list of relevant disposals in section 3(2) but limit that entry to a specified aspect of the court order. The modifications that can be made to the list are however limited by the provisions of section 4(2) and 4(3) so that they must relate to actions taken by the court in criminal proceedings and must constitute a restriction on an offender's whereabouts or consumption of alcohol, drugs or other substances.

Reason for taking power

11. This power is necessary to allow Scottish Ministers to amend the list of relevant disposals contained within section 3(2) of the Bill. In the absence of such a power, electronic monitoring could only be used in relation to the disposals listed. This would not meet the policy objective of allowing the use of electronic monitoring to be expanded in order to respond either to changes in the court's powers or changes in technology. Allowing the list of disposals to be amended by regulation ensures that the future use of electronic monitoring in relation to criminal proceedings is not hampered by the adoption of a fixed and inflexible list of disposals. This power is limited so as to relate only to measures concerning an offender's whereabouts or their consumption of alcohol, drugs or other substances.

Choice of Procedure

12. This power is subject to negative procedure. It is considered that the expansion of electronic monitoring by section 4(1) regulations is subject to the court's determining where monitoring is appropriate in the individual circumstances of the case. Nothing in section 4(1) regulations will impose electronic monitoring on an offender – that is the responsibility for the court taking into account the circumstances of the offender. The power in section 4(1) is simply to add to a list of disposals and that power is restricted to certain disposals which include a restriction on an offender's movements or consumption of certain substances. Accordingly, as this power does not directly impose electronic monitoring on any individual and

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as the power is subject to a significant limitation, negative procedure is considered appropriate.

Section 7(1)(e) - Power to prescribe types of conditions to which electronic monitoring may apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

13. Section 7(1)(e) provides Scottish Ministers with the power to prescribe conditions in relation to release from imprisonment or detention alongside which Scottish Ministers may impose an electronic monitoring requirement on an offender. Section 7(1) contains a list of conditions which may be imposed on an offender on release from prison and the compliance with which may be monitored electronically. The power in section 7(1)(e) enables Ministers to prescribe additional types of conditions which can be monitored electronically.

Reason for taking power

14. This power to prescribe the types of conditions to which electronic monitoring may apply will allow the Scottish Ministers to add future conditions with regard to release from prison or detention without having to introduce primary legislation to do so each time. This power will ensure that the use of electronic monitoring can be expanded where new powers of release are created or different circumstances arise where electronic monitoring could be beneficial. Allowing the list of conditions to be amended by regulation ensures that the future use of electronic monitoring in relation to individuals released from detention or imprisonment is not hampered by the adoption of a fixed and inflexible list.

Choice of procedure

15. This power is subject to negative procedure. It is considered that nothing in section 7(1)(e) regulations will impose electronic monitoring on an offender. That is the responsibility of the Parole Board and (in some scenarios) Ministers taking into account the circumstances of the offender. The power in section 7(1)(e) simply enables Ministers to specify additional

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types of early release conditions which may attract electronic monitoring. That power is restricted so that Ministers can only specify conditions imposed on a prisoner who is released from prison and, by virtue of section 7(2), those conditions will relate only to restrictions on an offender's movements or consumption of certain substances. Accordingly, as this power does not directly impose electronic monitoring on any individual and as the power is subject to a significant limitation, negative procedure is considered appropriate. In addition, this power does not enable Ministers to amend primary legislation.

Section 8(1) - Power to prescribe types of approved devices

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

Provision

16. Section 8(1) makes provision for Scottish Ministers to approve devices for monitoring an offender's whereabouts or detecting whether an offender has consumed, taken or ingested alcohol, drugs or other substances. These approved devices may then be used in relation to the monitoring of that offender for the purposes of a requirement imposed by a court under section 1 or by Scottish Ministers under section 5.

Reason for taking power

17. The Scottish Ministers have powers, under current legislation, to specify the types of devices which may be used for the various types of electronic monitoring. At present, only Radio Frequency devices have been specified under these powers. The creation of general rules which cover the various types of electronic monitoring necessitate the repeal of the existing law on electronic monitoring and, in some cases, the re-enactment of some of that law so as to cover the new uses of electronic monitoring. The ability of Ministers to prescribe the types of devices that may be used for electronic monitoring is one such existing power that is to be repealed and re-enacted in a wider sense in the Bill to fit the new regime for electronic monitoring.

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18. This power allows Scottish Ministers to prescribe a range of devices such as devices which utilise Global Positioning System (GPS) technology, or devices for transdermal alcohol monitoring. This power will enable Ministers to explore the opportunities presented by new and future technologies to strengthen the electronic monitoring regime, by empowering them to prescribe new and developing technologies to be utilised as and when they evolve.

Choice of procedure

19. This power is subject to negative procedure. Section 8(1) is a technical power to specify the types of devices that can be used for electronic monitoring and does not impose specific obligations on any person. It replicates the existing provisions of section 245C of the Criminal Procedure (Scotland) Act 1995, extending them such that they apply to all forms of electronic monitoring. Regulations made under section 245C of the 1995 Act are subject to negative procedure and it is considered that this remains appropriate.

Section 9(1) – Power to make provision about the use of approved devices and information obtained via electronic monitoring

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

20. Section 9(1) provides Scottish Ministers with regulation-making powers to make provision in relation to the use of approved devices, and the use of information obtained through the monitoring of an offender by means of such devices. Section 9(3) to (5) clarifies the types of provision that may be made under section 9(1). Ministers may use the power in section 9(1) to specify how a device is to be worn or used by an offender. Ministers may restrict the use of a particular device or the gathering of information. Regulations under section 9(1) may also regulate the use, sharing, retention and destruction of information gathered under electronic monitoring. Section 9(3) to (5) does not provide an exhaustive list of the types of provision that may be made under section 9(1); it simply states some examples of how that power could be used.

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Reason for taking power

21. This power allows Scottish Ministers to make provisions relating to how approved devices are to be used, and in relation to how the information gathered by those devices should be used. Ministers are conscious of the increased collection of data that will accompany the increased monitoring of offenders and the policy intention is to ensure that the data protection rights of the offender are respected. The use of new technology, such as GPS or alcohol monitoring, may not be appropriate in some circumstances and this power enables Ministers to restrict the circumstances in which this new technology is used to ensure that it happens appropriately. This power further enables Ministers to ensure that data is collected, retained, used and destroyed in accordance with the data protection rights of the offender, and allows Ministers to react to changes in data protection law to ensure those rights continue to be respected.

Choice of procedure

22. This power is subject to negative procedure. Regulations made under this section will primarily be to restrict the use of data obtained via electronic monitoring, by placing obligations on Scottish Ministers to handle that data in a certain way. On the basis that it is considered that regulations made under this power will therefore be mainly prohibitive and restrictive rather than permissive, negative procedure is considered to be the most appropriate.

Section 15 - Procedure for making regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

23. Section 15(1) provides that regulations under Part 1 of the Bill may make different provisions for different purposes (including provision of temporary or local effect); and includes incidental, supplementary, consequential, transitional, transitory or saving provisions. This is a gloss on the regulation-making powers elsewhere in Part 1 of the Bill rather than a stand-alone power to make regulations. Where Ministers are empowered to make regulations under Part 1, section 15 ensures that that power could

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be used to make provision for different purposes including provision which is restricted in terms of time or geographical effect.

Reason for taking power

24. By enabling Scottish Ministers to make provision of temporary or local effect, the powers in section 4(1) of the Bill could be used to establish pilot projects for the use of electronic monitoring in relation to new court orders. Under section 4(1), read alongside section 15(1), an addition to the list of relevant disposals in section 3(2) could be restricted to a specific Sheriff Court for a specific period of time in order to gauge the effectiveness of electronic monitoring in those circumstances. If the pilot project is successful, Scottish Ministers could introduce further subordinate legislation under section 4(1) to remove the time and location restrictions and roll that form of electronic monitoring out across Scotland.

Choice of procedure

25. This is not a stand-alone power; it is a gloss on the powers in Part 1 of the Bill to make regulations. Section 15(2) provides that all powers to make regulations in Part 1 of the Bill will be subject to negative procedure. The choice of this procedure is discussed above in relation to each individual regulation-making power.

Section 26(4) – documents to accompany application to Mental Health Tribunal

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: negative

Provision

26. Section 26(4) of the Bill inserts new section 164A into the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the 2003 Act') to enable a person who is subject to a compulsion order to apply to the Mental Health Tribunal for Scotland for a determination of their disclosure requirements. A regulation-making power is provided to enable Scottish Ministers to specify any documents which require to accompany the application. There

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is no express reference to Scottish Ministers because section 329(1) of the 2003 Act defines regulations as regulations made by the Scottish Ministers.

Reason for taking power

27. This power will allow the Scottish Ministers to respond flexibly if the need arises to specify whether certain documents should always accompany an application. Experience of the application process will help inform how this regulation-making power will be used.

Choice of procedure

28. Under section 326(3) of the 2003 Act, negative procedure is the default procedure provided for regulations made under that Act and it is considered to be the appropriate procedure in this case. As a result, no specific provision is made to specify procedure.

Section 30(4) – Adjusting the list of orders which, if breached, delay the length before a conviction is spent

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

29. Section 30 of the Bill inserts new section 6(3ZA) to (3ZE) into the 1974 Act which relates to the rules governing disclosure periods for certain disposals given when a court order has been breached. Section 30(4) provides for when certain orders are imposed on a person (an order for conditional discharge, a community payback order, a drug treatment and testing order and a restriction of liberty order) and subsequently breached. If, as a consequence of the breach, the person is sentenced for the original offence after the disclosure period for the orders has expired, and the disclosure period applicable to this new sentence ends later than the original disclosure period would have, the person is not treated as a protected person until this new disclosure period comes to an end. Similarly the conviction is not spent until such point. Section 30(4) inserts, at new section 6(3ZD), a regulation-making power for the Scottish Ministers to amend, remove or add a further entry to the list of orders to which this rule applies.

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Reason for taking power

30. This power will allow the Scottish Ministers to respond flexibly to the need to adjust the list of offences to which this rules applies. This may be necessary where, for example, a new disposal similar to those already contained in section 30(4) is created. Where such a new disposal is created, it may be that provision is made in the primary legislation creating the disposal but this regulation-making power will provide flexibility to respond swiftly should the need arise in the future.

Choice of procedure

31. Regulations made under this section are subject to the affirmative procedure. It is considered that this level of scrutiny is appropriate as the power provides for the ability to amend the 1974 Act.

Section 31 – Regulating which alternatives to prosecution have disclosure periods and what those disclosure periods are

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

Provision

32. Section 31 of the Bill inserts new section 8C into the 1974 Act. This provides a regulation making power in relation to the treatment of alternatives to prosecution under the 1974 Act.

33. Section 8B of the 1974 Act currently sets out the circumstances in which a person has been given an alternative to prosecution in respect of an offence for the purposes of the 1974 Act. The power provided for at new section 8C enables modification of the circumstances in which a person is given an alternative to prosecution for the purposes of the 1974 Act. The modifications which can be made are to amend or remove an entry on the list, or to add an entry to the list. It also enables paragraph 1 of schedule 3 of the 1974 Act to be amended to modify when an alternative to prosecution becomes spent, i.e. the disclosure period, by amending or

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removing an existing provision or adding provision, for example to reflect any new alternatives to prosecution.

Reason for taking power

34. This power is included as it has been noticed it was missing from changes made to the 1974 Act by the Criminal Justice and Licensing (Scotland) Act 2010, which inserted provisions relating to alternatives to prosecution into the 1974 Act. At that time, it was intended to replicate the provisions of the 1974, as they apply to convictions, for alternatives to prosecutions. The 1974 Act contains a power to amend the disclosure periods which apply to disposals. No similar such power exists for alternatives to prosecution.

35. This power will provide flexibility for the Scottish Ministers to respond to, for example, the changing use of alternatives to prosecution by proposing changes to disclosure periods. It will also allow a flexible response should new alternatives to prosecution be created requiring the legal protections of the 1974 Act.

Choice of procedure

36. Regulations made under this section are subject to affirmative procedure. This is considered appropriate as the power can be used to provide for substantive policy in relation to the treatment of alternatives to prosecutions within the 1974 Act, e.g. the length of a disclosure period, by way of modification of the 1974 Act.

Section 32 – exercise of powers contained within the 1974 Act

Power conferred on: the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: affirmative

Provision

37. The 1974 Act contains a number of order-making powers conferred on the Secretary of State. Such powers, insofar as they are exercisable within devolved competence, are now exercised by the Scottish Ministers by virtue of the Scotland Act 1998. Section 10 of the 1974 Act deals with

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procedural matters relating to orders under the 1974 Act. In particular, section 10(2) means that orders made by the Scottish Ministers are subject to the affirmative procedure.

38. Section 32 inserts a new section 10A into the 1974 Act. This provision ensures that any orders made by the Scottish Ministers under the 1974 Act can make different provisions for different purposes and make incidental, supplementary, consequential, transitional, transitory or saving provision. Section 10A(2) provides that the power under section 5(11) of the 1974 Act, insofar as exercisable by the Scottish Ministers, includes the ability of the Scottish Ministers to make consequential provision modifying any enactment when making use of the section 5(11) order-making power.

Reason for taking power

39. These provisions are inserted into the 1974 Act to ensure that, in exercising order-making powers under the 1974 Act, the Scottish Ministers have the necessary flexibility, and ancillary powers, to ensure any provision they make operates comprehensively and accurately. These provisions are standard provisions contained in modern legislation, but were not included in legislation made at the time the 1974 Act was passed.

Choice of procedure

40. This is determined by existing section 10 of the 1974 Act. The effect of section 10(2) is that any orders made under the 1974 Act by the Scottish Ministers will be subject to the affirmative procedure in the Scottish Parliament. Since section 10 is not amended by the Bill, and section 10A does not impose any new powers on the Scottish Ministers, it is appropriate that this existing level of scrutiny should remain unchanged.

Section 45 – Regulating administrative arrangements of the Parole Board for Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

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41. Section 45 enables the Scottish Ministers to make regulations authorising the chairing member of the Parole Board to make provision about the administrative arrangements within the Parole Board for Scotland. The powers also allow the chairperson to delegate responsibility for such arrangements.

Reason for taking power

42. This power will be used to ensure that administrative arrangements for the Parole Board are transparent and that matters of accountability and delegation for these arrangements are provided in secondary legislation. Rather than set out a definitive list of the administrative arrangements on the face of the Bill, it is considered appropriate to provide such details in subordinate legislation. It may be necessary to amend the administrative arrangements set out in regulations from time to time. The use of regulation-making powers will provide the Scottish Ministers with the flexibility to do so by subordinate legislation, rather than requiring further primary legislation.

Choice of procedure

43. Regulations made under this section are subject to affirmative procedure. This procedure is considered appropriate to allow the Parliament further scrutiny of the draft instrument.

Section 48 - Ancillary powers

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative if amends primary legislation; otherwise negative

Provision

44. Section 48(1) of the Bill enables Scottish Ministers to make such incidental, supplementary, consequential, transitional, transitory or saving provisions as they consider appropriate for the purpose of, in connection with, or for giving full effect to the Bill.

Reason for taking power

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45. This power is necessary to ensure flexibility when it comes to implementation of the Bill and the effective operation of the legislation once it comes into force. Several of the Bill's provisions are inserted into or interact with other legislation, particularly the 1974 Act. While the Scottish Government has given careful consideration to such interaction, there may be unforeseen matters which are required in order to ensure the proper effect of the Bill is realised. Without such a power, any such changes would require to be made via primary legislation which would not be an effective use of the Parliament's, or the Scottish Government's, resources. The power is limited to the extent that it can only be used as Scottish Ministers consider appropriate for the purposes of, in connection with, or for giving full effect to, the Bill.

Choice of procedure

46. Regulations made under this section which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to affirmative procedure. Otherwise regulations made under this section are subject to negative procedure. This approach is typical for ancillary powers of this type.

Section 49 - Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid only

Provision

47. Section 49 of the Bill enables the Scottish Ministers to make regulations appointing days on which the provisions of the Bill come into force (other than section 49 itself, section 48 and section 50, which come into force on the day after Royal Assent). Regulations under this power may include transitional, transitory or saving provision and made different provisions for different purposes.

Reason for taking power

48. This power is necessary to enable the Scottish Ministers to commence the provisions in the Bill appropriately by allowing them to take into account the existing law and provide for a smooth transition towards

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the rule established by those provisions. Decisions on when and to what extent the Bill is commenced are best determined by the Scottish Ministers, particularly since it might be appropriate to commence provisions at different times.

Choice of procedure

This power is subject only to the default laying procedure under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is typical for commencement regulations and is justified having regard to the administrative nature of the commencement of the Bill provisions which have been agreed to by the Scottish Parliament.

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