

Management of Offenders (Scotland) Bill

[As Amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Management of Offenders (Scotland) Bill. It describes the new subordinate-legislation making powers added to the Bill at Stage 2 and the adjustment made to a power that was in the Bill at introduction. This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

New delegated powers

Section 7A – Duty to share information before releasing a prisoner on licence

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

Provision

3. Section 7A(1) and (2) places a duty on the Scottish Ministers to request of the Scottish Court and Tribunal Service, the Police Service of Scotland and a relevant local authority (in exercise of its social work service functions) information relevant to a prisoner's monitoring. The request must

be made by the Scottish Ministers before exercising their powers to release the prisoner on Home Detention Curfew under section 3AA(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Under section 7A(3), following receipt of such a request, the information should be provided to the Scottish Ministers within 28 days. Section 7A(4) provides the Scottish Ministers with a power to make further provision by regulations for the purposes of and in connection with section 7A.

Reason for taking power

4. Section 7A was added to the Bill by a non-Government amendment. The Government is not clear why the power in section 7A(4) was considered necessary.

Choice of procedure

5. This power is subject to the negative procedure. As the Government is not clear what the power's intended purpose is, it cannot comment on why that procedure is appropriate.

Section 32A(1) – Excluded sentences: applications for convictions to be treated as spent

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

6. Section 32A(1) enables the Scottish Ministers to make regulations for or in connection with the purpose of allowing a person on whom a relevant sentence was imposed to apply to be treated as a protected person in respect of that conviction and for the conviction to be treated as spent. The meaning of “relevant sentence” is set out in subsection (3) and includes determinate custodial sentences of greater than 48 months. Subsection (6) provides that references to protected persons and convictions being treated as spent are to be construed in accordance with the Rehabilitation of Offenders Act 1974 (“the 1974 Act”).

7. Subsection (4) provides the regulations must contain provision on certain matters including: that applications are to be made to a specified reviewer; that the application is to be determined by the specified reviewer;

and that those subject to sex offender notification requirements cannot make an application. Under subsection (4), regulations must contain provision that an application cannot be made until the expiry of the “appropriate period”. Subsection (5)(a) defines the appropriate period as, 6 years plus the length of sentence for convictions obtained when aged 18 or older and 3 years plus the length of sentence for convictions obtained when under the age of 18 at date of conviction. Regulations made under subsection (1) must also contain provision setting, or for ascertaining, the “relevant date”. As defined by subsection (5)(b), the “relevant date” is the date from which the applicant’s conviction is to be treated as spent and on which the applicant is to be treated as a protected person in respect of that conviction.

8. Section 32B sets out further details on the exercise of the power under section 32A(1), setting out non-exhaustive matters about which provision may, in particular, be made in regulations made under section 32A(1).

Reason for taking power

9. Section 18 of the Bill amends section 5(1) of the 1974 Act to change when certain custodial sentences become “excluded sentences”, from a period of 30 months to a period of 48 months. This means that convictions attracting a sentence of up to and including a period of 48 months will now be capable of becoming spent if the Bill is passed. However, sentences greater than 48 months will be “excluded sentences”, meaning the conviction for which the sentence was imposed cannot become spent under the 1974 Act.

10. However, some stakeholders, (e.g. Howard League and the Scottish Centre for Crime and Justice Research), raised concerns during Stage 1 scrutiny that although generally content with the overall reforms to the 1974 Act, people who received sentences of greater than 48 months would still be left facing a lifetime of disclosure under basic disclosure with no prospect of being able to seek to have that reviewed. As such, there were calls for steps to be taken to help those receiving longer sentences to be able to, at some future date, have their convictions considered spent.

11. Therefore, after considering the views from stakeholders, the Scottish Government considers that a revised system of disclosure that doesn’t even permit the possibility of not needing to disclose relevant sentences over 48 months under basic disclosure would seem disproportionate and

not in keeping with the overall progressive reforms to the 1974 Act in this Bill. The power conferred by section 32A(1) is in response to these concerns.

12. The development of a review mechanism is a new significant step for the operation of the 1974 Act. Considerable detail about how such a review mechanism will operate requires to be fully thought through. As such, the taking of these enabling powers will allow the Scottish Ministers to further develop the progressive reforms to the 1974 Act by creating an independent review mechanism, via regulations, for certain relevant sentences greater than 48 months in conjunction with key interests and allow for future engagement on the exact detail of how the review mechanism will operate. If full details of the review mechanism had been placed on the face of the Bill, this would not have permitted appropriate consultation and engagement before decisions about specific details would require to have been taken.

Choice of procedure

13. 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. The taking of these enabling powers will allow the Scottish Government to bring forward a future scheme for full scrutiny by the Scottish Parliament.

Section 32C – Regulations under section 32A: appropriate period

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative

Provision

Section 32C provides an enabling power to allow the Scottish Ministers to modify aspects of the definition of “appropriate period” in section 32A(5)(a). The power conferred by section 32C enables the Scottish Ministers to adjust either the age when different buffer periods apply or the length of buffer periods or both. The “buffer periods” refer to the number of years added to the length of the sentence for the purposes of determining the appropriate period in section 32A(5)(a).

Reason for taking power

This ensures there is flexibility to change the buffer periods and the age at which the buffer periods apply at some future date, if appropriate, through secondary legislation. This may be thought appropriate if, for example, the age within the 1974 Act when different disclosure periods apply changed from the age of 18 to a different age.

Choice of procedure

Regulations made under this section are subject to the affirmative procedure. It is considered that this level of scrutiny is appropriate as regulations under section 32C would amend primary legislation.

Revised delegated power

Section 9 – Use of devices and information

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations made by Scottish statutory instrument
Revised or new power:	revised
Parliamentary procedure:	affirmative procedure

Provision

14. Section 9 deals with the specification of approved devices for electronic monitoring under Part 1 of the Bill, and the use of those devices and the information obtained through them. Subsection (1) provides the Scottish Ministers with a power to make regulations about those matters. The substance of the power was not changed at Stage 2. The Delegated Powers Memorandum for the Bill as introduced provides further detail and explains the reason for taking the power. The change made at Stage 2 in relation to the power section 9 confers relates to the parliamentary scrutiny procedure that is to apply to power's exercise.

Choice of procedure

15. Section 9 was amended at Stage 2 to make the power it confers subject to the affirmative rather than the negative procedure. This change

was made following the recommendation of the Delegated Powers and Law Reform Committee in its Stage 1 report on the Bill.¹

16. Although regulations made under this power will be mainly prohibitive and restrictive rather than permissive, the information collected could be of a highly sensitive nature (levels of substance consumption or exact geographical location). The change to the affirmative procedure reflects the Parliament's desire to have close oversight of the data arrangements that are to be put in place

¹ Delegated Powers and Law Reform Committee 25th report, 2018, Management of Offenders (Scotland) Bill at Stage 1 (SPP 326) para 35.

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