

Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (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.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 52–EN);
- a Financial Memorandum (SP Bill 52–FM);
- a Policy Memorandum (SP Bill 52–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 52–LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill is divided into 3 Parts (consisting of 29 sections) and 1 schedule.

5. Part 1 of the Bill aims to make permanent the temporary measures from the Coronavirus (Recovery and Reform) (Scotland) Act 2022 that relate to:

- allowing for the electronic signing and sending of documents in criminal cases;
- enabling virtual attendance at a criminal court;

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

- a national jurisdiction for callings from custody, so that custody cases can be heard in any sheriff court in Scotland; and
- an increase in the maximum level of fiscal fine, to £500, along with adjustments to the scale of fines.

6. This Part of the Bill also introduces new provisions that will:

- support the use of images rather than production of physical evidence in court;
- enable copies held in the Digital Evidence Sharing Capability (“DESC”) and successor systems to be treated as equivalent to the item copied without the need for additional authentication, to provide flexibility in the law;
- allow the court to accept in evidence other copy documents without authentication under schedule 8 of the Criminal Procedure (Scotland) 1995 (“the 1995 Act”) when it considers it appropriate to do so; and
- extend the national custody jurisdiction to the justice of the peace court and provide for that jurisdiction to be exercisable by a sheriff as well as by a summary sheriff or justice of the peace.

7. Part 2 of the Bill contains provisions that will create a national domestic homicide and suicide review model. Domestic homicide and suicide reviews are a multi-agency process which enables lessons to be learned following a homicide or suicide where abuse is known or suspected. The aim of the review is to work with relevant agencies, either statutory or voluntary, where a victim and/or perpetrator have come into contact with services, to better identify and respond to the risks associated with domestic abuse and help prevent future domestic abuse related deaths. Measures included are:

- definition and scope of a domestic homicide or suicide review;
- enabling powers to modify the scope and name of the review;
- provisions establishing a review oversight committee, chair, deputy chair and case review panels and chairs;
- provisions requiring the notification of any death of which the notifying body is aware which it believes is a reviewable death;
- provisions ensuring a review does not prejudice another live investigation or proceedings;
- provisions ensuring co-operation, participation, and recovery of information; and
- reporting requirements.

8. Further information about the provisions of the Bill are contained in the Explanatory Notes and Policy Memorandum which are published separately.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Rationale for subordinate legislation

9. The Bill contains a number of delegated powers which are explained in more detail below. The Scottish Government has carefully considered whether and in what manner provisions should be set out in subordinate legislation rather than on the face of the Bill. In considering these issues, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the likely frequency of amendment;
- the need to make proper use of Parliamentary time;
- ensuring sufficient flexibility to respond to changing circumstances; and
- the need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation.

Delegated powers

Section 5(6)(b) – Power to prescribe digital evidence storage systems

Power conferred on: The High Court of Judiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: Laid, no procedure

Provision

10. Section 5 makes provision to dispense with the requirement to authenticate copy documents under schedule 8 of the 1995 Act where certain conditions are met. One of those conditions is that the document is stored on the ‘digital evidence storage system’ which is defined in subsection (6) as the system operated by Police Scotland known as the Digital Evidence Sharing Capability (‘DESC’) or such other digital system as may be prescribed. Paragraph 8 of schedule 8 confirms that “prescribed” means by Act of Adjournal.

Reason for taking power

11. DESC is a cross sector collaboration which modernises and streamlines the way digital evidence is collected, managed and shared throughout the criminal justice process. DESC captures and stores digital evidence, such as photographs or video footage, which can then be accessed on the same secure platform by the police, prosecutors, defence agents and played in court at any subsequent trial. It has been developed over many years with justice partners and will lead to significant efficiencies across the system both in reducing the need to routinely store and transport physical items and also in enhancing the speed and ease of disclosure of evidence to support early resolution of cases.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

12. There are currently no plans to introduce any alternative systems to replace or store evidence alongside DESC in the operation of schedule 8. However, it is possible that in future DESC may be renamed or replaced by a successor system. In order to future proof the legislation and ensure that the provisions in schedule 8 could continue to operate for digitally stored evidence, subsection (6)(b) permits the High Court to prescribe another digital system to operate under the provision. This power is required in order to provide flexibility for such future iterations, upgrades or alternatives.

Choice of procedure

13. It is not considered necessary for any future prescribing of an alternative system to be done by means of a change to the 1995 Act. This is because it is not generally considered appropriate to include detailed matters relating to the operational systems used by justice agencies in primary legislation. Such matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the 1995 Act, which makes provision about Acts of Adjournal generally). This is in line with the existing powers already granted to the High Court under schedule 8 of the 1995 Act. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 6(1)(b) – Increase of fixed penalty limit

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

14. Section 6 modifies section 302 of the 1995 Act to provide that the maximum permitted level of fiscal fine available to prosecutors to offer accused as an alternative to prosecution (if accepted) is £500. This is therefore the maximum amount that can be set when the existing power to specify fine levels by subordinate legislation is exercised, but fine levels themselves are determined separately (currently by the Criminal Procedure (Scotland) Act 1995 Fixed Penalty Order 2008).

15. As well as making the change described above, section 6(1) replaces an existing power with an updated version of it. Subsection (1)(b) of section 6 inserts a new subsection (7B) into section 302 to provide the Scottish Ministers with the power to amend the 1995 Act to increase the maximum permitted level of fiscal fine by way of regulations. This power is exercisable by substituting the figure of £500 for a higher figure on the face of the 1995 Act. At present this power would be exercised by order under section 302(7A) without modifying the text of the 1995 Act.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Reason for taking power

16. Fiscal fines are an important tool available to prosecutors to use in appropriate cases. They have long been used as a proportionate response to lower-level offending where the public interest is not met by prosecution in court or use of another direct measure. It is considered that for fiscal fines to be an effective tool to keep less serious cases out of the court system, they need to be set at an appropriate and meaningful level to address the range of circumstances for which they might be used. Appropriate modification of the maximum level is required from time to time to ensure that fiscal fines continue to be a meaningful tool for prosecutors and allow court and other resources to be focussed on more serious cases. It is considered more appropriate going forward to make such a modification by amending section 302 of the 1995 Act so that the maximum permitted level is evident to anyone looking at that section.

Choice of procedure

17. The power is subject to the affirmative procedure. This choice of procedure is in line with the level of procedure applicable to the current power under section 302(7A) (which, under subsection (8)(b), is subject to the affirmative procedure). The Scottish Government considers that this choice of procedure remains appropriate for the updated power, to allow the Scottish Parliament to apply a high level of scrutiny to the detail of this change. This is considered appropriate because although it is up to individuals whether or not to accept a fiscal fine, the level of a fiscal fine will be of importance to those affected by it.

Section 10(1) – Power to modify matters in relation to reviews

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

18. Section 10 enables the Scottish Ministers to make changes to the domestic homicide or suicide review mechanism provided for by section 9. The Scottish Ministers may:

- under paragraph (a) make provision about what it means for abusive behaviour to ‘result in’, or in the case of suicide to be a contributing factor to a death;
- under paragraph (b) modify what relationship requires to exist or have existed between two people in order to give rise to a review for the purposes of section 9;
- under paragraph (c) modify the circumstances relating to abusive behaviour which may give rise to a review for the purposes of section 9 (including to encompass circumstances in which there is no death); and

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

- under paragraph (d) modify the name of the review provided for by section 9 in consequence of a change made under paragraph (c).

19. Under subsection (2), such regulations may modify any enactment including the provisions of this Bill.

Reason for taking power

20. This power futureproofs the legislation by enabling the Scottish Ministers to adapt the model in response to learnings gained from the experience of operating the review model and changing social circumstances. The inclusion of this power will allow the Scottish Ministers to continue to assess the practical and operational impact of the model, both in terms of volume and how to define any other categories which may be added to it in future (for example what might constitute an ‘honour killing’), and make any necessary adjustments to ensure it remains fit for purpose.

Choice of procedure

21. These powers are subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to apply a high level of scrutiny to the detail of any changes made through the exercise of these powers. This procedure reflects the importance and significance of potential changes made under this power. Although some limbs of the power are of less significance (such as the label that is used as the name of the review model), it is recognised that making changes to the circumstances that are capable of being covered by the review model is of fundamental importance to the operation of the system of reviews. As such, it is considered appropriate that the affirmative procedure applies to the use of this power, even in cases where the power to modify primary legislation is not exercised.

Section 11(5) – Power to modify list of nominating bodies

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

22. Section 11 provides for the creation of a review oversight committee to secure and oversee the carrying out of reviews. It also makes provision in relation to the committee’s composition, including providing that the Scottish Ministers are to appoint some committee members from nominations received from the list of persons set out at subsection (3). Subsection (5) enables the Scottish Ministers to modify subsection (3) to add a person, vary the description of a person, or remove a person on that list by way of regulations. This power is subject to the Scottish Ministers consulting, in accordance with subsection (6), the person in respect of which the changes are being proposed.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Reason for taking power

23. This power enables the Scottish Ministers to adapt the list of those influencing the membership of the review oversight committee, in order to respond to changing circumstances (including future changes to the public sector landscape) and ensure that the committee can continue to operate effectively. For example, cases where this is relevant could include where the persons noted in subsection (3) change their legal name, or are no longer operational, as well as where practical experience of reviews demonstrates that a particular statutory body has ongoing involvement in reviews and it is therefore considered appropriate to add them to the list. This power would allow adjustments to be made to the legislation accordingly.

Choice of procedure

24. The exercise of this power will not affect the underlying principles of the Bill or its provision for reviews. Being named in subsection (3) also does not confer a direct right of appointment; it simply allows for the making of nominations. The negative procedure is therefore considered to provide an appropriate balance between the nature and content of the regulations that would be made under this power and the availability of parliamentary time and resource to scrutinise such regulations. Although the power allows for the modification of primary legislation (in order to maintain one comprehensive and authoritative list), the nature of the change that would be made is very mechanical as it is limited to the naming of persons.

Section 20(6) – Power to modify list of public authorities required to co-operate

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

25. Section 20 places a duty on named public authorities to co-operate in relation to consideration of a death (i.e. the sift stage) and, where the outcome of the sift is that a review is to be held, the review itself. This includes participating in reviews (where requested to do so) and providing information on request. The public authorities subject to this duty are listed at subsection (5). Subsection (6) enables the Scottish Ministers to add a public authority, vary the description of a public authority, or remove a public authority from that list by way of regulations. Before any regulations are made, subsection (7) requires Scottish Ministers to consult the public authority to which the regulations would relate.

Reason for taking power

26. This power enables the Scottish Ministers to adapt the list of public authorities in light of practical experience of the public authorities whose co-operation proves

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

essential to the conduct of reviews, or to reflect an organisation changing its name. This will futureproof the legislation, and allow the Scottish Ministers to respond to the experience of operating the review process and changing circumstances, including future changes to the public sector landscape.

Choice of procedure

27. The exercise of this power will not affect the underlying principles of the Bill and its provision for reviews. Public authorities which are not subject to the broader duty to co-operate under section 20 can still be required to provide information under section 21, so being added to or removed from the list in section 20(5) will not be determinative of whether a body with relevant information is required to provide that for the purpose of reviews. The negative procedure is therefore considered to provide an appropriate balance between the nature and content of the regulations that would be made under this power and the availability of parliamentary time and resource to scrutinise such regulations. Although the power allows for the modification of primary legislation (in order to maintain one comprehensive and authoritative list), the nature of the change that would be made is very mechanical as it is limited to the naming of public authorities.

Section 25(1): Guidance by Ministers

Power conferred on: Scottish Ministers

Power exercisable by: Guidance issued by Scottish Ministers

Parliamentary procedure: None

Provision

28. Section 25(1) of the Bill contains an implicit power for the Scottish Ministers to issue guidance. The subsection provides that the review oversight committee and any case review panel established under section 12 must have regard to any written guidance issued by the Scottish Ministers as to the exercise of their functions under Part 2 of the Bill.

Reason for taking power

29. The requirement for the review oversight committee and case review panels to have regard to guidance issued by the Scottish Ministers is considered appropriate as a means to give the Scottish Ministers opportunity to set out their expectations on a range of matters concerning the exercise of functions, and that guidance can be expected to be updated from time to time. For example, within guidance, the Scottish Ministers may set out detailed aspects of the sift and review processes in a softer and more flexible way than legislative provision allows. Using guidance for such matters also enables the content to be changed easily in light of experience of operating the review model.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Choice of procedure

30. The guidance will cover matters of detail, and will expand upon the core principles within the Bill that are already subject to parliamentary scrutiny by virtue of being in the Bill. As guidance does not have the force of law, and requires to be updated from time to time to reflect changes in best practice, insights from learning and operational developments, it is considered that requiring the Parliament to scrutinise guidance would not be the best use of parliamentary time.

Section 27 – Ancillary powers

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative

31. Section 27 enables the Scottish Ministers to, by regulations, make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to this Bill or any provision made under it. Regulations under this section may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

32. Section 27 follows the standard model for the power to make ancillary provision. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. Without the power to make incidental, supplementary and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters that are necessary to give full effect to the original Bill. This would not be an effective use of either the Parliament's or the Government's resources. However, it is appropriate for such provisions where significant (as opposed to routine provision connected to commencement) to be subject to parliamentary procedure.

Choice of procedure

33. Any regulations made under this section will be subject to the affirmative procedure if they add to, replace or omit any part of the text of primary legislation. Otherwise, they will be subject to the negative procedure. This is a standard procedure for these types of ancillary regulations, as any change to primary legislation will be given sufficient scrutiny due to the use of the affirmative procedure.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Section 28 – Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

34. Sections 1, 2, 3, 6, 7(1) insofar as it relates to section 7(2), 7(2) and 8 come into force on whichever is the later of the day after Royal Assent or 1 December 2025. Part 3 of the Bill comes into force on the day after Royal Assent.

35. The other provisions of the Bill come into force on such day as the Scottish Ministers may by regulations appoint. Regulations under this section may make different provision for different purposes and may include transitional, transitory or saving provision.

Reason for taking power

36. Part 1 of the Bill makes permanent a number of the temporary justice measures which have been in force since 7 April 2020 through the Covid emergency legislation and the Coronavirus (Recovery and Reform) (Scotland) Act 2022. The 2022 Act contains a sunset clause which means the temporary measures cannot be extended beyond 30 November 2025. The approach to commencement of these sections of the Bill is therefore designed to avoid any gap between the expiry of the temporary provisions under the 2022 Act and the commencement of the relevant provisions of the Bill.

37. In relation to the other provisions, the Scottish Ministers need a flexible approach to commencing these provisions. It is standard practice for the Scottish Ministers to have the power to commence provisions at such time as they consider to be suitable.

Choice of procedure

38. As is usual for commencement regulations, the default laying requirement will apply, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government considers this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.

This document relates to the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 24 September 2024

Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill

Delegated Powers Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents