

POLICE (ETHICS, CONDUCT AND SCRUTINY) (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 Police (Ethics, Conduct and Scrutiny) (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 29–EN);
 - a Financial Memorandum (SP Bill 29–FM);
 - a Policy Memorandum (SP Bill 29–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 29–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 makes provision about the ethical standards of the Police Service of Scotland, procedures for dealing with and the consequences of certain conduct by constables and how policing in Scotland is scrutinised by the Police Investigations and Review Commissioner (“PIRC”). The Bill also makes changes to the governance of the PIRC. The Bill is an entirely amending Bill which operates on the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”) and the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”), as well as some limited provision directly amending secondary legislation made under the 2012 Act, namely the Police Service of Scotland (Conduct) Regulations 2014, and the Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013.

5. The Bill makes provision in respect of police ethics. Section 2 introduces a statutory code of ethics for police officers and staff and section 3 introduces an explicit duty of candour.

6. The Bill makes provision about police conduct. Section 4 makes the Scottish Police Authority (“SPA”) liable for any unlawful conduct of the chief constable. Section 5 paves the way for further functions to be conferred on the PIRC in regulations in relation to misconduct procedures. Section 6 allows misconduct procedures to be applied to persons who have ceased to be constables where gross misconduct is concerned. Section 7 requires the SPA to establish and maintain a police barred list and a police advisory list of certain former constables. Section 8 paves the way for an independent panel to determine cases relating to the standard of behaviour of senior officers and for them to have a right of appeal to the police appeals tribunal against the decisions of such a panel.

7. The Bill, in sections 9 to 16, makes provision about the functions of the PIRC. These sections make some adjustments to the PIRC’s current functions relating to the review of complaints handling by the police, and investigations into matters involving the police. They also give the PIRC new functions to call-in a complaint for consideration by the PIRC, and to investigate matters occurring in Scotland which involve constables from forces in England, Wales and Northern Ireland.

8. Finally, section 17 amends the 2006 Act to add to the corporate governance of the PIRC by making provision for a statutory advisory board to advise on non-operational, corporate governance matters.

9. Further detail about the Bill’s provisions is contained in the Explanatory Notes.

RATIONALE FOR SUBORDINATE LEGISLATION

10. The Bill confers powers on the Scottish Ministers to make regulations in relation to a range of matters dealt with in the Bill. The powers conferred by the Bill are, for the most part, either of a technical and procedural nature or relate to matters which because of their character require a flexible approach and thus are more appropriate to be dealt with by subordinate legislation.

11. The Scottish Government has, in considering what matters should be set out in subordinate legislation and the appropriate level of parliamentary scrutiny for subordinate legislation, had regard to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation being amended by the Bill; and,
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

12. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure is considered appropriate.

DELEGATED POWERS

Section 2: Code of Ethics

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

13. Section 2(2) of the Bill inserts new sections 36A and 36B into the 2012 Act. Section 36B requires that the chief constable prepares a Code of Ethics. Section 36B sets out some of the processes and procedures for doing that, including who must be consulted on the contents of the draft. Section 36B(4) provides for the power to make regulations to modify the list of consultees who must be consulted in respect of each draft of the Code of Ethics, as set out in the new schedule 2ZA to be inserted into the 2012 Act.

Reason for taking power

14. The list of consultees is designed to include those with relevant knowledge or expertise, including staff networks that represent particular diversity and minority groups, to ensure their views and perspectives are considered. As groups change and evolve, this list may need to be updated to reflect changes to organisational responsibilities.

Choice of procedure

15. The regulations to modify the list are subject to the affirmative procedure by virtue of the amendment to section 125 of the 2012 Act made by section 2(5) of the Bill. Given that the list of consultees is set out in primary legislation, it is considered that the affirmative procedure is appropriate for the purposes of amending the list.

Section 7: Scottish police advisory list and Scottish police barred list

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

16. Section 7 inserts a new chapter 9A, and new section 59A, into Part 1 of the 2012 Act. New section 59A(1) requires the SPA to establish and maintain the advisory list and the barred list and subsections (2) – (4) set out the circumstances in which a person is to be entered on each of the lists. Subsections (2)(a) and (3) require a person to be entered on the advisory list if disciplinary proceedings have been brought against the person for gross misconduct, and the person ceases to

be a constable (whether through resignation, retirement or dismissal for performance) before those proceedings are concluded. Subsection (2)(b) requires a person to be entered on the advisory list if, after the person has ceased to be a constable, disciplinary proceedings are brought against the person for gross misconduct. Subsection (4) requires a person to be added to the barred list if the person is dismissed as a constable for gross misconduct, or a decision is made in disciplinary proceedings for gross misconduct against a former constable that the former constable would have been dismissed for if still a constable at that time.

17. Subsection (5) provides the Scottish Ministers with the power to make provision by regulations for or about:

- information to be included in the advisory list or the barred list in respect of a person on that list,
- circumstances in which a person—
 - i) who would otherwise require to be entered on the advisory list or the barred list is not to be so entered, or
 - ii) is to be removed from the advisory list or the barred list,
- notice to be given to the Authority by a person specified in the regulations of a person who is to be entered in, or removed from, the advisory list or the barred list,
- notice to be given to a person who is to be entered in, or removed from, the advisory list or the barred list of the fact of being entered or removed,
- the consequences of a person being on the advisory list or the barred list, including in particular provision preventing the employment or other appointment of a person on the barred list by a person specified in the regulations,
- persons who must consult the advisory list and the barred list before employing or otherwise appointing a person,
- circumstances in which information about a person which is included in the advisory list or the barred list may be shared or published by the Authority,
- the delegation by the Authority of its functions in relation to the advisory list or the barred list,
- such other matters in connection with the lists as the Scottish Ministers consider appropriate.

18. Subsection (6) enables regulations under subsection (5) to modify any enactment, including the Bill itself.

19. Some of the powers taken merit further comment.

20. Information under subsection (5)(a) is expected to include the name, date of birth, rank, date of dismissal and a brief description of the misconduct that led to the dismissal. Subsection (5)(b) allows the regulations to make provision for cases where someone who otherwise would be entered on a list is not to be entered on it, or where someone on a list is to be removed. This will allow the regulations to provide that, for example, where an allegation is made against a person

who has ceased to be a constable and who is already on the barred list, there is no need to enter that person on the advisory list. Similarly, this power would allow regulations to enable someone to be removed from the advisory list where, ultimately, a decision to dismiss the person would not have been made.

21. Subsection (5)(e) will allow regulations to make provision as regards the effect of being on the advisory list or the barred list and subsection (5)(f) will allow regulations to contain a requirement for certain persons, namely policing bodies, to consult the lists before employing or appointing a person. The intention is to use these powers in order to prevent someone who is entered on the barred list to gain employment in the policing profession.

22. The intention is to use the power in subsection (5)(g) to allow information included in the lists to be shared (or published) with policing bodies in England and Wales. Currently there is nothing stopping a police officer in Scotland from resigning or retiring during an investigation into a matter that could have resulted in their dismissal and then seeking employment in a policing body in England and Wales. Scottish barred and advisory lists address this issue as policing bodies in England and Wales will be able to check the Scottish lists and ensure that a person is not barred from employment or appointment.

23. Although the SPA is required to establish and maintain the lists, under subsection (5)(h), regulations may make provision for the delegation of the Authority's functions in relation to the lists. This will allow the most appropriate body to be tasked with maintaining the lists and in future this may not be the Authority.

Reason for taking power

24. There is a need for flexibility in terms of how the barred and advisory scheme is to operate, not least in order to ensure that the Scottish lists will be able to join up with existing barred and advisory lists in other jurisdictions of the UK. The detailed operation of the lists will also require to interact with the procedures for misconduct, which are set out in regulations made under section 48 of the 2012 Act. It is therefore considered that the powers taken are necessary and justified in order to ensure that the lists can operate as needed.

Choice of procedure

25. The Scottish Government considers that the detailed requirements relating to the operation of the barred and advisory lists are appropriate matters to be left to secondary legislation, however, that additional parliamentary scrutiny afforded by the affirmative procedure is merited because the detailed framework of how the barred and advisory lists are to operate, including what legal effect they are to have, is not provided for on the face of the Bill. Given that being entered on the barred list can have the effect of preventing someone from continuing in their chosen profession, the Scottish Government considers that enhanced scrutiny of such regulations is important.

Section 14: Investigations involving constables from outwith Scotland

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

26. Section 14 of the Bill inserts new sections 41G and 41H into the 2006 Act. Section 41G allows the PIRC to investigate serious incidents or allegations of criminality involving constables from forces other than the Police Service of Scotland who are carrying out policing functions in Scotland. This could be functions carried out on behalf of their own forces or on behalf of Police Scotland under section 98 of the Police Act 1996. The PIRC has powers to carry out such investigations into constables of the Police Service of Scotland under sections 33A(b), 33A(c) and 41B of the 2006 Act already. The Scottish Ministers have the power to make provision about investigations into serious incidents and investigations in the public interest (the latter of which has no parallel in section 41G) by regulations under section 41D of the 2006 Act. Section 41H enables the Scottish Ministers to make regulations about investigations by the PIRC into matters involving constables of forces other than the Police Service.

Reason for taking power

27. It will enable Scottish Ministers to make regulations about the procedure to be followed, in consultation with the PIRC, in a detailed way that takes account of the need to make proper use of valuable Parliamentary time. To note, there is a similar power for the Scottish Ministers to make regulations about investigations into constables of the Police Service of Scotland under section 41D of the 2006 Act.

Choice of procedure

28. The regulations will be subject to the affirmative procedure by virtue of section 103(4) of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”), the same procedure as those made under section 41D of the 2006 Act. This procedure is considered appropriate to allow the Scottish Parliament the opportunity to consider the detail of the form and procedures of investigations, the circumstances under which the Commissioner will not be required to carry out investigations and other matters relating to investigations by the Commissioner, and is consistent with the procedure for similar regulations under section 41D of the 2006 Act.

Section 16: Provision of information to the Commissioner

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

29. Section 44(1) and (2) of the 2006 Act currently requires the Scottish Police Authority and the chief constable to provide the PIRC with certain information and documents. Section 16 of the Bill inserts new subsection (6) into section 44. This enables the Scottish Ministers to make regulations which authorise or require the SPA or the chief constable to provide information and documents to the PIRC by giving the PIRC access to an electronic storage system (such as the police complaints database).

Reason for taking power

30. Provision enabling the PIRC to have access to electronic databases will require to take into account a range of things, including the features of those databases and the need to ensure that the PIRC's access to them takes proper account of data protection issues. Having the details set out in regulations will enable legislation to keep pace with changes in technology whilst respecting the valuable parliamentary time.

Choice of procedure

31. This power is subject to the negative procedure by virtue of section 103(3) of the 2006 Act. This amendment sits within the section of the 2006 Act on information sharing. Other regulations made under that section are made by negative procedure. The provision does not impact on the PIRC's powers in themselves, or when the PIRC may or may not investigate a matter. It is a technical and minor matter around how the PIRC may go about carrying out their investigations, and ensuring this is done in the most efficient and effective manner possible. It is therefore considered appropriate that these regulations are subject to negative procedure.

Section 18: Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure if modifying primary legislation otherwise negative procedure.

Provision

32. Section 18 of the Bill provides the Scottish Ministers with the power, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Any such regulations may make different provision for different purposes and may modify any enactment.

Reason for taking power

33. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill. The Bill’s substantive provisions all amend other legislation. While the Scottish Government has carefully considered these amendments, the Bill may give rise to a need for ancillary provision. The power to make such provision is common in Bills to provide flexibility to make any adjustments in response to experience in relation to the operation of the Act as timeously as possible.

34. The Scottish Government considers that it is appropriate to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

35. If regulations made using the power were to textually amend any primary legislation, they would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure.

36. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures would provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 19: Commencement

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Laid, no further procedure

Provision

37. Section 19 of the Bill – the power to commence – provides that sections 18 and 20 will come into force on the day after Royal Assent. Other provisions in the Act come into force on such days as the Scottish Ministers may by regulations appoint. This will enable transitional arrangements and impacts on the organisations to be commenced in a practicable way.

Reason for taking power

38. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

Choice of procedure

39. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. It is considered that this provides for an appropriate level of Parliamentary scrutiny. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

*This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29)
as introduced in the Scottish Parliament on 6 June 2023*

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