

Police (Ethics, Conduct and Scrutiny) (Scotland) Bill [As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill ("the 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. It should be read in conjunction with the Delegated Powers Memorandum ("DPM") published to accompany the Bill on introduction.
2. The contents of this Memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill 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 has been considered appropriate.

Delegated powers

Section 3B: Procedures for vetting

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Revised or new power: New in this Bill, but revising an existing power in the Police and Fire Reform (Scotland) Act 212

Provision

4. Section 3B of the Bill is an entirely new section inserted at Stage 2, which revises an established regulation making power, to require regulations to provide for the ongoing vetting of police constables. The regulations will require a vetting regime that ensures that police constables are re-vetted on an ongoing basis, and with cause, and can be dismissed etc. should they not be able to maintain a vetting status.

5. Until now, vetting has been carried out in accordance with non-statutory policies and practices, but a need has been identified to be able to dismiss a constable for an inability to achieve or maintain a certain standard of vetting clearance. Providing this power requires the creation of a regulatory regime for the vetting of constables once they are in post, i.e. ongoing vetting¹, for the reasons set out below.

6. Police constables are office-holders. They are mainly regulated by the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”), section 12 of which provides that a constable is to hold and vacate office in accordance with regulations made under section 48 of the 2012 Act, or any other enactment which makes provision in that regard. There is accordingly a highly developed regulatory regime in existence², made under the power contained in section 48, which provides for many aspects of the constables’ terms and conditions.

7. Section 48 requires the Scottish Ministers to make regulations as to the governance, administration and conditions of service of constables and cadets. This very wide power is limited as provided for in sections 49 to 53 of the 2012 Act, each of which is concerned with one or more particular topics.

8. Of the provisions dealing with limitations in respect of particular topics, section 52 of the 2012 Act is concerned with disciplinary procedures. For the most part, the ways that constables can be vacated from office are contained in the current regulations relating to conduct and performance, made under section 48 of the 2012 Act, read with section 52.

9. Regulations made under section 48 are subject to the standard consultation requirements set out in section 54. Section 125 of the 2012 Act provides that regulations made under the Act are subject to the negative procedure, save for the exceptions listed, which do not include section 48 regulations.

10. From this outline of the current legislative scheme, three points are worth noting: There is a long-standing and comprehensive regulatory regime already in place, with established requirements as to consultation and parliamentary scrutiny; any means to dismiss a constable must be in legislation; and, there is statutory requirement for the

¹ In contrast to ongoing vetting, no powers are required in respect of recruitment vetting, which, because it occurs before a person becomes a constable etc., sits outside the 2012 Act.

² Including, The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013; The Police Service of Scotland (Conduct) Regulations 2014; The Police Service of Scotland (Senior Officers) (Performance) Regulations 2016; The Police Service of Scotland (Performance) Regulations 2014 and The Police Service of Scotland (Performance) Regulations 2013.

This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29A) as amended at Stage 2

detail around the terms and conditions and dismissal of constables to be held in regulations.

11. Section 3B of the Bill inserts a new section 50A “Ongoing vetting” into the sections detailing how regulation making powers under section 48 of the 2012 Act should be used. Section 50A will require the Scottish Ministers to prepare and lay regulations for the ongoing vetting of constables. Subsection (3) defines vetting as, “an assessment as to a constable’s suitability, having regard, insofar as they relate to the ethical standards and behaviour expected of constables, to the constable’s character and personal circumstances, to hold the office of constable or a particular rank or role”.

12. Section 50A will require a vetting regime that ensures that police constables are re-vetted on an ongoing basis and subsection (1)(a) sets out that constables are to undergo vetting periodically and if a reason to do so arises. Currently, constables can undergo vetting, but they cannot be dismissed directly from failing vetting, as there are no regulations allowing for dismissal following vetting. Section 50A(1)(b) will require the regulations to set out the circumstances in which a constable may be dismissed or demoted, following vetting.

13. Section 50A(2) sets out provisions that may be set in regulations, and these include the frequency of vetting; the processes to be followed in the carrying out of vetting; appeals against decisions; a duty for constables to co-operate with vetting; and requiring constables to comply with conditions to retain their vetting clearance.

14. As regulations made under section 48 of the 2012 Act, the ongoing vetting regulations must be consulted upon as set out in section 54. Section 54(2) requires mandatory consultation on draft regulations with the chief constable, the Scottish Police Authority, the joint central committee of the Police Federation for Scotland, and groups/organisations representative of various ranks of constable. The Scottish Ministers must consider any representations made by these persons/groups. There are therefore highly developed arrangements already in place for this mandatory consultation on section 48 regulations. In effect the Scottish Police Consultative Forum (“SPCF”) provides a space for engagement and meeting the mandatory consultation requirements on draft regulations that are set out above. The SPCF meets regularly throughout the year.

15. The public expect that the police workforce acts with integrity and professionalism at all times and section 50A will ensure that, going forward, all police constables will have to go through a regime of ongoing vetting, which will continue throughout a constables’ professional life, and will allow for the dismissal of those constables who cannot maintain a vetting status, reducing the overall risk to the public presented by those constables whose character or circumstances challenge their suitability to hold the office of constable.

This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29A) as amended at Stage 2

Reason for taking power

16. No new regulation making power is being taken here. The amendment requires the existing regulation making power to be used in a certain way, to make it clear that section 48 can be used to introduce regulations for ongoing vetting and to ensure that such a regulatory regime, including a power to dismiss, has vires. Arguably section 48 would already allow for this, without amendment. These regulations will form part of their terms and conditions, similarly to regulations on conduct and performance, under section 48 of the 2012 Act. The regulation making power in section 48 has been clarified in this way, at this point, in pursuance of recommendations made by His Majesty's Inspectorate of Constabulary in Scotland, in the interests of public safety, in October 2023³.

Choice of procedure

17. The regulations will be taken under the negative procedure as with all regulations made under section 48 of the 2012 Act. Regulations for performance and conduct are also made under the negative procedure, and both of these processes can equally result in dismissal or demotion of a constable. The new regulation making power sits as part of these regulations, which provide for the main conditions of service of constables, and the regulations will be consulted with the main policing stakeholders, as set out under section 54(2) of the 2012 Act.

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

Revised or new power: Revised

Provision

18. Section 7 of the Bill has been amended to accommodate the dismissal for a failure of vetting, which is provided for in section 3A of the Bill, described above. Section 7 inserts a new section into the 2012 Act, section 59A, which provides a new power to make regulations providing for an advisory list and a barred list. Section 7 of the Bill was described in paragraphs 16 to 25 of the DPM published to accompany the Bill on introduction. To ensure that the risks posed by a constable dismissed for a failure to maintain vetting are minimised, the amendment to section 7 requires such a constable to be added to the barred list. This change is made through adding a new reason to the list of reasons which require a person to be entered onto the Barred List, contained in subsection (4) of section 59A.

19. Before a constable's vetting clearance is removed, consideration will need to be made as to whether any risk can be mitigated. If a decision is made to remove vetting clearance, this is a reflection of the fact that the risk the constable is deemed to pose to

³ See recommendation 1 of the [Assurance review of vetting policy and procedures within Police Scotland, 3 October 2023](#)

This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29A) as amended at Stage 2

policing, or the public cannot be safely mitigated. At the point the constable will be dismissed therefore, they will be deemed to pose an unacceptable risk to policing. It would be unlikely that the risk would be diminished by them moving to another police force or body. The amendments will ensure that dismissals for vetting are treated in an equivalent way to misconduct dismissals, with a constable added to the Scottish Barred List following dismissal under the regulations set out under section 50A of the 2012 Act. Given that the Scottish Police Authority will now need to add those dismissed for failing to maintain vetting to the Barred List, the regulations that will provide detail on how the vetting list will work, will now also have to contain detail about persons who are placed on the list for failing to maintain vetting.

20. There are some further changes to what provision may and must be put in the regulations, as a result of opposition amendments:

- The Scottish Ministers now **must** (not may) make provision for notice to be given to a person who is to be entered in, or removed from, the advisory list or the barred list.
- The Scottish Ministers now may only make provision about publishing the Barred List, **not** for publishing the advisory list.

Reason for taking power

21. The Scottish Government is amending section 7 to include those who are dismissed for failing to maintain vetting to the Barred List. This in turn will allow the regulation making power that has already been taken in the Bill to cover dismissal for vetting, which is considered necessary for the reasons set out above.

Choice of procedure

22. As detailed in the DPM published to accompany the Bill on introduction, section 7 powers were set out to be under the Affirmative procedure and these amendments therefore fall within this procedure, providing the enhanced scrutiny of such regulations.

This document relates to the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill (SP Bill 29A) as amended at Stage 2

Police (Ethics, Conduct and Scrutiny) (Scotland) Bill [As amended at Stage 2]

Supplementary 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