

CUSTODIAL SENTENCES AND WEAPONS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Custodial Sentences and Weapons (Scotland) 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 this Memorandum are entirely the responsibility of the Scottish Executive and have not been endorsed by the Scottish Parliament.

INTERPRETATION

3. In this Memorandum:
 - “the 1982 Act” means the Civic Government (Scotland) Act 1982;
 - “the 1988 Act” means the Criminal Justice Act 1988;
 - “the 1993 Act” means the Prisoners and Criminal Proceedings (Scotland) Act 1993; and
 - “the 1995 Act” means the Criminal Procedure (Scotland) Act 1995.

OUTLINE OF BILL PROVISIONS

4. The Bill contains policy provisions on two broad policy areas – custodial sentences and the introduction of new controls on the sale of non-domestic knives and swords. The provisions on custodial sentences are outlined in the Executive's publication *Release and Post-Custody Management of Offenders*, published on 20 June 2006. The provisions which introduce new controls on the sale of non-domestic knives and swords are based on the consultation paper, *Tackling Knife Crime: A Consultation*, published in June 2005.
5. The Bill is divided into 4 Parts and, in summary, provides for the following:
 - **Part 1** provides for the continued existence of the Parole Board for Scotland, and schedule 1, which is introduced by this Part, provides for its constitution;
 - **Part 2** provides a comprehensive set of measures for the confinement, review and release of prisoners which will replace those currently set out in the 1993 Act;

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- • **Part 3** provides a series of measures on weapons, including restrictions on the sale of swords and non-domestic knives; and
- • **Part 4** contains general, ancillary and commencement provisions.

6. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum published separately as [SP Bill 80–EN], and in the Policy Memorandum published separately as [SP Bill 80–PM].

APPROACH TO USE OF DELEGATED POWERS

7. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Executive has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- the need to make proper use of valuable Parliamentary time;
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure that other areas of local authority licensing can be developed in a coherent and consistent way;
- the likely frequency of amendment;
- the possible need to change provisions in a co-ordinated way;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament; and
- ensure that knife and sword dealers are regulated through flexible measures which can be applied in an appropriate manner based upon the industry's success, or otherwise, with respect to self policing.

8. In deciding which form of Parliamentary procedure is appropriate, a balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill the balance reflects the view of the Executive on the importance of the matter delegated by Parliament.

PART 1 – THE PAROLE BOARD FOR SCOTLAND

Section 2 – power to make rules for the proceedings of the Parole Board for Scotland

Power conferred on: the Scottish Ministers

Power exercisable by: rules made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

9. Section 2 enables the Scottish Ministers to make rules about the practice and procedure of the Parole Board for Scotland. In particular, these may include provision authorising cases referred to the Board to be dealt with, in whole or in part, by a specified number of members of the Board in accordance with such procedure as may be specified in the rules. The rules may also specify periods within which certain actions must be performed, and may require persons to attend to give evidence, or to produce documents, at proceedings of the Board. The rules may, further, provide for penalties for those who fail to attend, if they are required to do so. This may be achieved by applying section 210(4) and (5) of the Local Government (Scotland) Act 1973, with such modification as may be set out in the rules. (In this way, the Board could require a person's attendance to give evidence or to produce documents, provided that the person was paid their necessary expenses and provided that he or she could not be compelled to answer any question or produce any document which could not be compelled were the matter to be conducted in a court of law. There is provision for a penalty for non-compliance.)

Reason for taking power

10. This power is considered necessary and appropriate to enable the Scottish Ministers to prescribe in detail the practices and procedures to be put in place to ensure that the Board is able to discharge its statutory functions. (For comparison, the current rules, made under section 20(4) and (4A) of the 1993 Act, are set out in SSI 2001/315.) It is desirable to retain a degree of flexibility over the detailed provisions which will regulate the Board's procedures and this is best achieved by allowing a comprehensive set of rules to be made by subordinate legislation.

Choice of procedure

11. An order containing rules will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 47). The negative resolution procedure is considered appropriate given the desirability for flexibility in the use of the new power. The existing rules are made under negative resolution procedure and this has not given rise to adverse comment or difficulty.

PART 2 – CONFINEMENT AND RELEASE OF PRISONERS

Section 4(2) – power to amend definitions of “custody and community sentence” and “custody-only sentence”

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

12. Section 4(2) enables the Scottish Ministers to amend by order the definitions of “custody and community sentence” and “custody-only sentence” referred to in subsection (1) of this section and to substitute a different term from that mentioned in these definitions. At present, the Bill defines “custody and community” sentence as a sentence of imprisonment for a term of 15 days or more; and a “custody-only sentence” as a sentence of imprisonment of less than 15 days.

Reason for taking power

13. The power to amend the definitions is necessary to provide Scottish Ministers with the flexibility required to accommodate changing trends in sentencing, types of offences and management of offenders. By way of example, on the basis of future data it may be shown that the custody and community sentence is more effective for sentences of a longer period than the 15 days currently prescribed. Should this prove to be the case, it may be beneficial to alter the definitions to ensure that sentences are managed as effectively as possible.

Choice of procedure

14. An order made under this section must be laid in draft before, and approved by a resolution of, the Scottish Parliament (section 48(4)). As an alteration to the period of imprisonment in the definition of “custody-only sentence” and “custody and community sentence” will result in potentially significant changes to, for example, the way a number of prisoners serve their sentences (by spending, longer or shorter periods in custody), it is considered that the affirmative procedure is appropriate.

Section 6(10) – power to amend proportion of sentence specified as custody part

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

15. Section 6(10) enables the Scottish Ministers to amend, by order, the provision at subsection (3) of this section (which defines a “custody part” as a minimum of one half of the sentence) and substitute a different proportion of the sentence.

16. Section 6(1) provides that the court, when imposing a sentence of 15 days or more (a custody and community sentence), must make an order specifying the period that will be spent in custody (the custody part). Section 6(2) states the custody part of the sentence is that part that

represents the appropriate period to satisfy the requirements for retribution and deterrence. Section 6(3) provides that the custody part will be a minimum of one half of the sentence unless the court considers, taking into account the matters prescribed in subsection 6(4), that it is appropriate to specify a greater proportion of the sentence than one half. In such cases, the court may not make an order specifying a custody part that is greater than three quarters of the sentence.

Reason for taking power

17. The power to amend the proportion is necessary to enable the Scottish Ministers to increase or decrease the minimum custody part should it prove necessary, against the possibility of future changes in sentencing patterns, to ensure that it is fit for purpose in delivering the element of the sentence required for the purposes of retribution and deterrence.

Choice of power

18. An order under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 48). The negative resolution procedure is considered appropriate given the desirability for flexibility in the use of the new power. Any use of the power would need to take account of the fact that no custody part may exceed three quarters of the sentence (by virtue of section 6(6)) and there will also always remain the power of the court to increase the custody part, up to a maximum of three quarters, if it considers it appropriate to do so by reference to the requirement of retribution and deterrence.

Section 30(5) – power to amend licence conditions to be suspended while prisoner being detained

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

19. Section 30 deals with the situation in which a prisoner who has been released on licence is in custody for any reason during the currency of the licence (without the licence being revoked). All conditions apart from those specified in subsection (3) are suspended for the period the person is in custody. Section 30(5) enables the Scottish Ministers, by order, to amend subsection (3), and they may do so by amending the conditions or adding or removing conditions.

Reason for taking power

20. It is thought that the two conditions specified at present in subsection (3), namely the requirement to be of good behaviour and to keep the peace, and also to refrain from contacting a person, or class of person, are the only ones which are, generally speaking, likely to be capable of being breached by a prisoner in custody. Other conditions, such as a prohibition on foreign travel or a requirement to attend supervision at the local authority, are inappropriate for a person who is confined. However, it is considered necessary to take the present power so that the specified conditions can be modified if future developments render that necessary.

Choice of procedure

21. An order under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 48). The negative resolution procedure is considered appropriate given the relatively limited nature of the enabling power and the desirability for flexibility in the use of the new power.

Section 36(1)(b) – Power to amend description of prisoners eligible for release on curfew licence

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

22. Under this section the Scottish Ministers may release, on licence, a custody and community prisoner who is serving a sentence of 3 months or more and who is of a description specified by order. Subsection 36(3) provides that the licence must include a curfew condition. This is a condition that requires the person to whom it relates to remain at the place specified in the condition for specified times. In addition, it may also require a person *not* to be in a specified place for specified periods. Compliance will be electronically monitored. There are time limits specified in section 36(4) which regulate when a person may be released on licence under this section. As the Policy Memorandum states, the provisions re-enact the measures contained in the Management of Offenders etc. (Scotland) Act 2005.

23. The order-making power covers, first, the power to specify descriptions of prisoner who may be released on licence under section 36 (on what is known as home detention curfew). The Policy Memorandum indicates that groups such as high risk offenders and sex offenders will be excluded. Secondly, the order may, by section 36(9), apply provisions in Part 2 of the Bill to curfew licences and may modify those provisions as appropriate. Finally, the order may modify the period during the sentence specified in section 36(4) when a prisoner may be released on home detention curfew.

Reason for taking power

24. The central reason for taking the power is to allow the Scottish Parliament the opportunity to consider the categories of prisoner who may be released on home detention curfew. Without an order under section 36(1)(b), no prisoner may be so released. As explained below, the order is subject to the affirmative procedure. Beyond that, the reason for the power is twofold. First, it allows Ministers to apply relevant provisions on Part 2 of the Bill to those released on home detention curfew. Secondly, it allows Ministers to amend the time limits which apply to the release of prisoners on home detention curfew, should that prove necessary or desirable in the future in the light of experience.

Choice of power

25. An order made under this section must be laid in draft before, and approved by a resolution of, the Scottish Parliament (section 48(4)). We consider that the affirmative procedure is appropriate in order to allow the Parliament the fullest opportunity to consider and debate the application of the home detention curfew provisions.

Section 38(2) – monitoring of curfew condition

Power conferred on: the Scottish Ministers

Power exercisable by: regulation made by statutory instrument

Parliamentary procedure: negative resolution of the Scottish Parliament

Provision

26. As mentioned above, certain prisoners may be released on home detention curfew. They must be subject to a curfew condition, and section 38(1) provides that compliance with this is to be monitored remotely. Section 38(2) applies section 245C of the 1995 Act (which deals with contractual and other arrangements for remote monitoring devices in respect of prisoners with a restriction of liberty order) in relation to curfew conditions. Under section 245C(3), as applied by section 38 of the Bill, the Scottish Ministers must make regulations specifying the devices which may be used for remotely monitoring an offender's compliance with a curfew condition.

Reason for taking power

27. It is necessary to specify devices by which compliance with the curfew condition may be monitored. This is so that the person designated under section 38 as being responsible for the remote monitoring knows what device or devices can be used in order to carry out this function.

Choice of procedure

28. An order specifying relevant devices will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 245C(4), read with section 118 of the Scotland Act). The negative resolution procedure is considered appropriate given the relatively limited nature of the enabling power and the desirability for flexibility in the use of the new power, especially in order to keep pace with any technological or other developments which relate to the design or manufacture of remote monitoring devices. The order is likely to be technical in nature and it is thought unlikely that members will routinely want to debate which devices should be prescribed.

Paragraph 3 of Schedule 1 – power to regulate the procedure for appointing Parole Board members

Power conferred on: the Scottish Ministers

Power exercisable by: regulation made by statutory instrument

Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

29. Paragraph 3(1) of schedule 1 confers a power on the Scottish Ministers to make regulations governing the procedure for appointing members to the Parole Board, including any requirements as to consultation.

Reason for taking power

30. The Board will continue to be a Tribunal Non Departmental Public Body (NDPB). As Tribunal NDPBs do not fall under the auspices of the Office of the Commissioner for Public Appointments in Scotland (OCPAS), which governs the procedures for public appointments to other Scottish public bodies, this power is considered necessary and appropriate to enable the

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Parliament to regulate the way in which Scottish Ministers make appointments to the Board to enable it to undertake its functions appropriately. (As a matter of practice, past appointments to the Parole Board have been made in accordance with OCPAS procedures.)

31. The power extends to allowing the regulations to make different provision in relation to the different kinds of Board member. This is considered desirable to allow the procedures to be tailored to the particular requirements which may be appropriate in certain situations.

Choice of power

32. An order made under this section must be laid in draft before, and approved by a resolution of, the Scottish Parliament (section 48(4)). We consider that this is appropriate in order to allow the Parliament to consider and debate the proposed regulations.

Paragraph 17 of Schedule 1 – power to regulate the suspension of a Parole Board member pending consideration for removal of office

Power conferred on: the Scottish Ministers

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution of the Scottish Parliament

Provision

33. Paragraph 17 of schedule 1 confers a power on the Scottish Ministers to make regulations for the suspension of a Parole Board member pending an investigation into his or her fitness for office on the grounds set out in paragraph 15(b) of the schedule. The investigation will be carried out by a tribunal constituted under paragraph 16. The regulations may also make provision for the effect and duration of the suspension, the procedure to be followed by the tribunal and any further matter which is considered necessary or expedient.

Reason for taking power

34. This power is considered necessary to enable Scottish Ministers to make provisions for the procedure to be followed by and before a tribunal (constituted under paragraph 16). Such a tribunal is constituted to carry out an investigation at the request of Scottish Ministers in order to ascertain whether a member of the Board is no longer fit for office by reason of inability, neglect of duty or misbehaviour.

Choice of procedure

35. An order made under this section must be laid in draft before, and approved by a resolution of, the Scottish Parliament (section 48(4)). We consider, given the serious nature of the function exercised by the tribunal, affirmative procedure is appropriate in order to allow the Parliament to consider and debate the proposed regulations.

PART 3 – WEAPONS

36. Sections 43 to 46 make provision in relation to weapons. Sections 43 and 44 establish a new scheme for the licensing of knife etc. dealers, section 45 amends existing provisions in the

1988 Act on the sale etc. of offensive weapons, and section 46 makes new provision in relation to restrictions on the sale etc. of swords.

37. Section 43 of the Bill inserts new sections 27A to 27R into the 1982 Act. Order-making powers are conferred by sections 27A(6), 27C(1)(a), 27K(7) and 27Q. Section 27R contains the general subordinate legislation provisions in respect of these powers. Section 27R(1) provides that all powers to make orders are exercisable by statutory instrument. Section 27R(2) provides that all of these powers are subject to negative resolution procedure.

New section 27A of the 1982 Act

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

38. Section 43 of the Bill inserts a new section 27A into the 1982 Act to provide for the licensing of those who carry on a business as a dealer in any article mentioned in section 27A(2). The articles so mentioned are knives, knife blades, swords and other bladed or sharply pointed articles made or adapted to cause injury. Knives and knife blades designed for domestic use are excluded. Section 27A(6) provides a power for the Scottish Ministers to modify subsection (2) so as to add, remove or amend descriptions of articles or classes of article.

Reason for taking power

39. While section 27A(2) sets the broad policy intent, it is important to provide a degree of flexibility in the scope of the licensing scheme. In particular, as set out in the Policy Memorandum (paragraph 108), it is intended that this power would be used initially to remove folding pocketknives, *sgian dubhs* and *kirpans* where the blade is less than 7.62 centimetres (3 inches) from the scope of the scheme. Over time, it may be possible to remove other articles from the scope of the scheme in light of changing experience on the ground of the use of bladed/pointed weapons. Equally, it may be necessary to bring other weapons within the scope of the scheme.

Choice of procedure

40. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 27R(2)). The negative resolution procedure is considered appropriate given the limited nature of the enabling power and the need for flexibility in the use of the new power. The power is likely to be used to refine the provisions in the Bill by excluding certain specific weapons, but not departing substantially from the categories of articles that are set out in the Bill. It is anticipated that any additional articles specified would be similar to those already specified.

New section 27C of the 1982 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

41. Section 43 of the Bill inserts a new section 27C into the 1982 Act to provide for the setting of conditions to be attached to knife dealers' licences. Section 27C(1)(a) requires licensing authorities to attach to knife dealers' licences such conditions as are specified by the Scottish Ministers by order.

Reason for taking power

42. While licensing authorities already have general powers to attach conditions under the 1982 Act, it is considered necessary to set minimum conditions that will apply across Scotland. The intended use of the power is set out at paragraphs 114 and 115 of the Policy Memorandum. The conditions may be specified in particular or in general, allowing, in the latter case, licensing authorities some flexibility to tailor conditions to individual circumstances.

Choice of procedure

43. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 27R(2)). The negative resolution procedure is considered appropriate given the limited nature of the enabling power and the need for flexibility in the use of the new power. The provision at section 27C(1)(c) illustrates the types of conditions that may be included in any order.

New section 27K of the 1982 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

44. Section 43 of the Bill inserts new sections 27J and 27K into the 1982 Act. These provide for the making of forfeiture orders by the court when a person is convicted of certain offences in connection with knife dealers' licences, and set out the effect of such orders. Section 27K(7) provides a power for the Scottish Ministers to make provision for or in connection with the disposal of property forfeited under a forfeiture order once a 6 month period (a period intended to protect any interests of third parties) has passed. Similar provision is made in section 7 of the Knives Act 1997 and in the Knives (Forfeited Property) Regulations 1997 (SI 1997/1907).

Reason for taking power

45. It is not anticipated that the offences which may lead to the making of forfeiture orders, and therefore the forfeiture orders themselves, will be frequent occurrences. However, the articles which may be forfeited may be of some continuing value. It is therefore important that procedures for the disposal of such property, and for the application of the proceeds, are clear.

Choice of procedure

46. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 27R(2)). The negative resolution procedure is considered appropriate given the technical and procedural nature of the enabling power.

New section 27Q of the 1982 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

47. Section 43 of the Bill inserts a new section 27Q into the 1982 Act. This provides that the Scottish Ministers may, by order, provide exceptions from the new offences created by sections 27D, 27F and 27G, and in sections 5 and 7 of the 1982 Act so far as they relate to knife dealers' licences.

Reason for taking power

48. It is not intended that this power would be used at the outset. However, limited circumstances may be identified in the future where application of the offences provided in the Bill would be inappropriate. For example, if a test purchasing scheme proves to be necessary as part of the enforcement of the provisions, then a person involved in making test purchases may be open to prosecution under the section 27D offence of providing false information to a dealer. Section 105(2) of the Licensing (Scotland) Act 2005 similarly provides for the disapplication of the offence in section 105(1) to allow test purchasing by children and young persons.

Choice of procedure

49. Orders made under this section will be subject to annulment in pursuance of a resolution of the Scottish Parliament (section 27R(2)). The negative resolution procedure is considered appropriate given the intention to use the power in very limited circumstances for the purpose of ensuring compliance with the licensing scheme.

Section 45 – Sale etc. of weapons

Amendment of section 141 of the 1988 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

50. Section 45 of the Bill amends section 141 of the 1988 Act. Section 141(1) provides that any person who manufactures, sells or hires, or offers for sale or hire, exposes or has in his or her possession for the purpose of sale or hire, or lends or gives to any other person a designated offensive weapon shall be guilty of an offence. The import of any such weapons is prohibited by section 141(4). A wide range of weapons has been designated in the Criminal Justice Act 1988 (Offensive Weapons) (Scotland) Order 2005 (SSI 2005/483). Defences are available relating to functions carried out on behalf of the Crown or of a visiting force and making weapons available to

museums and galleries. New section 141(11A) confers a power for Ministers by order to provide for exceptions and exemptions from an offence under section 141(1), and to specify new defences. Similar provision is proposed for England and Wales in clause 40 of the Violent Crime Reduction Bill, currently being considered by the House of Lords.

Reason for taking power

51. The amendments made by section 44 recognise that, while use or trading in weapons specified under section 141 is rarely justified, there may be legitimate circumstances where such use can be allowed. The power contained in new section 141(11A) provides useful flexibility to deal with additional circumstances identified in the future.

Choice of procedure

52. Orders made under new section 141(11A) must be laid in draft before and approved by a resolution of the Scottish Parliament. The affirmative resolution procedure is considered appropriate to ensure that the Parliament can consider whether and in what circumstances additional defences should be provided.

Section 46 – Sale etc. of swords

New section 141ZA of the 1988 Act (as it modifies the existing order-making power in section 141)

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

53. Section 46 of the Bill inserts a new section 141ZA into the Criminal Justice Act 1988. As described in connection with section 45, section 141(1) of the 1988 Act provides that any person who manufactures, sells or hires etc. a designated offensive weapon shall be guilty of an offence. Swords, other than swordsticks, have not yet been specified under this section.

54. New section 141ZA supplements section 141 in its application to swords. It provides that, where Ministers make an order under section 141(2) applying that section to swords, they may include in that order provision for or in connection with modifying section 141. Those modifications may include new defences, increased penalties, and the creation of a new offence of providing false information. It also allows the order to establish a system of authorisations, allowing individual uses of swords to be permitted.

Reason for taking power

55. Section 46 does not provide a new order-making power as such, but modifies the existing power in section 141 in relation to swords. While section 141 could have been used to introduce a blanket ban on swords, it is recognised that there are legitimate uses for swords that should continue to be permitted. The intended use of the power is set out in detail in the Policy Memorandum (paragraph 95 et seq.), in particular in relation to the defences which it is proposed would be contained in the order.

56. The approach taken here may be contrasted with that in section 45 applying to offensive weapons more generally. While swords and offensive weapons could have been dealt with together by providing a more general modification of section 141, the more extensive provision envisaged in relation to swords justifies the separate treatment.

Choice of procedure

57. Orders made under section 141(2), including those relating to swords, must be laid in draft before and approved by a resolution of the Scottish Parliament. No change has been made to the parliamentary procedure relating to these orders.

PART 4 – GENERAL

Section 47 - Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

58. Section 47 of the Bill confers on Scottish Ministers a power to make by order such incidental, supplementary, consequential, transitory, transitional or saving provision as they consider appropriate. Section 47(2) ensures that the power extends to the modification of any enactment (including the Bill), instrument or document.

Reason for taking power

59. Any body of new law, particularly one contained in a significant reform measure such as the Bill, gives rise to the need for a range of ancillary provisions.

60. The Executive considers that the power to make such provision should extend to the modification of enactments, including this Bill.

61. Without the power to make incidental, supplemental and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament's or the Executive's resources.

62. For example, there will be a need to make transitional and transitory provision dealing with the treatment of prisoners who are already subject to the provisions of the 1993 Act, particularly if such prisoners are subsequently convicted for a later offence and come under the provisions of the Bill in relation to that offence.

63. The Executive considers it prudent to include a power to make saving provisions also. This will guard against the risk that any change in the law inadvertently leads to a situation where an accused person may avoid criminal trial or punishment, or be treated unfairly by virtue of the transition from the existing law to the new law.

64. Again, taking the example mentioned above, provisions of the 1993 Act which are repealed by the Bill will need to be saved in so far as they relate to existing prisoners whose sentence is managed under the provisions of the 1993 Act. The power to make savings is therefore clearly necessary and must be combined with a power to modify enactments (because the saved provisions are contained in an Act).

65. The Executive also expects that there will be a need for supplemental provision to give full effect to the provisions of the Bill. For example, other legislation which mentions sentences of imprisonment or release from such sentences may need to be amended to take into account the new sentencing and release regime. Such changes may be required to both primary and secondary legislation and it is felt more appropriate to do much of this by ancillary orders under Section 47 rather than weighing down the Bill with a large volume of minor supplemental and consequential provisions.

Choice of procedure

66. Given that the power conferred by this section can only be used in connection with the provisions of the Bill, it is clear that the orders made under this power will not contain core substantive provisions and it is therefore submitted that the negative procedure is considered appropriate.

Section 50(2) – Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: None

Provision

67. Section 50 of the Bill provides that Scottish Ministers may by order appoint a day when the provisions of the Bill shall come into force. Such an order may appoint different days for different purposes.

Reason for taking power

68. A large prison reform measure, such as that contained in this Bill will not come into force on Royal Assent, or indeed on a single day. The Executive considers that the provisions of the Bill should be commenced at different times as Scottish Ministers think appropriate or expedient.

Choice of procedure

69. The decision on when and to what extent the Bill is commenced is an administrative issue for Scottish Ministers. As is usual, therefore, the Executive considers that the commencement powers should not be subject to any Parliamentary procedure.

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