Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Sexual Offences (Scotland) Bill. This Memorandum explains changes to the powers to make subordinate legislation under the Sexual Offences (Scotland) Bill resulting from amendments at Stage 2. This supplementary memorandum should be reading in conjunction with the original Delegated Powers Memorandum for the Bill.

AMENDMENTS TO DELEGATED POWERS

2. During Stage 2 proceedings, Scottish Ministers modified some of the delegated powers that were introduced by the Bill. These changes are designed to give Parliament a greater role in scrutinising subordinate legislation made under the Bill and respond to comments made by both the Subordinate Legislation Committee and the Justice Committee on these powers.

3. There follows a description of the delegated powers which have been amended at Stage 2.

Section 29(5A) – Power to specify “relevant sexual offences” for the purpose of section 29(2)

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

Provision

4. Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (which are concerned with sexual activity involving or directed towards children aged 13-15) that he or she reasonably believed that the child with whom he or she engaged in sexual activity had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a ‘relevant sexual offence’. Section 29(5) of the Bill, as introduced, provided Scottish Ministers with an order making power to specify what offences would be “relevant offences” for the purpose of section 29. This order making power was subject to negative resolution procedure.
5. Section 29(5) of the Bill, as amended at Stage 2, now provides that a “relevant offence” means an offence listed in schedule 1Z to the Bill (amendments will be made at Stage 3 so that section 29(5)(a) refers to “relevant sexual offences” to ensure consistency with the rest of section 29). Schedule 1Z provides a list of “relevant offences”. These are offences concerning sexual activity with children under the age of consent in Scotland, England & Wales and Northern Ireland. This schedule was introduced at Stage 2 in response to comments from the Justice Committee that “relevant offences” were not defined on the face of the Bill.

6. Section 29(5A) of the Bill contains an order making power which enables Scottish Ministers to modify the list of relevant offences contained in schedule 1Z. In line with the recommendation contained in the Subordinate Legislation Committee’s Stage 1 Report, the power to amend the Schedule to add new offences had been restricted to sexual offences involving children.

Reason for taking power

7. Although “relevant offences” are listed in a schedule to the Bill, it is considered appropriate to retain a power to add or delete offences from the list of “relevant offences” to ensure that there is flexibility to respond to changing legislation in all parts of the United Kingdom. It may be that primary legislation is brought forward in other parts of the United Kingdom which create new sexual offences in those jurisdictions or revoke the offences which are listed in schedule 1Z. The list of “relevant offences” will need to be updated in consequence of that legislation. Using this order making power provides the flexibility to take account of these changes, given that it may not be competent for the legislation brought forward in other parts of the UK to amend the schedule of “relevant offences”. Furthermore, as section 29(2) prevents a person from using a defence if he or she is charged with a “relevant offence”, it is also important that such changes are brought forward as soon as possible. An order making power provides the best mechanism to do this, as opposed to bringing forward primary legislation in Scotland which will be subject to longer timescales.

Choice of procedure

8. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the significance of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, any power to specify a “relevant offence” should be subject to affirmative resolution procedure. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 29(5A) to amend the schedule of offences shall be subject to affirmative resolution procedure.
Section 32(8) – Power to amend the definition of what constitutes a ‘position of trust’ in respect of the offence of sexual abuse of trust at section 31

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

Provision

9. Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if he or she is aged 18 years or older and intentionally engages in a sexual activity with, or directed at, a person who is under 18 and in respect of whom he or she is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence of sexual abuse of trust at section 31. Section 33 interprets terms used in section 32 of the Bill.

10. Section 32(8) provides the Scottish Ministers with an order making power to modify section 32 and 33, (other than section 32(8)) so as to add, delete or amend a condition constituting a position of trust. This order-making power was introduced at Stage 2 and replaces the order-making power at section 32(1) of the Bill, as introduced, which provided only an order making power to add new conditions which constitute a position of trust (and not to delete or amend existing conditions).

Reason for taking this power

11. The reason for widening the original power in section 32(1) of the Bill is to allow for sufficient flexibility to amend the definition of a ‘position of trust’ to reflect any future changes to the arrangements relating to the education or care of young people in Scotland. These changes may result in needing to amend or remove the conditions in section 32 (and modify section 33 to add, remove or modify the definition of any terms in section 33) as well as needing to create additional conditions. Ensuring that children are protected from harm by those in positions of trust or responsibility over them has been an area of policy subject to recent developments and it is possible that further developments in the future may necessitate changes to the definition of a ‘position of trust’. Without a power to modify and remove conditions (as well as add conditions) by statutory instrument, primary legislation will be required to ensure that this definition continues to accurately reflect the changes in circumstances in which positions of trust arise, which would be subject to longer timescales and inhibit Government’s ability to respond quickly to changes in the arrangements for the care and education of young people. Given these changes will impact on whether a person has committed a criminal offence, there is a need for the Government to give effect to such changes quickly.

Choice of procedure

12. The Bill as introduced provided that the order making power in section 32(1) was subject to negative resolution procedure. The Subordinate Legislation Committee’s Stage 1 Report recommended that, given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust, affirmative resolution procedure is the appropriate level of Parliamentary scrutiny. In light of the Committee’s recommendation, amendments were brought forward at Stage 2 which provide that the exercise of the power at section 32(8) shall be subject to affirmative resolution procedure.
SEXUAL OFFENCES (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM